ENSURING TRANSPARENCY THROUGH THE FREEDOM OF INFORMATION ACT (FOIA)

HEARING

BEFORE THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM HOUSE OF REPRESENTATIVES

ONE HUNDRED FOURTEENTH CONGRESS

FIRST SESSION

JUNE 2, 2015

Serial No. 114–80

Printed for the use of the Committee on Oversight and Government Reform

Available via the World Wide Web: http://www.fdsys.gov
http://www.house.gov/reform

U.S. GOVERNMENT PUBLISHING OFFICE

22–315 PDF WASHINGTON : 2017

For sale by the Superintendent of Documents, U.S. Government Publishing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

JASON CHAFFETZ, Utah, *Chairman*

JOHN L. MICA, Florida
MICHAEL R. TURNER, Ohio
JOHN J. DUNCAN, JR., Tennessee
JIM JORDAN, Ohio
TIM WALBERG, Michigan
JUSTIN AMASH, Michigan
PAUL A. GOSAR, Arizona
SCOTT DESJARLAIS, Tennessee
TREY GOWDY, South Carolina
BLAKE FARENTHOLD, Texas
CYNTHIA M. LUMMIS, Wyoming
THOMAS MASSIE, Kentucky
MARK MEADOWS, North Carolina
RON DESANTIS, Florida
MICK MULVANEY, South Carolina
KEN BUCK, Colorado
MARK WALKER, North Carolina
ROD BLUM, Iowa
JODY B. HICE, Georgia
STEVE RUSSELL, Oklahoma
EARL L. "BUDDY" CARTER, Georgia
GLENN GROTHMAN, Wisconsin
WILL HURD, Texas
GARY J. PALMER, Alabama

ELIJAH E. CUMMINGS, Maryland, *Ranking Minority Member*
CAROLYN B. MALONEY, New York
ELEANOR HOLMES NORTON, District of Columbia
WM. LACY CLAY, Missouri
STEPHEN F. LYNCH, Massachusetts
JIM COOPER, Tennessee
GERALD E. CONNOLLY, Virginia
MATT CARTWRIGHT, Pennsylvania
TAMMY DUCKWORTH, Illinois
ROBIN L. KELLY, Illinois
BRENDA L. LAWRENCE, Michigan
TED LIEU, California
BONNIE WATSON COLEMAN, New Jersey
STACEY E. PLASKETT, Virgin Islands
MARK DESAULNIER, California
BRENDAN F. BOYLE, Pennsylvania
PETER WELCH, Vermont
MICHELLE LUJAN GRISHAM, New Mexico

SEAN MCLAUGHLIN, *Staff Director*
DAVID RAPALLO, *Minority Staff Director*
KATY ROTHER, *Counsel*
SHARON CASEY, *Deputy Chief Clerk*

CONTENTS

Page

Hearing held on June 2, 2015 1

WITNESSES

Ms. Sharyl Attkisson, Investigative Reporter
Oral Statement 6
Written Statement 8
Mr. Jason Leopold, Investigative Reporter, Vice News
Oral Statement 10
Written Statement 12
Mr. David E. McCraw, Vice President and Assistant General Counsel, The New York Times
Oral Statement 16
Written Statement 18
Ms. Leah Goodman, Investigative Reporter, Newsweek
Oral Statement 20
Written Statement 23
Mr. Terry Anderson, Adjunct Professor, University of Florida
Oral Statement 27
Written Statement 30
Mr. Tom Fitton, President, Judicial Watch
Oral Statement 66
Written Statement 69
Ms. Cleta Mitchell, Partner, Foley & Lardner LLP
Oral Statement 75
Written Statement 77
Mr. Nate Jones, Director of the Freedom of Information Act Project, National Security Archive
Oral Statement 109
Written Statement 111
Ms. Lisette Garcia, FOIA Resource Center
Oral Statement 121
Written Statement 123
Mr. Gabriel Rottman, Legislative Counsel/Policy Advisor, American Civil Liberties Union
Oral Statement 131
Written Statement 133
Ms. Anne Weismann, Executive Director, Campaign for Accountability
Oral Statement 143
Written Statement 145

APPENDIX

Chaffetz Statement 168
2009–01–21 Presidential Documents White House Memo FOIA 172
2009–04–15 Craig-White House Memo re: Doc Requests 174
1988–09–01 Markman DOJ MEMO re WH Records in Agency Files 175

ENSURING TRANSPARENCY THROUGH THE FREEDOM OF INFORMATION ACT

Tuesday, June 2, 2015

HOUSE OF REPRESENTATIVES,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
WASHINGTON, D.C.

The committee met, pursuant to call, at 2:10 p.m., in Room 2154, Rayburn House Office Building, Hon. Jason Chaffetz [chairman of the committee] presiding.

Present: Representatives Chaffetz, Duncan, Jordan, Walberg, Amash, Gosar, Gowdy, Lummis, Meadows, DeSantis, Mulvaney, Blum, Hice, Russell, Carter, Grothman, Hurd, Palmer, Cummings, Norton, Clay, Lynch, Connolly, Duckworth, Lawrence, Lieu, Watson Coleman, Plaskett, DeSaulnier, Welch, and Lujan Grisham.

Chairman CHAFFETZ. The Committee on Oversight and Government Reform will come to order.

And, without objection, the chair is authorized to declare a recess at any time.

I appreciate you all being here for our hearing, "Ensuring Transparency Through the Freedom of Information Act." We have just completed votes on the floor, and I am sure we will have some members as they hustle back here to the hearing, but I wanted to get started.

We have a very distinguished couple of panels. We appreciate those that are participating and sharing their perspectives with us.

I would remind the committee that we are not only the Oversight Committee but we are also Oversight and Government Reform. The goal of these hearings is to come to a place where we can actually reform this process so that it works, no matter who is in the White House, no matter what administration is there, that we get this part of the equation right.

My passion for this comes from the idea that government should be open and transparent. It is what separates the United States of America from everybody else. We are self-critical. We do take things and look back, and sometimes those things are a little bit embarrassing. But because it might be a little bit embarrassing is not enough to withhold information from the public and the public's right to know. It is the heart of what we do as a committee, it is what we are supposed to be doing as the United States Congress, and it is what we are supposed to be doing as a country.

And nothing makes government more accountable than making its actions open and transparent to those that are paying the bills. The Freedom of Information Act, otherwise known as FOIA, gives the public a tool to gain insight into how their government func-

tions—what it did well, what it didn't do well, what it should have done, what it shouldn't have done. And, clearly, in retrospect, looking back with 20/20 vision, you can go back with great clarity, but that is why it is important to do this and understand.

A request for FOIA must simply be in writing and reasonably describe the records being requested. That is it. That is the way, at least, it should be. But navigating the FOIA process is complicated and varies across government agencies. Something like 550,000 times in just the time since I have served in Congress, which is the same time that President Obama took office, 550,000 times FOIAs were rejected because there was some sort of exemption that took place.

In responding to a FOIA request, each agency has its own set of standards which may or may not be updated to reflect the current law. One of the great frustrations is, agency by agency, there seem to be different standards and different practices. And when we get to the hearing tomorrow, that is one of the things we want to explore with our witnesses.

What one agency deems to be a reasonable description of documents requested may not be adequate for another agency. For example, the State Department rejected a request because it didn't include the contract number, when the FCC, for instance, doesn't require that information at all.

Congress must ensure that, when it comes to FOIA, agencies are following the law. The FOIA statute requires agencies to give a preliminary response within 20 business days of the request. In practice, agencies take the 20-day time limit merely as a suggestion rather than a rule, and most of it is just laughed off and doesn't even come close to meeting the 20-day rule as prescribed by law.

Some agencies don't even bother to go through the process of responding at all within the 20 days. Syracuse University recently learned this the hard way when only 7 of 21 agencies provided a satisfactory response to the exact same request for records kept by every FOIA office. The inconsistency is amazing. Three agencies didn't even bother to respond at all. The unresponsive agencies were the Bureau of Alcohol, Tobacco, and Firearms; the Department of Justice Executive Office of the United States Attorneys; and the Department of Justice National Security Division.

The FOIA law requires documents to be released unless those documents fall into the exemptions outlined in the statute, and exemptions are far narrower than most agencies claim. The committee reviewed redacted and unredacted versions of documents from the FCC and found numerous redacted emails with no statutory justification, in our opinion. Of note, the FCC redacted the chairman's initials from all documents under a privacy exemption, while failing to redact email addresses and other contact information for third parties—inconsistent, to say the least.

We also found some agencies redacted basic information already available to the public. Redacting information that can easily be found on an agency's Web site does not suggest a government interested in ensuring transparency. For example, in 2011, Immigration and Customs Enforcement at the Department of Homeland Security provided the National Security Archive with 111 pages of docu-

ments already available to the public, including news clippings, media alerts, even congressional testimony. Yet, in those public documents, ICE chose to redact the information like the name of the board agent that sang the national anthem at the conference.

These types of redactions not only have no legal basis but they defy common sense, and they make it more timely, more expensive to go through the process of redacting the person who sang the national anthem than just allowing the American people to know who that person was.

So requesters who actually receive a response must literally read between the blacked-out lines. And every time we see such questionable redactions, we have to wonder: If they are hiding this, what else are they hiding?

Congress intended for FOIA to increase accountability by giving taxpayers a view into the inner workings of their government. And it is not just taxpayers; it is the media, as well. That no longer appears to be the case.

We have two full panels of witnesses here today with extensive professional experience with the Freedom of Information Act, and all have at one time or another struggled with the FOIA process. I look forward to hearing from all of our witnesses about their experiences with FOIA and entertain suggestions that they might have to ensure disclosure of information is timely, it is accurate, it is routine, and something that is more common practice than it is here today.

So we appreciate all the witnesses and look forward to a good, robust hearing. We have three panels—two today, one tomorrow.

And, with that, I would now like to recognize the distinguished ranking member, Mr. Cummings of Maryland, for his opening statement.

Mr. CUMMINGS. Thank you very much, Mr. Chairman, for calling today's hearing as well as our hearing tomorrow on the Freedom of Information Act.

FOIA is the cornerstone of our open-government laws, and it has been used by countless journalists, watchdog groups, and citizens to obtain information about their government and its actions. FOIA helped the families of 9/11 victims trace the actions and whereabouts of their loved ones. FOIA led to the discovery in 2002 that one in five FDA scientists felt pressured to approve unsafe drugs. And following the shooting of Michael Brown in Ferguson, Mississippi, FOIA helped highlight the transfer of military equipment to police departments.

We will hear today from witnesses who use FOIA and know firsthand how important it can be.

I appreciate each of you taking the time to share your experiences with us, and I look forward to your testimony.

Today I would like to make one simple but critical point: Congress cannot continue to slash agency budgets, starve them of resources, cut their staffs, and all the while expecting them to tackle the increasing number of FOIA requests that are now at an all-time historic high.

Let me give you some specifics.

First, the number of FOIA requests has skyrocketed from 2009 to 2014. In 2009, when President Obama took office, there were

about 558,000 FOIA requests submitted to Federal agencies. By 2014, that number rose dramatically to more than 714,000. From 2009 to 2014, the overall number of FOIA requests submitted to Federal agencies increased by 28 percent, with new records set in each of the past 4 years in a row.

The problem is that the total number of FOIA personnel has now dropped to its lowest point at any time since President Obama took office. In 2009, the number of full-time FOIA staff at Federal agencies was 4,000. In 2014, the number of full-time FOIA staff dropped to 3,838, a decrease of about 4 percent. Is there any wonder why we have FOIA backlogs?

The number of requests has been skyrocketing, but agency budgets have been slashed by draconian sequestration cuts, resulting in fewer staff to handle impossible workloads. These trends are simply not sustainable if we truly want a FOIA system that works for the American people.

With that said, I know there is one thing that every member of this committee agrees on, and that is the need for legislation to update and improve FOIA. On February 2, Representative Darrell Issa, our former chairman, and I joined together on a bipartisan basis, introduced a FOIA Oversight and Implementation Act, and we passed it out of our committee unanimously several months ago.

This legislation would codify the presumption of openness that President Obama put in place by the executive order on his first day in office. The bill would also codify Attorney General Holder's directive that the Department of Justice will not defend FOIA denials unless agencies reasonably foresee that disclosures would harm an interest protected by a FOIA exemption or if disclosure is prohibited by law.

The bill would also make other improvements. It would put a 25-year sunset on Exemption 5 of FOIA, the deliberative process exemption, and limit the scope of records that agencies could withhold under the exemption. It would require the Office of Management and Budget to create a central portal to allow FOIA requests to any agency through one Web site. And it would strengthen the independence of the Office of Government Information Services by allowing it to submit testimony and reports directly to Congress.

Our bill has widespread support. A collection of 47 open-government groups supports the bill. Yet, still, it has not been scheduled for a floor House vote. I believe the House should pass the bill quickly so that we can work with the Senate to get it to the President's desk.

With that, let me close by reading from an editorial that was published in the New York Times on February 18 which said this, "For Republicans, this is a rare chance to log a significant bipartisan accomplishment in the public interest, one that Mitch McConnell, the Senate majority leader, and Mr. Boehner should probably seize. The availability of information that sheds light on the workings of government is essential for a healthy democracy. Strengthening the law will help ensure the basic principles of transparency are not a matter of executive discretion."

Mr. Chairman, I hope that we can seize this opportunity, and I hope that—again, I want to thank you for calling this hearing.

And, with that, I yield back.

Chairman CHAFFETZ. I thank the gentleman.

I will hold the record open for 5 legislative days for any members who would like to submit a written statement.

Chairman CHAFFETZ. We will now recognize our first panel of members.

Sharyl Attkisson is an award-winning investigative journalist. During her 30-year career, she has been a correspondent or anchor at CBS News, PBS, CNN, and in local news. Her investigations have covered a wide range of topics, from green energy, to earthquake aid in Haiti, to lobbying in Washington, D.C. She has won five Emmy Awards for her investigative work, and in 2012 she earned both the Emmy Award and the Edward R. Murrow Award for Excellence in Investigative Reporting for her work on Operation Fast and Furious. In addition to her Emmy Award wins, Ms. Attkisson has been nominated a further seven times.

Jason Leopold is an investigative reporter with VICE News. During his 20 years as a reporter, he logged stints at the Los Angeles Times, Dow Jones Newswire, and other prominent organizations. His work has included extensive reporting on national security issues, civil liberties, Guantanamo Bay, as well as Enron. In 2013, he was awarded a crowd-funding grant by the Freedom of Press Foundation to continue his Freedom of Information Act work and coverage of Guantanamo Bay. We are pleased to have him here.

David McCraw currently serves as vice president and assistant general counsel for The New York Times Company. With 13 years at the Times, he is responsible for the company's litigation matters and providing counsel to the company on freedom of information and access to the courts. He has previously served as the deputy general counsel for the New York Daily News. As lead litigation attorney for FOIA lawsuits brought by the Times, Mr. McCraw has been involved in the suits seeking documents on issues including unsafe workplaces, Department of Justice justifications for drones strikes, and the names of companies permitted to trade with sanctioned nations.

Leah Goodman is an investigative reporter at Newsweek. She has written for Bloomberg, Forbes, the Financial Times, Barron's, The Wall Street Journal, and CNN Fortune. Additionally, she has been a fellow at the Center for Environmental Journalism at the University of Colorado at Boulder. For Newsweek, Ms. Goodman writes about money, politics, and institutional cultures of corruption. We are pleased that she is here, as well.

We are also honored to have Mr. Terry Anderson, who is a retired journalist and former foreign correspondent in Asia, Africa, as well as the Middle East. He served as the chief Middle East correspondent for the Associated Press and is a former Marine and Vietnam veteran.

We thank you, sir, for your service—especially for the time in 1985, while working for the Associated Press, Mr. Anderson was abducted in Beirut and held captive for nearly 7 years, an experience he recounted in his best-selling book, "Den of Lions." He is the honorary chairman of the Committee to Protect Journalists and has spent more than 10 years as a journalism professor at Syracuse University.

We welcome you all.

Pursuant to committee rules, all witnesses are to be sworn before they testify. If you would please rise and raise your right hands, we would appreciate it.

Do you solemnly swear or affirm that the testimony you are about to give will be the truth, the whole truth, and nothing but the truth?

Thank you.

Let the record reflect that all witnesses have answered in the affirmative.

And, at this time, we are going to recognize—we will start with Ms. Attkisson.

We would appreciate you limiting your testimony to 5 minutes, but we are pretty liberal with that. As long as you go over but don't go over too much, we will use some discretion here. But we want to leave time for some questions; we also have a second panel after this. But we would love to get your candid perspective, and I know that is hard to wrap up in 5 minutes, but let's give it a try.

And we will start with Ms. Attkisson. You are now recognized. Thank you.

STATEMENT OF SHARYL ATTKISSON

Ms. ATTKISSON. Plenty of time for a journalist that sometimes had to do stories in 2 minutes on the news frequently.

Good afternoon.

The Freedom of Information Act, or FOIA, should be one of the most powerful tools of the public and the press in a free and open society. Instead, it's largely a pointless, useless shadow of its intended self. Federal bureaucrats paid tax dollars to act on our behalf routinely break the law with impunity as if—treating public material as if it's confidential, secret information to be controlled by a chosen few. They withhold it from the public, its rightful owners, while sharing it with select partners such as corporations or other so-called stakeholders.

In 2013, the Defense Department finally responded to a FOIA request I'd made in 2003—too late to be of use for the news story I was working on back then, 10 years before. For some perspective, my daughter was 8 years old when I made the FOIA request. By the time I got a response from the Pentagon, she was going off to college.

Last October, I filed a FOIA request when CDC was not forthcoming about the epidemic of Enterovirus EV–D68, possibly linked to the deaths of 14 children in the U.S. and the paralysis of 115 children. In December, long past the supposed 20-day response time allowed under FOIA, I asked CDC about the status. CDC answered, incredibly, that they were just far too busy with the Ebola crisis to process my FOIA. But even now, with the Ebola crisis excuse gone, CDC still hasn't provided a single page of enterovirus information 8 months after I asked.

Filing a lawsuit to force the government to comply with FOIA law takes too much time and money, and the agencies still play the delay game. In court, the Justice Department, itself one of the worst FOIA offenders, spends our tax dollars defending violators in their effort to keep public documents secret. In one lawsuit I filed, the FBI spent months repeatedly claiming that it didn't have infor-

mation that it had previously acknowledged in writing that it did have.

I also filed a lawsuit for healthcare.gov material in 2012. Apparently, the government didn't even bother to start looking for it until I filed a lawsuit. Only now in 2015 are they beginning to do so. The documents provided so far are redacted beyond reason.

In 2014, when the State Department finally sent some emails responsive to a 2012 request I'd made, just about everything was redacted except the address line.

It should come as no surprise that the Federal agencies often treat Congress with the same disdain and lack of transparency. They guard and redact information Congress requests as if Congress is a foreign enemy rather than representatives of the rightful owners of information. When pressed to provide material to Congress, Federal officials often exert dictatorial control, creating strict terms and rules such as only allowing review of the material during certain times in very special rooms all under the watchful eye of Federal agency minders. This is not transparency.

The FOIA process is improperly politicized. Federal agency press flaks and politicians intervene to withhold potentially embarrassing information. FOIA law does not permit this political intervention, but it happens all the time.

Federal agencies increasingly employ new tactics to obfuscate and delay. They say they don't understand a FOIA request. They claim it's too broad. They say a search would be unreasonable. When they do provide a sensitive document, they redact nearly everything, using exemptions such as (b)(5) deliberative process, which has become so ridiculously overused it has earned the nickname the "withhold it because you want to" exemption.

These are some recent documents I received from Department of Health and Human Services with some (b)(5) exemptions on there.

Federal agencies claim they lack funding and staff. With all due respect, Congressman Cummings, you're probably very correct in much of that, but I have also seen that they create some of their own backlog by unnecessarily requiring even the simplest request to go through the onerous FOIA process when it's not necessary.

And when a court finds a Federal agency violated FOIA law, penalties are almost never imposed. And if ordered to repay the plaintiff's legal fees, the government does so with your tax dollars, meaning there is no deterrent to stop the bad behavior. In other words, they are using our money to prevent us from seeing our own documents.

In short, FOIA law was intended to facilitate the timely release of public information, but instead Federal officials have perverted it and now use it to obfuscate, obstruct, and delay. The system is not broken by accident; it's by design. In my view, the only thing that can make FOIA work as designed would be meaningful criminal penalties for violators.

Thank you.

[Prepared statement of Ms. Attkisson follows:]

Sharyl Attkisson

Good afternoon.

The Freedom of Information Act or FOIA should be one of the most powerful tools of the public and the press in a free and open society. Instead, it's largely a pointless, useless shadow of its intended self.

Federal bureaucrats paid tax dollars to act on our behalf routinely break the law with impunity, treating public material as if it's confidential, secret information to be controlled by a chosen few. They withhold it from us, its rightful owners, while sharing it with select partners such as corporations or other so-called "stakeholders."

In October, I filed a FOIA request when the CDC was not forthcoming about the epidemic of Enterovirus EV-D68 possibly linked to the deaths of 14 children and 115 paralyzed children.

In December, long past the supposed 20-day response time, I asked about the status. CDC answered incredibly that officials were just too busy with the Ebola crisis to fulfill my FOIA on EV-D68. Even now with the excuse of the Ebola crisis over, I still haven't been given any EV-D68 information eight months after I asked.

In 2013, the Defense Department finally responded to a FOIA request I'd made in 2003. Too late to be of use for the news story I was working on back then.

Filing a lawsuit against the government takes too much time and money, and the agencies still play the delay game in court. In court, the Justice Department—itself among the worst of FOIA offenders—spends our tax dollars defending the offending federal agencies.

In one lawsuit I filed, the FBI spent months repeatedly claiming it didn't have information it had previously acknowledged having in writing.

I also filed a lawsuit for HealthCare.gov material I sought in 2012. Apparently the government didn't bother to start looking for documents I requested back in 2012—only now in 2015 are they doing so under court pressure. Documents provided so far are redacted beyond reason.

In 2014, when the State Department finally sent some documents responsive to a request I made in 2012, most of the content of relevant emails is redacted with the exception of the address line.

It should come as no surprise that federal agencies often treat Congress with the same disdain and lack of transparency. They guard and redact information as if Congress is the enemy rather than representatives of the rightful owners of the information. Federal officials create strict rules and reading rooms where members of Congress or staff may be allowed limited glimpses of requested material during certain hours of the day, all while under the watchful eye of a federal agency representative. Members of Congress may be forbidden from making copies. Sometimes note-taking is prohibited. This is not transparency.

The FOIA process is improperly politicized. Federal agency press flacks are notified and intervene when FOIA requests for possibly embarrassing information are made. FOIA law does not permit this political intervention, but it's routinely done.

Federal agencies increasingly employ new tactics to obfuscate and delay.
They say they don't understand the request.
They claim it's too broad.
They say a search would be unreasonable.

When they do provide a sensitive document, they redact nearly everything under exemptions such as b(5)—so overused, it's now nicknamed the "withhold it because you want to" exemption.

They claim they lack funding and staff. But they have created their own FOIA backlog by putting simple requests that should be fulfilled without requiring a FOIA to the end of a long FOIA queue.

Even when a court finds a federal agency violated FOIA law, the government pays any fines and costs with your tax dollars, so there's no deterrent to keep them from repeating the bad behavior.

Fixing FOIA is no easy task. We have learned that some federal officials use other tactics to avoid disclosure of their public actions. Some use private emails, personal servers, pseudonyms, text messages, all of which end up creating records that are not produced for FOIA requests. They instruct subordinates not to put public business in writing on email. And federal officials routinely fail to follow public records laws that require that they make a written record of verbal meetings for the public record.

In short, FOIA law was intended to facilitate the timely release of public information. Instead, federal officials have perverted it and use it to obfuscate, obstruct and delay. The broken system is not by accident, it's by design.

In my view, the only thing that could change things would be meaningful criminal penalties for violators.

Chairman CHAFFETZ. Thank you.
Mr. Leopold, you are now recognized.

STATEMENT OF JASON LEOPOLD

Mr. LEOPOLD. Chairman Chaffetz, Ranking Member Cummings, and members of the committee, thank you for inviting me to testify today about the Freedom of Information Act.

My name is Jason Leopold, and I'm an investigative reporter at VICE News. I aggressively use the Freedom of Information Act in order to find out what is taking place behind the scenes within the Federal Government. I write long-form investigative news reports, many of which showcase the documents I have obtained through FOIA. And I also maintain a FOIA blog at VICE News called "Primary Sources."

My FOIA work has been cited by the Second Circuit Court of Appeals and contributed to the panel's decision last year to order the Obama administration's release to The New York Times and the ACLU the Justice Department's "targeted killing" memorandum.

Documents I have received through FOIA over the past year include a Justice Department white paper that explains the legal justification granted to the CIA to kill a U.S. citizen suspected of being a member of Al Qaeda; an invoice showing that Guantanamo officials spent $300,000 on force-feeding formula while denying the existence of a mass hunger strike at the detention facility; and emails showing the White House's interference with the FCC over net neutrality.

Information obtained through FOIA is critical to our democracy because it helps citizens learn what their government is up to. Unfortunately, delays in obtaining responsive records remain a significant problem for requesters. I have submitted thousands of FOIA requests to dozens of different agencies, and, in my experience, fewer than 1 percent of my requests have been decided within the timeframe required by FOIA. I routinely experience delays of several years in response to my FOIA requests. For example, the Office of Legal Counsel recently informed me that it would likely not complete the processing of my FOIA request for emails until December 31, 2016, due in part to the agency's backlog.

FOIA requests are sometimes delayed and politicized at the Pentagon because the agency has a policy that calls for certain FOIA requests that may generate media attention to first undergo an internal review and receive department-level clearance before a response is issued and/or records are released.

My FOIA attorney, Ryan James, successfully fought back the State Department's attempts to delay the release of Hillary Clinton's emails until next year by securing an agreement that will see monthly releases of those documents, and that took place last week.

But the delayed responses to FOIA requests are a significant problem for investigative journalists. Information becomes less newsworthy with the passage of time, and it leads to a perception that FOIA is not a useful tool.

FOIA does provide for expedited processing in certain circumstances, but I have found that agencies take a narrow view of

what circumstances merit expedition. Even when expedited processing is granted, the process still moves slowly.

For example, I submitted a FOIA request to the Department of Justice on September 5, 2014, for records relating to the Department's investigation of allegations that the CIA had accessed Senate Intelligence Committee staffers' computers without authorization. When I did not receive a prompt response, I immediately filed a lawsuit. Expedited processing was eventually granted, but the agency sought and obtained approval from the court to delay the release of any records until January 29, 2016.

It is often the case that the filing of a lawsuit against an agency catalyzes the release of documents, and I am fortunate to have a prominent FOIA attorney, Jeffrey Light, representing me and VICE News in more than a dozen lawsuits currently against various government agencies. But let me give you a specific example of how the FBI maintains a deliberate policy of violating FOIA until a lawsuit is filed.

Under Exemption 7(A), an agency may withhold records or information compiled for law enforcement purposes which could reasonably be expected to interfere with enforcement proceedings. Congress deliberately chose the words "records or information" when it amended Exemption 7 in 1974. The FBI's standard practice, however, is to categorically apply this exemption for all investigative files rather than determining which records or information would interfere with law enforcement proceedings. This is a clear violation of FOIA. Doubtlessly aware of this fact, the FBI has never defended its position in court. Instead, when a lawsuit is filed, the FBI conducts a new review, applying the proper standards.

A Federal judge recently stated that, "Because the court has doubts about whether the FBI conducted the required review at the administrative stage in this case, it will remind the Bureau of its obligation to perform such reviews in the future." Despite this reminder from the court, the FBI has continued to deny my requests because the records requested are located in an investigative file.

Congress and the courts could not have been clearer. It is a violation of FOIA for the FBI to interpret Exemption 7(A) the way it has. Yet the FBI continues to be in routine and flagrant violation of the law. I have many more examples to share with this committee.

In sum, FOIA can be a valuable tool for investigative journalists but only when it functions effectively.

Thank you for your time and attention to this important matter, and I look forward to answering your questions.

[Prepared statement of Mr. Leopold follows:]

Testimony of Jason Leopold, Investigative Reporter, VICE News

Before the House Committee on Oversight & Government Reform

Ensuring Transparency through the Freedom of Information Act (FOIA)

June 2, 2015

Chairman Chaffetz, Ranking Member Cummings, and Members of the Committee:

Thank you for inviting me to testify before the Committee today. My name is Jason Leopold and I am an investigative reporter at VICE News. As part of my job, I regularly submit Freedom of Information Act, or FOIA requests and file lawsuits against government agencies in order to obtain documents about previously unknown government programs, operations, and investigations; and to find out what is generally taking place behind the scenes within the federal government. I write longform investigative news reports, many of which showcase the documents I have obtained through FOIA. I also maintain a FOIA blog at VICE News called "Primary Sources."[1]

Having worked as an investigative reporter for more than a decade, I look forward to talking to you today about the need to ensure transparency through the Freedom of Information Act.

I. Use of FOIA by Investigative Journalists

Information obtained through FOIA is critical to our democracy because it helps citizens learn what their government is up to. Since FOIA went into effect in 1967, investigative journalists have made effective use of the law to expose government wrongdoing, corruption, and waste. For example, FOIA requests by Mark Feldstein, *The Washington Post*, and the Associated Press revealed that the Nixon Administration had been spying on influential journalist Jack Anderson.[2] Through documents it obtained under FOIA, the Associated Press published an article in 2005 detailing how a significant portion of the $5 billion designated for a post-September 11 recovery program to help small businesses was used to give low-interest loans to companies that did not need terrorism relief, including a dog boutique in Utah and an Oregon winery.[3] The National Security Archive at The George Washington University has

[1] Primary Sources. Available at https://news.vice.com/topic/primary-sources

[2] "The Good, The Bad, The Ugly of Using FOIA." Available at http://ajr.org/2014/10/08/foia-request-challenges/

[3] "Many who got Sept. 11 loans didn't need them; some loan recipients had no idea their funds came from terror-relief program," Richmond Times Dispatch (Virginia), September 9, 2005, at A-1.

compiled a list of more than 100 significant news articles that were made possible because of FOIA.[4]

Over the last five years, I have made extensive use of FOIA in my work as an investigative journalist. Notable stories that I have written as a result of documents obtained under FOIA include:[5]

- "A Justice Department Memo Provides the CIA's Legal Justification to Kill a US Citizen"
- "Gitmo Spent $300,000 on Liquid Supplements While Denying a 'Mass Hunger Strike'"
- "The White House Emails at the Center of Washington's Brewing Net Neutrality Storm"

II. Current FOIA-Related Problems Experienced by Investigative Journalists

In 1996, when Congress passed the E-FOIA Amendments, Representative Steven Horn, who was a member of this committee, stated: "Most importantly, the bill would tackle the mother of all complaints lodged against the Freedom of Information Act: that is, the often ludicrous amount of time it takes some agencies to respond, if they respond at all, to freedom of information requests."[6] At least among investigative journalists, delay unfortunately remains the "mother of all complaints."

As you know, FOIA requires an agency to make a determination on releasing records within 20 business days. An extension of 10 business days is available in "unusual circumstances." I have submitted thousands of FOIA requests to dozens of different agencies, and in my experience, fewer than one percent of my requests have been decided within the timeframe required by FOIA. My colleagues have had similar experiences.

I routinely experience delays of several years. The agencies that have consistently been slowest to respond to my FOIA requests have been the FBI, the Department of Justice, and United States Southern Command. In the past two years, I have also begun to experience extremely lengthy delays in receiving responses from the NSA.

Delayed responses to FOIA requests are a significant problem for investigative journalists for several reasons.

First, information may become less valuable over time. Information about a candidate is less newsworthy after the election is over, and information about a war is less newsworthy after the conflict is over. Often, information delayed is information denied.

---

[4] "FOIA in the News 2004-2006." Available at http://nsarchive.gwu.edu/nsa/foia/stories.htm

[5] A copy of each of these stories is attached as Exhibit A.

[6] 142 CONG. REC. 10,451 (Sept. 17, 1996) (statement of Rep. Steven Horn, Chairman, Subcomm. On Gov't Management, Info. and Tech. of the House Comm. On Gov't Reform and Oversight).

Second, delays in agency responses to FOIA requests have led to a perception among most investigative journalists that FOIA is not a useful tool. As a result, many of my colleagues do not submit FOIA requests at all.

FOIA does provide for expedited processing in certain circumstances, but I have found that agencies take a narrow view of what circumstances merit expedition. For example, the Defense Intelligence Agency denied my request for expedited processing for documents related to the harm to national security caused by Edward Snowden.

Even when expedited processing is granted, the process still moves slowly. For example, I submitted a FOIA request to the Department of Justice on September 5, 2014 for records relating to the Department's investigation of allegations that the CIA had accessed SSCI computers without authorization. Expedited processing was granted, but the agency has decided that it will not release any records until January 29, 2016.

My request to the Executive Office of the United States Attorneys for records about Loretta Lynch illustrates the problems that investigative journalists face in using FOIA. I submitted my request the day that Loretta Lynch's nomination was announced by President Obama. I sought expedited processing because the records I was requesting relate to Lynch's performance of her duties as United States Attorney for the Eastern District of New York. When the agency did not rule on my request for expedited processing within the time period allowed by FOIA, I immediately filed suit. The agency conceded that the topic of my request is a "matter of widespread and exceptional interest," but insisted that it should not have to even begin releasing records for several months. My attorney filed several emergency motions requesting that the Department of Justice process my request and produce records before Lynch's confirmation hearing, but the judge presiding over the case indicated that he would not have time to rule on the motions for more than a month. After Lynch was confirmed, my request for expedited treatment became moot. To date, the agency has still not processed the documents I requested.

My experience requesting records about Loretta Lynch illustrates one of the major problems for investigative journalists using FOIA. Even when a journalist acts with the utmost diligence in filing a FOIA request and pursuing his or her rights in court, agency feet-dragging can frustrate a journalist's attempt to obtain records at the time when they are needed most.

It is often the case that the filing of a lawsuit against an agency catalyzes the release of documents. I am fortunate to have a prominent FOIA attorney, Jeffrey L. Light, representing me and VICE News in over a dozen lawsuits against various agencies. However, not all investigative journalists are in a position to expend the substantial resources necessary to bring FOIA lawsuits, and even large media outlets may find the cost of litigation to outweigh the benefits.

Investigative journalists should be spending their time and resources investigating, not litigating. Unfortunately, some agencies refuse to conduct adequate searches and fail to properly apply FOIA's exemption provisions until a lawsuit has been filed.

One specific and recurring problem I have experienced is with the FBI's invocation of Exemption 7(A). Under Exemption 7(A), an agency may withhold "records or information"

compiled for law enforcement purposes which "could reasonably be expected to interfere with enforcement proceedings." This exemption comes up frequently in my work because I am often requesting records or information about recent events.

Congress deliberately chose the words "records or information" when it amended Exemption 7 in 1974. Prior to that time, investigatory *files* compiled for law enforcement purposes were exempt. The problem was that agencies could simply place documents that they wanted to withhold from disclosure inside an investigatory file, and then treat the document as exempted simply because of its location. The 1974 amendment was designed to fix this problem by eliminating the blanket exemption for government records simply because they were found in investigatory files compiled for law enforcement purposes.

Notwithstanding Congress's clear intention and the plain language of FOIA after the 1974 amendment, the FBI continues to withhold information where the record requested "is located in an investigative *file* which is exempt from disclosure pursuant to 5 U.S.C. 552(b)(7)(A)" (emphasis added). I have received dozens of denial letters from the FBI based on this erroneous interpretation of FOIA, and the Department of Justice's Office of Information Policy has affirmed the FBI's decision in every administrative appeal I have filed. The FBI has not defended its position in court, but instead conducts a new review applying the proper standard once litigation has commenced. As a result, the issue becomes moot.

In a recent decision, a federal court held that "because the Court has doubts about whether the FBI conducted the required review at the administrative stage in this case, it will remind the Bureau of its obligation to perform such reviews in the future. See Crooker, 789 F.2d at 66 (holding that Congress eliminated 'blanket exemptions for Government records simply because they were found in investigatory files compiled for law enforcement purposes' (quoting Robbins Tire, 437 U.S. at 236, 229–30))." That decision was issued March 18, 2015 in the case Tipograph v. Department of Justice, No. 1:13-cv-239-CRC. Despite being reminded of its obligations, the FBI has continued to deny my requests because the records requested are "located in an investigative *file* which is exempt from disclosure pursuant to 5 U.S.C. 552(b)(7)(A)". The FBI's continued practice of asserting Exemption 7(A) directly violates Congress's command and the federal court's "reminder."

III. Conclusion

FOIA is a valuable tool for ensuring transparency in government. It has been used effectively by investigative journalists since it went into effect. Unfortunately, lengthy delays and agency feet-dragging can turn off investigative journalists to FOIA. While litigation helps, it can be costly and is not consistently effective at securing the release of records in a timely fashion.

Thank you for your attention to this important matter.

Chairman CHAFFETZ. Thank you.

Mr. McCraw, you are now recognized for 5 minutes.

STATEMENT OF DAVID E. MCCRAW

Mr. MCCRAW. Thank you, Mr. Chairman, and thank you, Ranking Member——

Chairman CHAFFETZ. Make sure that microphone is—there you go.

Mr. MCCRAW. Thank you, Mr. Chairman, and thank you, Ranking Member Cummings and members of the committee. I appreciate the opportunity to testify about the Freedom of Information Act.

As an assistant general counsel at The New York Times, I provide legal counsel to the newsroom. I'm very familiar with the problem that delay presents for our journalists as they seek information.

Last year, I filed eight FOIA lawsuits on behalf of the Times. Much of that litigation was driven not by actual disagreement about legal issues but in response to unacceptable delay by agencies. In other words, we find ourselves compelled to litigate simply to prompt agencies to act upon request.

Let me provide one recent example that shows how wasteful and inefficient all of that is and why reform is needed.

Late last year, the Times made a simple FOIA request to the Department of Justice. We wanted to know how much money the DOJ had spent paying the legal bills of FOIA requesters in the Southern District of New York. FOIA permits the courts to award attorneys' fees in FOIA cases where the requester wins. We simply wanted to know in a single judicial district how often that happened and in what amounts.

It was a straightforward request about a budgetary matter. No FOIA exemption could possibly apply. But weeks passed without a response. Over a 4-month period, we repeatedly contacted the FOIA officer handling the request. We called that office more than 10 times and left messages. Almost all of those cases went unreturned. Finally, we filed a lawsuit out of frustration.

At that point, the U.S. Attorney's Office was required to become involved. An assistant U.S. attorney took on the task of finding out what was going on in the FOIA office, had our request moved quickly along with court deadlines looming, and succeeded in getting the documents released to us.

In short, an assistant U.S. attorney ended up doing what the FOIA officer should have done in the first place. Forcing requesters to litigate to get a response is a waste of government resources. But more than that, a citizen's right to get information released in a timely fashion should not turn on whether the citizen is fortunate enough to have the resources and know-how to sue.

There is much that needs to be done to fix FOIA, and I urge the House to move forward with the reform bill which takes important steps towards empowering OGIS, limiting Exemption 5, and encouraging the use of technology.

But I want to focus today on something very basic: What can be done to get agencies to respond in the timeframes dictated by law?

Congress, in enacting FOIA, set a response deadline of 20 business days. While statistics show the response times have improved, we know from actual experience that responses from many agencies takes months or years. In the documents we submitted with my testimony, we include a letter from an agency that has sat on a request for nearly 4 years and now wants to know whether we're still interested.

Our written submissions document some specific issues relating to today. Let me just briefly highlight three.

First, much of the delay appears to have little to do with the nature and complexity of actual requests but instead results from a culture of unresponsiveness. Some agencies are consistently good, while others show little sign of improvement year after year.

As requesters, we are not in a position to know what the root causes of delay are—whether a lack of resources, poor work performance, inadequate training, or something else—but we do know two things: First, Congress, after weighing all the competing considerations, set specific deadlines in the law; second, the leaders of many agencies are permitting those deadlines to be ignored by staff.

In the end, this is a management issue, and those in charge of agencies should be held accountable for figuring out what the problem is and fixing it.

Second, delay frequently occurs because agencies decide to refer a request to another agency. This happens when the second agency is a stakeholder in the information sought. Referral may make sense as a policy matter, but few rules govern the process. The referring agency lacks authority to demand a response from the second agency or set a deadline, and the requesters are left on the sidelines. Much clearer rules and deadlines are needed.

Third, FOIA requests often seek information that has been submitted by companies to regulatory agencies. Disclosure of this information is vital to citizens so they can monitor whether regulators are doing their jobs and see whether companies are being treated fairly. But in response to such FOIA requests, agencies frequently take the position they need to consult with the submitters. This process becomes a source of endless delay.

In the documents we provided to the committee, we include an agency response letter saying it would take 15 years to finish the consultation and respond to our request. Not surprisingly, when we sued, a Federal judge found that was simply not the case and ordered the release of the information.

In conclusion, there are a host of reforms we're pursuing as we see in the House bill, but taking steps to ensure that agencies respond in the time period that Congress saw fit to establish should be an essential part of any reform.

Thank you for inviting me to testify and for taking on this important issue.

[Prepared statement of Mr. McCraw follows:]

Testimony of
David McCraw
on behalf of
The New York Times Company
Before the
Committee on Oversight and Government Reform
United States House of Representatives
on
the Freedom of Information Act
June 2, 2015

Chairman Chaffetz, Ranking Member Cummings, and members of the committee:

Thank you for the opportunity to testify today about the Freedom of Information Act. My name is David McCraw. I am an Assistant General Counsel at The New York Times Company, where I serve as legal counsel to The New York Times newsroom. Our journalists are regular users of FOIA, so we know first-hand the problems presented by agency delay.

Last year, I filed eight FOIA lawsuits on behalf of The Times. Much of that litigation was driven not by actual disagreement about legal issues but in response to unacceptable delay by agencies. In other words, we find ourselves compelled to initiate litigation simply to prompt agencies to act upon a request. Let me provide one recent example that shows how wasteful and inefficient all of that is and why reforms are needed.

Late last year The Times made a simple FOIA request to the Department of Justice. We wanted to know how much money the DOJ had spent paying the legal bills of FOIA requesters in the Southern District of New York. FOIA permits the courts to award attorneys' fees in FOIA cases where the requester wins. We simply wanted to know, in a single judicial district, how often that happened and in what amounts.

It was a straightforward request about a budgetary matter. No FOIA exemption could possibly apply. But weeks passed without a response. Over a four-month period, we repeatedly contacted the FOIA office handling the request. We called more than 10 times and left messages. Almost all of those calls went unreturned. Finally we filed a lawsuit out of frustration.

At that point, the U.S. Attorney's Office was required to become involved. An Assistant U.S. Attorney took on the task of finding out what was going on at the FOIA office, had our request moved along quickly with court deadlines looming, and succeeded in getting the documents released to us. In short, the Assistant U.S. Attorney ended up doing what the FOIA officer should have done in the first place.

Forcing requesters to litigate to get a response is a waste of government resources. But more than that, a citizen's right to get information released in a timely fashion should not turn on whether the citizen is fortunate enough to have the resources and know-how to sue.

There is much that needs to be done to fix FOIA, and I urge the House to move forward with the reform bill, which takes important steps toward empowering OGIS, limiting Exemption 5, and encouraging the use of technology.

But I want to focus today on something very basic: what can be done to get agencies to respond in the time frames dictated by law. Congress, in enacting FOIA, set a response deadline of 20 business days. While statistics show that response times have improved, we know from actual experience that responses from many agencies take months or years. In our written submission, we include a letter from an agency that has sat on a request for nearly four years and now wants to know whether we are still interested.

Our written submission documents some specific issues relating to delay. Let me briefly highlight three.

First, much of the delay appears to have little to do with the nature and complexity of the actual requests, but instead results from a culture of unresponsiveness. Some agencies are consistently good, while others show little sign of improvement year after year. As requesters, we are not in a position to know what the root causes of delay are, whether a lack of resources, poor work performance, inadequate training, or something else. But we do know two things: First, Congress, after weighing all the competing considerations, set specific deadlines in the law. Second, the leaders of many agencies are permitting those deadlines to be ignored by staff. In the end, this is a management issue, and those in charge of agencies should be held accountable for figuring out what the problem is and fixing it.

Second, delay frequently results because agencies decide to refer a request to another agency. This occurs when the second agency is a stakeholder in the information sought. Referral may make sense as a policy matter, but few rules govern the process. The referring agency lacks authority to demand a response from the second agency or set a deadline, and the requesters are left on the sidelines. Much clearer rules and deadlines are needed for the referral process.

Third, FOIA requests often seek information that has been submitted by companies to regulatory agencies. Disclosure of this information is vital to citizens so they can monitor whether regulators are doing their jobs and whether companies are being treated fairly. But in response to such FOIA requests, agencies frequently take the position that they need to consult with submitters. This process becomes a source of endless delay. In the documents we provided to the committee, we include an agency response letter saying that it would take 15 years to finish the consultation and respond to our request. Not surprisingly, when we sued, a federal judge found that was simply not the case and ordered release of the information.

In conclusion, there are a host of reforms worth pursuing, as we see in the House bill. But taking steps to ensure that agencies respond in the time periods that Congress saw fit to establish should be an essential part of any reform.

Thank you for inviting me to testify and for taking on this important issue.

Chairman CHAFFETZ. Thank you. I appreciate that.

Ms. Goodman, you are now recognized for 5 minutes.

STATEMENT OF LEAH GOODMAN

Ms. GOODMAN. I just want to thank you, Chairman, and thank Ranking Member Cummings and the rest of the members of the committee.

I'm really glad to be here today with so many journalists who I very much respect. And the fact that we've come here at all represents a stark departure from our usual routine as journalists. While we may frequently be found writing about hearings such as this, as a rule, we try not to participate in them.

Our mandate to remain objective as journalists demands that we stay well above the political fray and cover stories from all angles, notwithstanding whatever our privately held opinions may be. The urgent problem that we face, though, right now is that our role of objectively collecting and reporting the facts has been increasingly and aggressively blocked by those who would seek to separate the journalists, as well as members of the public, from the information that we are lawfully entitled to.

In my job as a senior writer and finance editor at Newsweek, I have been surprised by the number of government agencies that will stonewall even the most basic requests for information that readers and the public have a right to.

There are no Washington editors here today from any of the big newspapers, and the reason why—because I spoke with them—is that they are concerned about a chilling effect for even speaking out on this. They are concerned about the consequences of coming here. This, I think, speaks to the seriousness of this matter.

Collectively, the journalists who are here have covered major events in this country for decades and have dealt with plenty of blow-back, but we have never before seen so many agencies that have turned themselves into veritable black boxes where information comes in and does not come out. What we're now witnessing in terms of obstructionism and obfuscation is truly unprecedented in our careers. The issues surrounding the Freedom of Information Act, in my opinion, are symptomatic of a much wider problem.

Our job, which is to inform the public about issues crucial to our democracy and to the national discourse, relies on our ability to gather and check facts in a timely fashion. It should be understood that the job of journalists is to have no agenda other than to get answers to important questions for our readers. And we aren't just answerable to them; we are members of the public.

Last I checked, our government works for the public and is paid for by the U.S. taxpayer. You'd think that our public service mission as journalists and the government would have somewhat symbiotic relationships, but, as we know, we don't. The fact we're even here speaking to the Members of the House is proof that our widely held notion of a government accountable to its people is broken.

While my colleagues are much more accustomed to problems relevant to the Freedom of Information Act than I am, I am here to offer broader context about what we face every day as we try to do our job.

To be completely honest, I come from a generation of journalists who were told upon entering the newsroom: If you want to know what you're going to be writing about in 3 years, file a FOIA. So if I want to write about something less than 3 years, I don't file a FOIA.

The long waiting games, heavy redactions and lack of accountability, and the culture of concealment that seems to pervade the FOIA process also carries over into all aspects of what we do, especially when we're dealing with government agencies.

Once upon a time, you could call a government agency and talk to someone with a real first and last name. You could get their contact information without fighting through people for it. You could tell them what you were writing about and set up an interview with someone knowledgeable at the agency who could talk to you. Sometimes they would have no comment, which is fair enough, but everyone knew who they were dealing with and the process was as honest as one could expect it to be. In other words, there was a modicum of responsiveness and accountability.

These days, when I call a Federal agency, what I'm dealing with can only be compared with an offshore call center with a constantly rotating cast of characters answering the phones, who are trained to not give their names, who can tell you nothing about who is knowledgeable on the topic about which you're writing, and who urge you to email a generic "info@government.gov" sort of address, which has no name on it and, as all journalists know, is the kiss of death.

I don't think this is the fault of the staffers. In my opinion, most of the staff at these agencies are not being empowered by their superiors to have even rudimentary exchanges with journalists.

The next time you read a news article that involves a government agency, count how many times an actual person with a name has an actual quote from that agency that does not come from an already published comment or congressional testimony or a press release or a press conference. You'll see that quotes from these sources with full names from agencies are rarer than hen's teeth.

This is because, the environment we're operating in, journalists will not be able to talk to anyone unless we agree to not name them or they will ask to remain anonymous while contributing to our stories. In these cases, the agency or staff member will comment only on condition that they are not identified, effectively attempting to make it impossible for readers to know who's feeding them this information. And we, the journalists, are expected to be enablers and stewards of this cowardly process I find to be the opposite of what journalism is for.

One example: While investigating high-frequency trading last year and whether it was disrupting our markets, as finance editor for Newsweek, the U.S. Securities and Exchange Commission repeatedly told me that I could not quote its market experts, even after arranging interviews with them and conducting extensive conversations with them and agreeing to allow them to check their own quotes.

This government agency is tasked with overseeing the Nation's stock markets, and yet it also informed me that, while I could use the information it gave me, I could not say where I had gotten it

in my story. In other words, I was to hide the fact that I had gotten this information from the SEC and expected to present it to the public as incontrovertible fact.

Ethically, journalists can't agree to such terms unless under rare circumstances, usually ones entailing security or protection of an individual, not large government agencies. But these agencies want this kind of special treatment every day, and that is as a starting negotiation condition.

In the case of the SEC story, I didn't agree to the terms, and, as a result, an SEC staffer asked to speak with my editor immediately. The message was clear that if I did not do as I was told the situation would be escalated in a way that might be problematic for me. My editor was not amused, and, days after we went to print with this story, the SEC announced an investigation into high-frequency trading disrupting U.S. markets.

In the past year alone, I've worked with around two dozen government agencies that have wanted to dictate to me how to write my stories, what I can say and cannot say. And they seem to think this is entirely reasonable when, in fact, it is quite extraordinary. If I don't agree to the terms, the result will be waiting days, weeks, or getting no answers at all to questions.

While one might chalk this up to a basic lack of media training among these agencies, it is curiously lacking in exactly the same way, with the same tendency towards zero-accountability anonymousness. And it's getting worse.

These issues are not just ones of gamesmanship in the form of delays and denials of critical information but a desire on the part of our agencies to remain in the shadows while anonymously influencing the news received by the voting public. It is my hope that by appearing today the House might consider taking steps to place such standards that would restore accountability.

To directly address what can be done requiring—regarding FOIA and the broader problems that I speak of, Congress should consider legislating an enforceable set of core standards by which Americas can seek and receive information in a timely fashion from identifiable sources within the government in response to their questions rather than the cloak-and-dagger games that we now see. Until such standards are imposed and enforced with real consequences, I think these games will continue.

And, lastly, if you're wondering if I expect there to be consequences for my being here and saying this today, yes, I do. But I believe if we don't stand up and speak in one voice as journalists that our jobs will only get harder.

Thank you for your time, and, again, thank you for having me here.

[prepared statement of Ms. Goodman follows:]

Testimony to the House Oversight and Government Reform Committee on the Freedom of Information Act and the Increasing Lack of Transparency Among U.S. Government Agencies

June 2, 2015

Leah McGrath Goodman, Senior Writer and Finance Editor, *Newsweek*

Thank you for the invitation to appear before this panel today and for the opportunity to do so with journalistic colleagues whose diligence and professional tenacity I greatly admire and respect.

The fact we have come here represents a stark departure from our usual routine as journalists. While we may frequently be found writing about hearings such as this, we do not, as a rule, participate in them. Our mandate to remain objective as journalists demands that we stay well above the political fray and cover stories from all angles, notwithstanding whatever our privately held opinions might be.

The larger problem we now face is that our role of objectively collecting and reporting the facts has been increasingly and aggressively blocked by those who would seek to separate journalists -- and the public – from the information to which we are lawfully entitled. In my job as a senior writer and finance editor for *Newsweek*, I have been surprised by the number of government agencies that will stonewall even the most basic requests for information that readers and the public have a right to.

Take a look around – how many high-ranking Washington editors do you see here? None. What the journalists and editors who are not appearing today will not tell you is that they worry that to even speak to Congress about this issue will create still a further chilling effect that could impede their reporting. This is what I heard directly from several news outlets and writers in Washington who wanted to be here today but were concerned about the consequences. This, I think, speaks to the seriousness of the matter.

Collectively, the journalists who appear before you today have covered major events in this country for decades and have dealt with plenty of blowback. Yet never before have we seen so many government agencies that have turned themselves into veritable black boxes – where information flows in and nothing comes out. What we are now witnessing in terms of obstructionism and obfuscation is truly unprecedented in our careers. The issues surrounding the Freedom of Information Act, in my opinion, are symptomatic of a much wider problem.

Our job, which is to inform the public about issues crucial to our democracy and to the national discourse, relies on our ability to gather and check facts in a timely fashion. It should be understood that it is the job of journalists to have no agenda other than to get answers to important questions for our readers – we aren't just answerable to the public, we *are* the public.

Last I checked, our government works for the public and is paid for by the U.S. taxpayer. You'd think the public service mission of journalists and the government would make our relationships somewhat symbiotic. But, as we know, this is far from the case. The fact we even are here, journalists speaking to members of the House, is proof that our widely held notion of a government accountable to its people is broken.

While my colleagues are much more accustomed to problems relevant to the Freedom of Information Act, I am here to offer broader context about what we face every day as we try to do our jobs. (To be completely honest, I come from a generation of journalists who were told, upon entering the newsroom, 'If you want to know what you're going to be writing about in three years, file a FOIA.' So, if I want to write about something in less than three years, I do not file a FOIA.)

The long waiting times, heavy redactions, and lack of accountability and culture of concealment that seems to pervade the FOIA process also carries over into all aspects of dealing with government agencies for journalists.

Once upon a time, you could call a government agency, talk to someone with a real first and last name with contact information, tell them what you were writing about and set up an interview with a knowledgeable human being who could discuss it with you. Sometimes, they would have no comment, which is fair enough, but everyone knew who they were dealing with and the process was about as honest and straightforward as anyone could expect it to be. In other words, there was a modicum of responsiveness and accountability.

These days, when I call a federal agency, what I am dealing with can only be compared to an offshore call center, with a constantly rotating cast of people answering the phones, who are trained not to give their names, who can tell you nothing of who is knowledgeable on the topic about which you are researching and, nine times out of ten, ask you to send an email to a generic info@government.gov address –which, as all journalists can attest, is the kiss of death. I don't think this is the fault of these staffers. In my opinion, most staff at these government agencies are no longer empowered by their superiors to have even the most rudimentary exchanges with journalists.

The next time you read a news article that involves a government agency, count how many names of actual people you see and actual quotes from that agency that did not come from an already published public statement, a

press conference or congressional testimony. You will see that quotes from sources with full names at agencies are rarer than hen's teeth.

This is because of the environment in which we're operating as journalists. Most agencies will not work with the journalist unless they can remain unnamed or anonymous while contributing to our stories. In these cases, the agency or staff member will comment only on condition that they are not identified, effectively attempting to make it impossible for readers to know who is feeding them information – and we the journalists, are expected to be enablers and stewards of this process, a process I find to be the opposite of what journalism is for.

One example: While investigating high-frequency trading and whether it was disrupting the nation's markets as finance editor for *Newsweek* last spring, the U.S. Securities and Exchange Commission repeatedly told me that I could not quote its market experts, even after conducting extensive interviews with them and agreeing to allow them to check their quotes for accuracy before we went to print. This is the government agency tasked with overseeing the nation's stock markets.

The SEC also informed me that while I could use the information it had given me, I could not say where I had gotten it in my story. In other words, I was not to say I had received it from the SEC. I was expected to present the information to the public as incontrovertible fact and conceal that it came from the SEC. Ethically, journalists cannot agree to such terms except under rare circumstances – usually ones entailing the security or protection of an individual, not a large government agency. But these agencies want this kind of special treatment every day.

In the case of the SEC story, I did not agree to the terms and, as a result, an SEC staffer asked to speak with my editor. The message here was clear: if I did not do as I was told, the situation would be escalated in a retaliatory fashion. My editor was not amused and, days after my story went to print, the SEC's chairman announced an investigation into high-frequency trading and whether it was disrupting the nation's markets.

In the past year alone, I have worked with around two dozen government agencies that have wanted to dictate to me how to write my stories, what I can say and cannot say and seem to think that this is entirely reasonable when, in fact, it is quite extraordinary. If I do not agree to the terms, the result might be waiting days or weeks for answers to questions, or getting no answers at all.

While one might chalk this up to a basic lack of media training among these agencies, it is curiously lacking in exactly the same way, with the same tendency toward zero-accountability anonymity – and it is getting worse.

Late last year, the Internal Revenue Service emailed me a quote from what they said was "a spokesman" in response to a question I'd asked. No name was given, however. When I asked who the quote came from, the IRS informed me that it did not matter who said it, because I did not need a name. Yes, we do need names. That is how journalism works. Otherwise, how do we know the person is real? Last month, the Congressional Budget Office told me that they don't "do" quotes at all anymore, either named or unnamed, because they would prefer to cut and paste congressional testimony into emails and send that to journalists. How is this in any way even remotely accountable to the taxpayer?

The most concerning agency to me of all is the U.S. Department of Justice. This agency, which has collected billions in recent years from Wall Street settlements, plays a crucial role in our nation's justice system and security, but too often will just not answer questions. For the past year, the DOJ has informed me it is unable to verify how much money it has collected from Wall Street settlements since the financial crisis began, or how these funds have been spent or allocated, including how much consists of restitution to the millions of Americans who lost their homes. This information is retrievable and it should be retrieved in order to determine whether Americans have benefitted directly from these settlements or if the DOJ has primarily enriched itself.

These are issues not just of gamesmanship in the form of delays and denials of critical information, but a desire on the part of our agencies to remain in the shadows while anonymously influencing the news received by the voting public. It is my hope that by appearing today, the House might consider taking steps to put in place such standards that might help to restore accountability.

To directly address what can be done regarding FOIA and the broader problems of which I speak, Congress may want to consider legislating an enforceable set of core standards by which Americans can seek and receive information in a timely fashion from identifiable sources within their government in response to questions – rather than the cloak-and-dagger games that now beleaguer even the most basic efforts to get at facts.

Until such standards are imposed – and enforced – I believe the games will continue.

Lastly, if you are wondering, do I expect there to be consequences in my own work for speaking here today, the answer is yes. But I believe if journalists don't stand up and speak with one voice on this matter, the problem will only get worse and our jobs will only get harder.

Thank you for your time and, again, for your kind invitation.

Chairman CHAFFETZ. Thank you, Ms. Goodman.
Mr. Anderson, you are now recognized for 5 minutes.

STATEMENT OF TERRY ANDERSON

Mr. ANDERSON. Thank you, Mr. Chairman and members of the committee, for allowing me to come and speak here today.

I agree with the chairman and with my colleagues that government transparency and its obverse, government secrecy, are among the most important problems that we face today, both this body and our country.

The guarantee of freedom of speech and of the press and all the other freedoms that we have enjoyed for 240 years means little without freedom of information. If we do not know what our leaders are doing in our name, how are we going to hold them responsible, accountable? How can we know which leaders to choose? How can we claim to have a government of the people, by the people, and for the people?

Yes, there are certain things we should not know too much about—the movements and strategy of our Armed Forces in wartime, for instance—but such cases arise seldom. So why is our government and its agencies currently protecting millions of individual documents, hundreds of thousands of actions and decisions made by our elected and appointed officers, at the cost of somewhere upwards of $11 billion a year and increasing drastically?

Yes, I know the world is a dangerous place. I know that 2,700 people were murdered at the World Trade Center on September 11, 2001, and hundreds more in attacks on embassies and individual Americans around the world since. But I also know through experience and through research that the vast majority of those millions of secrets have nothing to do with terrorism or our national security. Instead, they often involve automatic decisions by the horde of bureaucrats who have the authority to stamp "Top Secret" on the flow of papers that cross their desk or, just as often, some minor functionary trying to protect himself or herself from political or personal embarrassment.

How do I know this? Well, when I came home from Lebanon, I was given a generous fellowship at Columbia University by the Freedom Forum so my wife and I could write a book about our experience. We decided to ask under the Freedom of Information Act for any information on my kidnappers that might be held by the various intelligence agencies—the CIA, the FBI, the NSA. In all, we requested responses from 13 government agencies.

As you know, FOIA sets time limits and parameters for official responses to that kind of request as well as procedures for appeal, ultimately to a court of law. After 2–1/2 years of messing about with denials and denials of appeals and outright failures to respond, I finally took advantage of that last provision and filed suit in U.S. District Court in Washington.

Included in the legal submission was the initial response from the DEA, which was made long after its FOIA deadline had expired but informed me that they could not furnish the information I requested because it would violate the privacy rights of the individuals concerned; however, if I was able to get a signed, notarized release from my former host, they would be happy to cooperate. I was

not greatly interested at the time in finding my kidnappers again and asking them for permission to peruse their files.

Eventually, I began getting actual documents. Most were heavily redacted, including one that had only the title left, with about a dozen pages following it completely blacked out. And so we fought on for 4 years, at the end of which, in accordance with repeated judicial orders, I had dozens of boxes of files to look through to try to understand the events that had engulfed me and my family.

I read them all carefully. They included copies of my own stories for the AP, which had already of course appeared in thousands of newspapers, copies of publicly available reports stamped "Confidential," and masses of irrelevant paper or discussions of diplomatic faux pas or less than diplomatic comments someone had made about foreign leaders, and so on.

So the government spent millions of dollars and 4 years of effort trying to protect secrets, not one of which concerned actual security interests of the United States.

During this period, the late Senator Daniel Moynihan conducted, at the President's request, a 2-year study of government secrecy. You may remember it. He concluded in his 1995 report that the U.S. had fallen into a culture of secrecy which had become dangerous to our democracy.

Senator Moynihan, a great statesman, a brilliant mind, and a personal friend, said this: "Excessive secrecy has significant consequences for the national interest when, as a result, policymakers are not fully informed, government is not held accountable for its actions, and the public cannot engage in informed debate. "Secrecy is a form of regulation," the Senator said, "and while we're all familiar with government overregulation, the public cannot know of overregulation when the regulation is kept secret from them."

Senator Moynihan also noted that while the then-controlling Presidential finding authorized 20 officials to use the Top Secret classification, meaning concerning information the disclosure of which could be expected to cause grave harm to our national security, some 2 million officials and a million private contractors have been given derivative authority to use that officially highest classification—3 million people stamping "Top Secret" on the flood of paper crossing their desks.

The Moynihan commission recommended some changes in the law, including an office of declassification. Nothing was acted upon. In fact, when President Clinton ordered a mass declassification of documents from World War II and before, he was largely ignored by the bureaucrats who run the system.

By the way, the oldest known classified document in the system at that time was a report on troop movements in World War I. As far as I know, it's still classified.

In 2006, the CIA and other agencies, in an operation that was itself classified, pulled 55,000 documents out of the public domain at the National Archives and reclassified them. I'm going to presume they're still doing that.

And so we come to the opening of the Obama administration. On inauguration day, the new President announced his commitment to a new era of openness and transparency. "My administration is

committed to creating an unprecedented level of openness in government," he said in a message to all government agencies.

Today, reporters describe this administration as "control freaks" and the most closed they've ever covered. The Obama administration has prosecuted more whistleblowers than any other and used the Espionage Act more often than any other administration to prosecute reporters' sources. It has also spied on reporters and even their parents.

The result of all this is inevitable, I believe. We now have a society in which large areas of government decision and action are routinely kept from the public. Think of Abu Ghraib and the torture of prisoners, official and unofficial. Think of massive spying on American citizens, whose phones, computers, vehicle movements, even bank accounts can be monitored without their knowledge. And if they have the ability, what makes you think they won't use it? Oh, and, by the way, I'm sure the members of the committee realize this includes you. When you call the head of the NSA in here and ask him and he says, "No, we don't spy on Members of Congress," are you going to believe him this time?

Our fear, heightened by the war on terrorism, is overwhelming the system of government that has served us for 240 years. Half of the Bill of Rights is now regularly ignored. Officials of our own government agencies seem to violate the Constitution at will and with impunity. Our senior intelligence officials blithely lie to you and to the American people in the name of security. And we can do little because we know little.

I believe that young Mr. Snowden should not be hiding in Moscow and poor Private Chelsea Manning should not be serving a long prison sentence. Yes, they broke the law, but they did so in accordance with their conscience, which told them that what they were seeing was wrong. They should be here in Washington wearing black ties and receiving awards. Because of them, we are now having a public debate over serious issues we would not even know about.

We need this debate. And, more than that, we need some action that will return us to the principles we have held to since the founding of the United States. We need to control our fear and control our government.

Thank you.

[Prepared statement of Mr. Anderson follows:]

Comments by Terry Anderson before the

U.S. House Committee on Oversight and Government Reform

2 Jun 15

Mr. Chairman, Members of the Committee, Ladies and Gentlemen

Thank you for inviting me here today to comment on a subject I consider among the most important of the many issues facing this body and this country – government transparency and government secrecy. As a teacher of journalism at several of America's finest universities, I have often begun my classes by reminding my students of something they learned in the fifth or sixth grade: The guarantee of Freedom of Speech, of the press, and all the other freedoms we have enjoyed for 240 years mean little without freedom of information. If we do not know what our leaders are doing in our name, how can we possible know how to hold them responsible for those actions? How can we know which leaders to choose? How can we claim to have a government of the people, by the people and for the people?

Yes, there are certain things we should not know too much about – the movements and strategy of our armed forces in wartime, for instance, or the exact methods by which our intelligence agencies gather information. But in actual fact, such cases arrive seldom. So why is our government and its agencies currently protecting millions of individual documents, hundreds of thousands of actions and decisions made by our elected and appointed officers, at the cost of somewhere upwards of $11 billion dollars a year, and rising drastically?

Yes, I know the world is a dangerous place. Yes, I know that 2,700 people were murdered at the World Trade Center on Sep. 11, 2001, and hundreds or thousands more in attacks on embassies and individual Americans around the world since. But I also know, through experience and research that the vast majority of those millions of secrets have nothing to do with terrorism, or our national or individual security. Instead, they involve automatic, kneejerk decisions by the horde of bureaucrats who have the authority to stamp "Top Secret" on the flow of papers that come before them (after all, what good is authority if it's not exercised?); or just as often some minor functionary trying to protect himself or herself, or their bosses from political or personal embarrassment.

How do I know this? Well, when I came home from Lebanon, I was given a generous fellowship at Columbia University by the Freedom Forum so my wife and I could write a book about our experience. Incidentally, I have a copy here for the chairman, and would be happy to furnish copies to any of the committee members who would like one. In the course of preparing to write that book, we decided to ask under the Freedom of Information Act for whatever information on my kidnapers might be held by the various intelligence agencies – CIA, FBI, NSA – in all, 13 government agencies. We listed nine actual names of members of the kidnap band, furnished to us by journalistic and other sources, as well as asking for our own files. As you know, FOIA sets time limits and parameters for official responses to such requests, as well as procedures for appeal, ultimately to a court of law. After two and a half years of messing about with denials and denials of appeals and outright failures to respond, I finally took advantage of that last provision, and file suit in U.S. District Court in Washington. Included in the legal submission was the initial response from the DEA (made long after the FOIA deadline expired), which informed me that they could not furnish the information I requested because it would violate the privacy rights of the individuals concerned. However, if I was able to get a signed, notarized release

from my former hosts, they would be happy to cooperate. Need I point out that I was not greatly interested in finding my kidnapers and asking them for permission to peruse their files, nor did I think I could find them, since the U.S. government had placed million-dollar rewards on their heads.

The DEA never backed down from that bit of farce, though the Attorney General quickly disavowed the response. Eventually, after the judge appointed a special master to review the requested files, I began getting actual documents. Most were heavily redacted, including one that had only the title left, with dozens of pages carefully blacked-out completely making up the rest of the document. So we fought on – for four years, at the end of which, in accordance with repeated judicial orders, I had dozens of boxes of files to look through to try to understand the events that had engulfed me and my family. I read them all, carefully. They included copies of my own stories for the AP, which had already of course appeared in thousands of newspapers; copies of publicly available reports stamped "Confidential," and masses of irrelevant paper or discussions of diplomat faux pas, or less-than-diplomatic comments on foreign leaders. And so on. So the government spent millions of dollars and four years of effort trying to protect secrets, not one of which concerned actual security interests of the United States. If you doubt me, by the way, all those documents are on file at Iowa State University and the National Security Archives.

We never did get any of our personal files. The urge of curiosity was not strong enough to overcome the publishers's deadline, so we just dropped those requests.

Coincidentally, during this period, the late Sen. Daniel Moynihan conducted at the president's request a two-year study of government secrecy. He concluded in his 1995 report that the U.S. had fallen into a "culture of secrecy" which had become dangerous to our democracy.

Sen. Moynihan, a great statesman, brilliant mind and a personal friend, said this:
"Excessive secrecy has significant consequences for the national interest when, as a result, policymakers are not fully informed, government is not held accountable for its actions, and the public cannot engage in informed debate. This remains a dangerous world; some secrecy is vital to save lives, bring miscreants to justice, protect national security, and engage in effective diplomacy. Yet as Justice Potter Stewart noted in his opinion in the Pentagon Papers case, when everything is secret, nothing is secret. Even as billions of dollars are spent each year on government secrecy, the classification and personnel security systems have not always succeeded at their core task of protecting those secrets most critical to the national security. The classification system, for example, is used too often to deny the public an understanding of the policymaking process, rather than for the necessary protection of intelligence activities and other highly sensitive matters."

Sen. Moynihan noted that the culture of over-classification, along with frequent political decisions to release classified information for political advantage, had destroyed public trust in the classification system and the government as a whole. "Secrecy is a form of regulation," he said, "and while we're all familiar with government over-regulation, the public cannot know of over-regulation when the regulation is kept secret from them."

The senator also noted that while the then-controlling presidential finding authorized a mere 20 offiicals to use the "Top Secret" designation, meaning the information's disclosure could be expected to cause major damage to our national security, some two million government officials and a million private contractors had been given "derivative authority" to do so.

Three million bureaucrats stamping "Top Secret" on the flood of documents crossing their desks, at their sole decision.

The commission recommended some changes in the law, including an office of declassification and a time limit on classified documents. Nothing was acted upon. In fact, when President Clinton ordered a mass declassification of documents from World War II and before, he was largely ignored by the bureaucrats who run the system. By the way, the oldest known classified document in the system at that time was a report on troop movements in WW I. As far as I know, it's still classified.

In 2006, the CIA and other agencies, in an operation that was itself classified, pulled 55,000 documents from the public domain at the National Archives, and reclassified them. Presumably, they have continued to do that.

And so we come to the opening of the Obama administration. On Inauguration Day, the new president announced his commitment to a new era of openness and transparency.

"My Administration is committed to creating an unprecedented level of openness in Government," he said in a message to all government agencies. "We will work together to ensure the public trust and establish a system of transparency, public participation, and collaboration. Openness will strengthen our democracy and promote efficiency and effectiveness in Government."
Today, reporters describe the administration as "control freaks," and the most closed they've ever covered. The Obama administration has prosecuted more whistle-blowers than any other, and used the Espionage Act more often than any other administration to prosecute reporters' sources. It has also spied on reporters, and even their parents.

The result? Inevitable, I believe. We now have a society in which large areas of government decision and action are routinely kept from the public. Think of Abu Gharib and the torture of prisoners, official and unofficial. Think of massive spying on American citizens, whose phones, computers, vehicle movements and bank accounts can be monitored without their knowledge. Oh, and distinguished committee members, don't think that doesn't include you. When you call the head of the NSA in here and ask him, and he says, no, we don't spy on members of Congress, are you going to believe him this time?

Our fear is overwhelming the system of government that has served us for 240 years. Half of the Bill of Rights is now regularly ignored. Our own government agencies violate the Constitution at will and with impunity. And we can do nothing, because we know nothing.
I believe that young Mr. Snowden should not be hiding in Moscow, and poor Pvt. Chelsea Manning should not be serving a long prison sentence. Yes, they broke the law – but they did so in accordance with their conscience, which told them that what they saw going on was wrong. They should be here in Washington, wearing black ties and receiving awards. Because of them, we are now having a public debate over serious issues we would not otherwise even know about.

We need this debate, and more than that, we need some action that will return us to the principles we have held to since the founding of the United States. We need to control our fear, and control our government.

Thank you

Chairman CHAFFETZ. Thank you.

I thank you all for your testimony.

We will now recognize the gentleman from South Carolina, Mr. Gowdy, for 5 minutes.

Mr. GOWDY. Thank you, Mr. Chairman. And I want to thank you for your longstanding interest and commitment in this area.

And our friend from Maryland put a slide up that dealt with budget constraints, and that just got me wondering—and I do want to welcome all of our panelists—could there possibly be any other explanation for the failure to fully comply with FOIA law other than budget constraints?

Ms. Attkisson, can you think of any other possible explanation for either slowly complying or not complying at all with FOIA complaints other than budget constraints?

Ms. ATTKISSON. Well, as I said, I think—yes. I think they're creating their own backlog and creating their own expense by requiring us to go through a process, when it used to be if you asked a government official for a quickly available public document, something that's easily accessible on their desk, they would give it to you. They now use FOIA to require you to go to the end of a long queue, where it will never be answered, thus creating this backlog themselves, I think intentionally.

I got a couple of phone calls on the eve of the hearing, or mail contacts from outstanding FOIA requests, Federal agencies. I'm sure it's just a coincidence. They just want to let me know that my request is still going, if I'm still interested, even though years have passed.

And one of the officers—I don't want to name names because this is someone who talks to me—said, "I don't know what's taking so long. This is ridiculous. We have all the papers that we're supposed to be giving you,and there's nothing in it except press clippings of your own work anyway, so I don't know why the Department of Justice is holding it up." And this is a request that's been outstanding since at least 2013.

So they're doing this intentionally; I don't think there's any doubt about that. And then I think that creates their own expense. They could use the money they use fighting lawsuits and other things they don't need to do to hire that staff they need to process the FOIA requests. And they can avoid a lot of FOIA requests by simply making obviously public information public without requiring the FOIA process.

Mr. GOWDY. We will circle back to that judicial remedy before we're through.

Mr. Leopold, are there any exemptions that just cry out to you as being overused?

Mr. LEOPOLD. Certainly Exemption 5, the "withhold it because you can" exemption. I've had——

Mr. GOWDY. It's probably not worded precisely that way, is it? What's the legal——

Mr. LEOPOLD. I don't know. It's redacted. So perhaps it's underneath a redaction.

Mr. GOWDY. What's the legal jargon by which—what does (b)(5) say?

Mr. LEOPOLD. (b)(5) is the deliberative process. Interagency communications——

Mr. GOWDY. So it doesn't have to be a legally recognized privilege. It can just be because we felt like it.

Mr. LEOPOLD. Correct.

And that's—the use of that exemption has increased astronomically. I've received—or, excuse me, the FCC had processed thousands and thousands of pages related to net neutrality that I requested a year ago, and they withheld thousands and thousands of pages under the (b)(5) exemption.

I believe this committee has some of those unredacted emails that I sought, so perhaps you can tell me what is—what's contained in those communications, because the FCC is saying that it's—you know, it's part of the deliberative process.

Mr. GOWDY. Mr. McCraw, it appears as if Members in my line of work are aligned, to a certain extent, with folks in your profession, which could be a sign of the apocalypse, or it could be that we are right.

Judges seem to have no trouble getting compliance. So, shy of going to court, what should Congress investigate so we can at least get as good a result as an unelected person who happens to wear a robe for the remainder of his or her life?

Mr. MCCRAW. I'm going to go with the theory we're right rather than the end of days.

I think that—and I mentioned this—that there needs to be a change in the culture. And that is hard to define how you get there.

I think it's easy to think about—and you've heard it here—what it would look like. And that is, just as they have customer service as a business, there should be citizen service. When you call that agency, somebody with a name, somebody with an email address, somebody with a phone number should be talking to you, and that you should be able to find out online whether your request is moving up, moving down, moving sideways, wherever it is. There should be reach-out to the requester community by the public liaison officer, by the chief FOIA officer to go over what we can do better.

And this goes back to the question that you posed to Mr. Leopold, is that it seems to me that key here is the presumption of access, which is in the reform bill. Because I think the presumption now is fear, and the agency FOIA officers don't want to get in trouble. They take the most conservative approach they can, knowing that that's the way to avoid trouble. Presumption of openness, where it is reversed and you get in trouble for hiding things—very important move.

Mr. GOWDY. Thank you.

And thank all of our panelists.

And I would yield back the time that I no longer have.

Chairman CHAFFETZ. I thank the gentleman.

Recognize the ranking member, Mr. Cummings from Maryland, for 5 minutes.

Mr. CUMMINGS. Mr. McCraw, how long have you been doing your work in this capacity that you're here today?

Mr. MCCRAW. Between the New York Times and the Daily News, I've been doing it on a daily basis for 15 years. I did some before that as well.

Mr. CUMMINGS. So you've seen a lot.

Mr. MCCRAW. I have.

Mr. CUMMINGS. Over the years has the problem gotten worse do you think?

Mr. MCCRAW. I'm sorry?

Mr. CUMMINGS. Has it gotten worse, I mean, over the years?

Mr. MCCRAW. I get asked that question a lot. I think it has gotten a little better in terms of knowing what is going on. I think some of the things that Congress did in 2007 have actually worked, so we understand more about the process, statistics and so forth. That's important. In terms of requests, I haven't really seen a great deal of change in terms of timeliness.

Mr. CUMMINGS. Clearly there is a problem, and, you know, the people in the media and others requesting may have one opinion and then those who are in government have another opinion. And I think that you're probably right when you talk about a culture of fear. And some kind of way we need to get to the bottom of that so that we don't waste so much time, waste so much energy, waste so much money, and so that we can get to the basis of FOIA. I mean, why do we even have it? Sometimes I think that we think we are going to be on this earth forever, and life is short.

And I was thinking about something that Ms. Attkisson said, talking about your daughter, started off in what grade? What grade did she start off in?

Ms. ATTKISSON. Well, when I requested at the one point she was 8 years old, and then she was going off to college 10 years later when I got a response.

Mr. CUMMINGS. We're better than that. We have got to do better.

Mr. McCraw, earlier this year Representative Issa and I introduced H.R. 653, the FOIA Oversight and Implementation Act. The bill codifies in law a presumption of openness. You talked about that just a moment ago. The bill does this by creating a legal presumption in favor of disclosure in response to FOIA requests. When President Obama took office, he issued the memo that directed agencies to administer FOIA with, "clear presumption. In the face of doubt, openness prevails," end of quote. You're familiar with that, right?

Mr. MCCRAW. I am.

Mr. CUMMINGS. So the bills requires that records be disclosed under FOIA unless agencies can demonstrate, "a specific identifiable harm." Now, in 2009 Attorney General Holder issued a memo instructing agencies that the Department of Justice will defend FOIA denials only if an agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions or disclosure is prohibited by law.

Do you think that incorporating this standard into the FOIA statue makes sense, and do you think that would be helpful?

Mr. MCCRAW. I do, Mr. Cummings, and it assures that that presumption doesn't get changed as administration changes. I also think that when Congress says it there's a chance the memo gets to the FOIA officers in a way that when the agency does.

Mr. CUMMINGS. Let's put a pin right there.

Mr. MCCRAW. Yeah.

Mr. CUMMINGS. Because I want to go back. Because I'm trying to get to the bottom of this. So what you're saying is the rule can—or the President can say one thing, but because of then going back to something else you said, because of a culture, then a lot of times that's not carried out. Is that——

Mr. MCCRAW. I think that's right. Many of the civil servants will outlast any given administration. The other thing that makes it important for Congress to say it is when I go to court, the standing of that as a law, as part of FOIA, is going to be different than it is as a regulation.

Mr. CUMMINGS. So in your testimony you talk about this culture of unresponsiveness. Do you think incorporating the presumption of openness into the FOIA would send the right message to agencies that they should err on the side of disclosure as long as it's——

Mr. MCCRAW. Yes.

Mr. CUMMINGS. Go ahead.

Mr. MCCRAW. Yes, I do, Mr. Cummings.

Mr. CUMMINGS. So you're familiar with 653. Is there anything that you would add to it? You know, cultures are tough. We're seeing this, the chairman and I, dealing with quite a few agencies, this committee. And the culture is hard to break sometimes. I mean, other than what we have, what do you suggest that we do?

Mr. MCCRAW. I think there are some things that would help. One is in the past FOIA used to have preferential treatment when you filed a court case. I would like to see that come back. I would like to see better accounting of how fast they're moving. The statistics tend to be at a level that don't really help us understand the nitty-gritty of how they're moving.

I think that in the 2007 Act, there was the creation of the public liaison. I think the public liaison should be required to make requests that account for how he or she in each agency is doing his job, what's happened over the course of the year. Those things would help.

The most important thing, though, which would require some homework and some deeper dive, is that the exemptions have been given much, much too broad of a reading not only by the agencies, by the courts. Congress has the power to cut those back. That's the single most important thing that would help.

Mr. CUMMINGS. Thank you very much, Mr. Chairman. I yield back.

Chairman CHAFFETZ. I thank the gentleman.

I now recognize the gentleman from North Carolina, Mr. Meadows, for 5 minutes.

Mr. MEADOWS. Thank you, Mr. Chairman.

Mr. McCraw, I want to pick up right where you left off, the exemptions, because we have gotten a number of redacted pieces of correspondence that have not only E5, but it's got all kinds of others. And so what you're saying is if we were to clarify what can be redacted or what the exemptions are, it would help your process. Is that correct?

Mr. MCCRAW. That is correct.

Mr. MEADOWS. So in doing that, can you help this committee identify some of those areas? And I would say to all of you, can you help us identify those areas? I know we have got a second panel, and they have weighed in on this particular issue before. But what I'm finding is that that there's a few catchalls.

And yet here's the interesting thing, and I think it was you that was talking about a culture of fear. I'm aware of no one, not one single person in all of the Federal agencies that ever got fired for giving out FOIA information inappropriately. Are you all aware of any?

Mr. MCCRAW. I'm not aware of any.

Ms. ATTKISSON. I don't think they're in fear of being fired. They've been directed by their superiors and by the political or the bureaucrats that persist from administration to administration how to handle these requests, and if they don't do so, it doesn't necessarily mean they'll lose their jobs, they just won't advance or something bad will happen to their career.

Mr. MEADOWS. All right. So, Ms. Attkisson, you're suggesting then that this is more of a directive than it is a lack of resources. It's basically a directive that says we need to be as confidential and keep it as close to the vest, versus we just don't have the time to respond. Is that correct?

Ms. ATTKISSON. I believe it is. And I've spoken to FOIA officers who described that process, that they are required to submit documents—and this started many years ago, not just recently—to submit documents for political clearance, which as I said in my opening statement isn't codified in FOIA law and yet is done all the time. And FOIA officers don't agree with that, most of them, I think, the ones that I deal with.

Mr. MEADOWS. So as an award-winning journalist, would you describe the closer you get to the heart of the matter, the more delayed those requests perhaps get, or is there no correlation?

Ms. ATTKISSON. For me, I mean, everybody has a different experience, but in general I just get pretty much nothing quickly ever. One exception is I deal with one agency called HERSA that maintains vaccine injury information, and I have to say that when I ask them for something, they provide it on a timely basis without requiring a FOIA, and that's the only agency I can think of that's done that for me in any significant way in years.

Mr. MEADOWS. Well, I can speak for myself, and I'm sure a number of my other colleagues would like to reach out to them and thank them and recognize them for the good job. Sometimes we don't pat enough people on the back.

Ms. Goodman, let me come to you.

Ms. ATTKISSON. I'm afraid they'll get in trouble because I mentioned their name.

Mr. MEADOWS. Okay. Well, we'll just unofficially just say thank you today if they happen to be watching.

Ms. Goodman, let me come to you, because one of the things that you shared concerned me greatly. You're saying that the chilling effect of potentially reporters and editors that are not here today testifying is because they are afraid that they may get some kind of reprisal from Federal agencies in terms of access if they are known to be complaining. Is that correct? Was that your testimony?

Ms. GOODMAN. Yes. My testimony, which I didn't read all of, also includes issues with the DOJ and IRS that I've had, and I fully expect that if those offices know that I've made that testimony today, then I will have more difficulty getting information the next time I call them, and that is the assumption of most journalists in Washington.

Mr. MEADOWS. Well, we are asking, this committee is asking you officially then today that if you see any abnormal response times as it relates to future requests that may be indicative of your testimony here today, if you would please let this committee know, especially if it relates to IRS and the Department of Treasury. That comes under our subcommittee, so we would ask that.

I want to finish with one final ask, Ms. Attkisson. As you look at the number of requests that have been made, many times the American people count on reporters to truly get the truth out there. Does it give the impression that not only just this administration, but government agencies across the board are less than transparent when they do not allow you to have that access?

Ms. ATTKISSON. I think that's true. And as someone else brought up, there are bureaucrats who persist from administration to administration and are just waiting for the current one to go out if they can just mark time long enough. I've dealt with the same bureaucrats in some cases from Clinton, Bush, and now Obama, some of the same people obstructing the same information. And maybe they move around a little bit, but they're still there.

Mr. MEADOWS. Thank you, Mr. Chairman.

Chairman CHAFFETZ. I thank the gentleman.

I now recognize the gentlewoman from the District of Columbia, Ms. Norton, for 5 minutes.

Ms. NORTON. Thank you very much, Mr. Chairman. It's very interesting testimony. You would think that the free press and the public had a lot in common. I always thought that I was a First Amendment lawyer in a prior life and that the press should not be seen as the enemy.

I will tell you that this committee will not see the press as the enemy until you get to investigate somebody up here. So it is in the nature of government that it will regard you as the enemy the more you want to know, and I'm not sure you'll ever see much difference in administrations.

And I'm interested in exemptions, whether or not there's anything that the committee could say in terms of clarifying language that would do any good. The chairman may remember that we have done clarifying language on whistleblowers, and I'm not sure even that always matters since we would like them to come out and below the whistle without feeling reprisal, and there the notion of reprisal is not guesstimate.

I continue, by the way, to be amazed with how much of your work you do for us. That is to say, people call the newspapers, and then they have a hearing because they read it in the newspapers, or they get a question that they wouldn't have otherwise.

So I'm interested in these kind of natural secretive agencies like DOD, you know, people like that. And I'm particularly interested that there has been what one would have thought would have been a clarifying Supreme Court decision, Milner v. Department of

Navy, that said that the statute means what it says, that you're supposed to give all records unless they're related to personnel rules and practices of the agency. That's pretty narrow. That's a pretty narrow hole if you're going to crawl through that.

The problem I have here is it does not seem to have thwarted an agency like the DOD. The Court has held that exemption called exemption—this is exemption No. 2, the one says personnel stuff yeah, but over the other stuff, no. So DOD is proposing an expansion even of that, and even after the Supreme Court decision.

And this is what it would say, and I'd like your view on this: Predominantly internal, you can withhold records that are predominantly internal to the agency but only to the extent that disclosure could reasonably be expected to risk impairment of the effective operation of an agency or circumvention of statute or regulation.

What's your view of that proposal from the DOD? What are they trying to do? What are they trying to do that exemption 2 doesn't do?

Mr. Leopold.

Mr. LEOPOLD. I think, simply put, they're trying to withhold more records and creating language that would thwart requesters' ability to obtain certain records. The fact that this new language was, I believe it was buried in the NDAA, if I'm not mistaken——

Ms. NORTON. Yeah, that's right.

Mr. LEOPOLD. —I have not pored over it, but I see it as just another hurdle that requesters have to jump over.

Ms. NORTON. And I'm interested in this because what the Court said is you can't use broad language. So the implication is there's narrow language you all can get to and maybe you will get over. So they're trying, they're trying, and here Congress has to respond by either putting it in—and you can scare Congress too in the age of ISIL. So this notion about no broad interpretation gets seen as, okay, make it as narrow as you can but broader than the one that says you can't withhold information unless it's personnel matters.

Here's another one, exemption 3: Add a statutory exemption that it could keep secret, "information on military tactics, techniques, or procedures." Now, is that necessary? I mean, is that something we need to clarify, would you say? Is that in danger of being disclosed by any agency, Mr. Leopold?

Mr. LEOPOLD. I have never received records, and I have asked for them. I've pretty much asked for everything from every agency, I think, that exists within the Federal Government. And by the way, let me just say that should Congress want to make itself subject to FOIA, I fully support that.

But to answer your question, I've never received any records from any government agency that would reveal military movements, troop movements.

Ms. NORTON. Have you asked for such information? I mean, are they concerned that you all might ask for something about where we are in Syria and what ISIL is doing? Is there something they have to protect themselves against? They keep coming back to the Congress whenever the Defense Authorization Act is up.

Mr. Anderson, did you have something on this?

Mr. ANDERSON. Ma'am, it seems to me the language you recited would allow them to withhold training manuals and things like

that that I know that the military fears the terrorists will get a hold of and somehow learn to be better at terrorism.

Ms. NORTON. And you don't think they could already withhold that?

Mr. ANDERSON. No, most of them are not classified in any way.

Ms. NORTON. And there's the rub, Mr. Chairman, because these are not classified materials, and so if they're unclassified and the press wants to know why they can't have access to them. Thank you very much, Mr. Chairman.

Chairman CHAFFETZ. Thank you.

I'll now recognize myself for 5 minutes. I'd like to enter two records and ask unanimous consent. One is a memorandum of January 21, 2009, Freedom of Information Act from the President of the United States. Without objection, so ordered.

Chairman CHAFFETZ. I would also like to introduce into the record, a couple months later, April 15, 2009, a directive from the White House, memorandum for all executive departments and agency general counsels from Gregory Craig, counselor to the President, reminder regarding document requests. Without objection, so ordered.

Chairman CHAFFETZ. Here's the concern. The President put forth a very laudable directive. He says: "The presumption of disclosure also means that agencies should take affirmative steps to make information public." He says all agencies should adopt the presumption in favor of disclosure. And he goes on, and I think most people would applaud this type of thing. Certainly in one of his first days in office to do that is significant. It's part of the reason we're here.

But I want to read to my colleagues a portion of this chilling effect that I think went out from the White House that changed that discussion quite dramatically. This is, again, to all executive department and agency general counsels: "This is a reminder that executive agencies should consult with the White House Counsel's Office on all document requests that may have involved documents with White House equities."

Now, I'm not sure what the definition of White House equities exactly is. But he says in the second paragraph: "The need to consult with the White House arises with respect to all types of document requests, including congressional committee requests, GAO requests, judicial subpoenas, and FOIA requests."

Now, we can talk about the backlog. We can talk about the thousands of people that have been employed. We can talk about the millions of dollars that are allocated. But if you've got the yahoos at the White House having to review each and every document that falls under FOIA, judicial subpoenas, GAO requests, congressional committee requests, this is the heart of the backlog. The heart of the backlog lies in this memo, that we have to clarify, the President of the United States less than 4 months after he's been in office, to say: No, no, no, no, no, no, no, don't fulfill the FOIA request. Send it here to the White House. We have equities, the White House equities.

You want to see the bottleneck, look at the White House. And if there's further clarification, let's see it. But right now it's a three-paragraph memo, and it's crystal clear: Folks, don't you dare fulfill that FOIA request.

This doesn't say comply with the law. Does anywhere in FOIA, does it say that the White House General Counsel's Office should review a FOIA request before it's given to the public or the media? No. But it does say: "The need to consult with the White House arises with respect to all types of document requests," and included in there is FOIA. And, it goes on, and it "applies to all documents and records, whether in oral, paper, or electronic form, that relate to communications to and from the White House, including preparations for such communications."

Mr. CONNOLLY. Would the chairman yield?

Chairman CHAFFETZ. Sure.

Mr. CONNOLLY. I thank the chairman. Chairman, I'd ask unanimous consent to enter into the record a memo from the George H.W. Bush White House Assistant Attorney General on this issue dated September 1, 1988, which is identical to the policy the chairman is decrying requiring that FOIA requests go through the White House.

Chairman CHAFFETZ. Without objection, so ordered.

Mr. CONNOLLY. I thank the chairman.

Chairman CHAFFETZ. And what I would argue is, if it wasn't right in the Bush administration, it's not right in the Obama administration. I don't care who's in the White House, it's wrong, it's wrong, it's wrong. It has a chilling effect. It slows people down. It sends a signal to those men and women who are on the front lines who are trying to do their jobs and have been hired to do it, don't you dare send that to Mr. Leopold, don't you dare give that to the New York Times, how dare you talk to CBS News, don't you dare talk to Newsweek. And heaven forbid you should give Mr. Anderson the records about his captors because we wouldn't want to offend the people that kidnapped Mr. Anderson for 7 years.

That's the problem. That's the problem. The message from the President, the message from the White House should be open it up. What are we afraid of? It was the Bush administration that did all that. Why couldn't we have done what the President asked for on day one of his administration, the first day he put it out there?

My guess is if we—this is a guess, total guess—if we had the President of the United States right here, his heart was in the right place, he wanted to do the right thing, he wanted to score points with the media, he wanted to score points with the public, he'd score points with me, the problem is 4 months later he made the same mistake evidently that the Bush administration made. In fact, it's worse. The backlog is double what it was.

And that's the problem. That's why we're here today. We're going to try to legislate. We're going to try to clarify further. But when you send out this email, you scare everybody and saying you better not send it out unless you get it to the White House.

Now, do any of you have a comment or question or want to respond to what I just said? Mr. McCraw, do you have any thought about this email and what it would do?

Mr. MCCRAW. I'm going to come back to a very simple thing, 20 days. Whatever the process is inside, follow the law and get the documents out to us in 20 days. That's what should happen.

We saw something similar in New York City when the Giuliani administration left, which had been very centralized, and the

Bloomberg administration stepped in, and the mayor's office essentially empowered the agencies without getting permission from the mayor's office to release stuff. It was a good day. And some of the agencies couldn't believe it. Took them a while to get used to the freedom. But, yes, the law should be abided by, and 20 days should mean 20 days.

Chairman CHAFFETZ. Thank you, sir.

On my list, based on attendance here, Mr. Lieu is up next, and we'll now recognize him for 5 minutes.

Mr. LIEU. Thank you, Mr. Chairman.

Let me first thank the panel for what you do. I believe the best protection for America and our way of life is not the NSA or the FBI, it's a free press that points out Federal governmental overreach, as well as overreach in the private sector.

I had a question for Ms. Attkisson. In your testimony you mentioned you had filed a FOIA request to the Centers for Disease Control about 8 months ago on the Enterovirus. Have you gotten a response yet or you still have not?

Ms. ATTKISSON. No, sir, I haven't received any documents. Just when I ask, they tell me they're working as fast as they can.

Mr. LIEU. Thank you.

And then to Ms. Goodman, I was floored when you said that you and other journalists may believe that you would face reprisal from agencies if you sort of spoke up and so on. So I have a question for you. Do you believe you have no recourse? Could you go to the IG or to another place to try to get protection? Or do you believe that, for instance, being here today, you're going to face a much harder time getting some information in the future?

Ms. GOODMAN. Let's see. How do I answer that? It's not just no recourse. It's literally, I mean, even not agreeing to their terms will cause huge consternation in that agency.

So, for example, when the SEC proposed to me that we'll give you information and just put it in the story, and I said, all right, I'm going to attribute it to the SEC, according to the SEC, whatever, they said: No, no, no, you can't do that, you can't say it came from us. That means when I write it, it looks like I think that what they said is true as opposed to I'm saying they said something is true. It's misleading, patently misleading to the reader.

And if you say, no, I will not do that, it's not just that there's no recourse, it's that now you're a sworn enemy of their office and as soon as they hear your name they will not answer your calls for sometimes days and you're on a deadline.

So, no, it definitely can be very hostile, and it's with the presumption on their part that they're entitled to do this to you, that they set the rules and you have to follow them, and if you don't, you're difficult.

Mr. LIEU. Thank you. That's just very troubling. I think that's not the America that most of the public would want to live in.

I'm going to reserve the balance of my time to make a statement. I believe the problems that the press is encountering with FOIA to me is the latest indication of the brazenness with which some of our Federal agencies violate congressional law and the Constitution. You see this with the NSA when they completely violated the PATRIOT Act by conducting mass surveillance on Americans'

phone records without any authorization from Congress. That's what the Second Circuit Court of Appeals said. You see that when the Director of National Intelligence comes to Congress, takes an oath, and lies to Congress. You see that when the FBI has been vacuuming up people's geolocation and their cell phones. Until recently they only started getting warrants for that.

When Federal agencies violate congressional law and the Constitution it is corrosive to our democracy, it undermines trust in the executive branch, and makes Members of Congress like me not want to give the executive branch any sort of rope to do additional things. It makes it hard for me as a Democrat to try to support things that the executive branch may want to do where they're asking for some sort of trust.

They could stop it now. They could simply tell the agencies to follow the law and follow the Constitution. It doesn't require Congress to act. They can also put in incentives. I was probably one of the few Members of Congress that actually worked on FOIA requests. When I was a young JAG, United States Air Force, I was responsible for doing these exemptions. And, of course, I met the deadlines always, but I also did notice that it didn't matter whether or not I met the deadlines. There were absolutely no consequences.

And when you have delays of not just months but years, then what you have is not just people not caring, you have deliberate withholding of information. And, again, that is also corrosive to democracy.

So it's my hope that Congress passes the law. Of course, we don't need to do that if simply the Federal agencies would just follow the existing law.

With that, I yield back the balance of my time.

Chairman CHAFFETZ. I thank the gentleman.

Mr. CONNOLLY. Mr. Chairman, can I just correct the record?

Chairman CHAFFETZ. Sure. Go ahead.

Mr. CONNOLLY. My friend from South Carolina caught the error. I indicated that the letter, the memo, from the White House dated 1988 was during the administration of George H.W. Bush. Obviously it was Ronald Reagan. And I correct the record. Thank you, Mr. Chairman.

Chairman CHAFFETZ. I appreciate you doing that.

I now recognize the gentleman from Michigan, Mr. Walberg, for 5 minutes.

Mr. WALBERG. Thank you, Mr. Chairman.

Let me ask Ms. Attkisson, based on your experience, what agencies have excessively used exemptions as was referred to by the preceding questioner?

Ms. ATTKISSON. I haven't dealt with all of them, but among the ones I've dealt with and most recently, I've gotten documents that have been, in my opinion, overly redacted from the State Department and Health and Human Services. The documents I keep showing with these (b)(5)s—there are tons of these, I just pulled out a few—are about healthcare.gov. And these are just emails about our business, nothing about national security, nothing that could possibly put us in danger or help terrorists, I don't think. These are conversations that they are saying were part of a deliberative process, which pretty much they've used to say everything

they do is part of a deliberative process until they put out a public press release announcing something they've done.

Mr. WALBERG. Take a little more time to explain the (b)(5) exemption. I understand it's basically called the "withhold it because you want to" exemption.

Ms. ATTKISSON. That's a nickname that has been given by people who have seen it overused and feel that the agencies have come to use it for anything that they want to withhold. Even though I think the intention was—I don't know what the intention was. I'm not a FOIA law expert about how it was created, but it seems to me it was to protect certain materials that could be very sensitive because maybe they were deliberating something internally and between agencies that would be bad for the public to know about. But that should be interpreted very narrowly, as all, I think, FOIA exemptions should be interpreted. Instead they slap that on just about anything they want to withhold.

Mr. WALBERG. Mr. McCraw, would you concur with that about the (b)(5) exemption?

Mr. MCCRAW. It is widely overused. It was intended to provide a certain amount of privacy to deliberation while a decision was being made so that people could give frank advice to leaders of an agency. I think once a decision is made that consideration falls away, but we see (b)(5) being applied to historic documents long after the deliberations are over.

The other thing I would raise is that the law has generally been interpreted that the facts should be released even if it's in a memo that's providing advice, if it summarizes a factual situation. We find that agencies don't take that step. And sometimes those facts are more important to us than the advice that ultimately is given in a conclusion.

Mr. WALBERG. Mr. Leopold, have you experienced an increase in agencies' use of exemptions over the last several years?

Mr. LEOPOLD. Indeed, and (b)(5) would certainly fall within that overuse of that exemption. I deal with many agencies, CIA, NSA, Department of Defense, so it's understood that certain information that I'm seeking, certain documents that I'm seeking, that there's going to be other exemptions that are used, exemptions like (b)(1), the national security exemption. Oftentimes, though, it becomes clear when these cases go to court that some of the information that is being withheld is being withheld to protect the government agencies or the administration from some sort of embarrassment, even the national security exemption. Those exemptions are used across the board at all government agencies.

I also just want to make a point here, since Mr. Cummings brought it up, about what could be done in this bill that you're working on. Please put something in the bill that holds some of these agencies and some of the FOIA officers accountable. There is no penalty at all for routinely violating the law, violating FOIA. So they can do it at will, and they do it, and there is no accountability whatsoever, there are no repercussions at all as a result of that.

Mr. WALBERG. I appreciate that.

Ms. Goodman, what's your experience with agencies excessively using exemptions to redact information in FOIA requests?

Ms. GOODMAN. I was just going to say maybe if a FOIA officer overly redacts, they could just be docked one week's pay, and I think you'll see a huge difference in the kind of responses you get.

I don't regularly use FOIAs. Actually, I would like to defer that to Mr. Leopold and Ms. Attkisson. In my case, unless I want to wait a long time for something, I don't do it.

Mr. WALBERG. Okay. Well, let's go back to that, as far as redacting. Has there been a significant increase in agencies excessively redacting in FOIA requests?

Mr. LEOPOLD. I've certainly seen more documents that I request are increasingly redacted. The Defense Intelligence Agency recently sent me 150 pages of completely redacted pages related to——

Mr. WALBERG. We have experienced the same on this committee.

Mr. LEOPOLD. This was quite stunning, and I'm trying to figure out how I can turn it into some sort of art display. But these were completely redacted pages related to the damage assessment that the Defense Intelligence Agency undertook with regard to the alleged damage that resulted from the leaks from Edward Snowden.

Mr. WALBERG. Thank you. We believe it's a new font.

But my time has expired. I yield back.

Chairman CHAFFETZ. I thank the gentleman.

I will now recognize the gentleman from California, Mr. DeSaulnier.

Mr. DESAULNIER. Thank you, Mr. Chairman.

This hearing is reminding me of a comment that a friend of mine who used to serve on the Los Angeles City Council used to say about government agencies. She used to say: I used to believe in conspiracies until I discovered incompetence. And sitting here today, I can't help but think there's a little bit of both.

But to the point of both the chairman's comments and others as to what is the motivation and the consequences. So, first of all, Mr. McCraw, having hearing what others have said, particularly Mr. Leopold and Ms. Attkisson, if we get the exemptions really tightened up, absent personal consequences for people withholding this, don't you think we need both?

Mr. MCCRAW. Need both personal consequences and——

Mr. DESAULNIER. And the exemptions tightened up.

Mr. MCCRAW. And exemptions.

Mr. DESAULNIER. So if you go to court and you get the exemptions tightened up but people continue to ignore the statutes, what good will it do.

Mr. MCCRAW. That's right. I do think that there should be a process by which if there is willful disregard for the law, that there should be consequences that go back to those folks who are actually doing the disregarding.

Mr. DESAULNIER. So maybe, Mr. Leopold and Ms. Attkisson, since you have both brought up personal consequences, what do you ascribe that to? That they are protecting the culture of the agency? Are they protecting political influences? Is it a combination of all of those? And have either of you or any of you ever seen examples of people sort of the reverse, being punished for doing what you're accusing them of doing, which is avoiding the letter of the law?

Mr. LEOPOLD. To your latter question, no, never. I don't know what the reason is that certain agencies just simply will not give up records. Let me give you an example of the Office of Net Assessment.

The Office of Net Assessment is the Pentagon's in-house think tank. They spend millions and millions of dollars putting together reports, reports that they contract out about perhaps some futuristic warfare or what the situation in the Middle East is going to look like with regard to oil.

I asked for those reports. I filed a FOIA request. They refused to comply with my FOIA request. They said it was too broad. I narrowed it. They still said it was too broad. I sued them. Recently they said that: We'll give you some documents as long as you promise to never file a FOIA request again and don't have anyone else file a FOIA request on your behalf.

Mr. DESAULNIER. How is that legal?

Mr. LEOPOLD. I don't know, but they put this in writing, and I'm really looking forward to the day when I write the story up.

Mr. DESAULNIER. Did you tell them no?

Mr. LEOPOLD. Yes. My employer, who is sitting right here, did tell them that.

Mr. DESAULNIER. It was meant as levity.

Mr. LEOPOLD. I don't know why they simply will not turn over these reports. They're not classified, okay. By the way, not only will they not give up the report, they can't find the reports. So they're saying that they won't give me the reports, but at the same time they're also saying: We don't know where they are. So millions of dollars of taxpayer dollars are being spent. I think the public has a right to find out about what these reports are.

Mr. DESAULNIER. Before Ms. Attkisson goes ahead, just so I can try to get the second part of the question in.

Ms. ATTKISSON. I think it's as simple as there are no repercussions if they withhold material that they should release, but there may be repercussions for them if they release material that we want when their superiors wanted them to withhold it.

Mr. DESAULNIER. Okay. We have tried to do FOIA, I understand. So it seems to me in this day and age where we have search engines that can give you all kinds of information, wouldn't it be more efficient if all of the agencies just were required to do everything electronically, and then we could actually reduce the period of time from 20 days down further? And do you have examples either where that's worked or——

Ms. ATTKISSON. I think even starting today, because it's a big job of course, but if starting today the agencies posted online routine business and emails and so on as they come in, they wouldn't have to deal with all the FOIA requests, multiple FOIA requests for the same information from different people, which costs more money and staffing and time.

Mr. LEOPOLD. I routinely check all the government Web sites' FOIA reading rooms.

Mr. DESAULNIER. I saw that.

Mr. LEOPOLD. They're not regularly——

Mr. DESAULNIER. You live an exciting life, Mr. Leopold.

Mr. LEOPOLD. Thank you, yes. It's quite exciting. Thank you for that.

But I do check their reading rooms regularly, and they don't update it. They don't update their reading rooms with documents, which they should.

But in terms of electronically, I mean, I file requests electronically, I get responses electronically, and oftentimes I do get records, even though they're heavily redacted, electronically as well. So I think that on that end it's working to some degree.

Mr. DESAULNIER. Thank you.

Thank you, Mr. Chairman.

Chairman CHAFFETZ. I thank the gentleman.

I recognize Mr. Mulvaney from South Carolina.

Mr. MULVANEY. Thank you, Mr. Chairman.

And I want to go back and address some of the issues that Mr. Connolly raised. I appreciate Mr. Connolly making the clarification regarding the origin of the document from 1988. It wasn't the Bush administration. It was the Reagan administration. But I think that there's something more to it than that.

Mr. Connolly suggested that the policy enacted in the waning days of the Reagan administration were the exact same, I think was his language, the policies were the exact same as the memo that the chairman cited from the early days of the Obama administration. He's already read that language from 2009.

The policy from the Reagan administration, with all due respect, was entirely different. It said that in processing requests from the Freedom of Information Act of the Privacy Act of 1974 the search for responsive records occasionally turns up White House records located in agency files. It goes on to say later on that records originating with or involving the White House office—and it specifically identifies what that means, deputy chief of staff, communication, speech writing, research, public affairs, et cetera—that if you find some of those things you have to call the White House Counsel.

Then it goes on to say that press briefings are not covered because they are in the public domain. It says that if stuff comes to the Executive Office of the President, the White House would like to see that. And then finally, if they're classified or sensitive regarding foreign relations, that you might want to call the White House before you respond to a FOIA request on that.

That is entirely different, entirely different from this administration's memo of 2009 which dealt not only with FOIA, but with congressional requests, GAO requests, judicial subpoenas, everything to every single agency for anything that had anything to do with White House equities. So I think to characterize the two as being exactly the same or even similar is wrong.

Which leads us to the issue that I think everybody is sort of afraid to talk about because we have had a really good couple of hearings here with some bipartisan support on the issues, and clearly there are folks on both sides of the aisle who don't like what's happening here, but I don't think you could ignore what the chairman raised in his comments just a few minutes ago, which is it's different now, isn't it? It's different now than it was 5 years ago, 10 years ago.

Ms. Attkisson, you said that it wasn't really because there were some bureaucrats who go from administration to administration, but it's different now, isn't it?

Ms. ATTKISSON. I don't know the whole picture, but you found this memo from the Obama administration and you found one from the Reagan administration and I saw one like that under the Clinton administration. So something is happening. It's as if the Department of Justice gets the memo with a new President and issues the standard memo. Even though there may be variations in the specifics, this memo goes out to everybody saying something like that.

Mr. MULVANEY. But it is, you didn't come here during the George W. Bush administration to have this hearing. This is not easy for you all to do. You said that, some of you, in your opening statements. You didn't come here during the Clinton administration. You're here now. It's different now, isn't it? It's worse now than it was before or else you wouldn't be here.

So I guess my question is this. We count on you folks to do something. You're the fourth estate. We're counting on the press to do its job, to do investigative reporting. Has anybody written on this? I mean, this is a big deal. Now is your chance. Mr. Leopold, have you written on this?

Mr. LEOPOLD. On this being what?

Mr. MULVANEY. The inability to get documents through FOIA from this administration.

Mr. LEOPOLD. Yes, extensively.

Mr. MULVANEY. Ms. Attkisson, have you written about this?

Ms. ATTKISSON. I haven't. Associated Press has done some excellent work on this. But I would say it's hard to tell in a short story. And TV, it's hard visually, I think TV people think it's hard to tell. I think there's a way to do it, and I also argue that we should be doing it frequently because that kind of pressure would help shake things loose as much as anything else, I think, if we covered it.

Mr. MULVANEY. Ms. Goodman, you said something that caught my attention, which is about the chilling effect, and I think someone earlier asked you the fact that there's no Washington area editors here, and that you were afraid about repercussions when it comes to access in the future, I think is your words. Again, I'm paraphrasing. I don't mean to put words in your mouth. It would be more difficult for you to get information going forward. Is that about what you testified?

Ms. GOODMAN. I think the reason why you haven't seen a journalist do a macro story on a bunch of agencies and how they might be stonewalling, or increasingly stonewalling, is because they may need to call those agencies in the future and work with them, and it's sort of seen as tattling on the playground. You know, we all have to be in this playground and we're supposed to play friendly.

But what I'm finding, I do think that I am seeing over the last I would say decade, I would say really since September 11, I have seen this fear culture that Mr. McCraw had referred to earlier, and it is don't let those journalists get anything. It's exactly what Ms. Attkisson said about there's a punishment or the idea that you messed up if you give those journalists anything that they might use that will humiliate or embarrass or show that this fear culture

has really gotten out of control to the point where it's taking away our liberties.

Mr. MULVANEY. So let me ask you one last difficult question. By the way, I recognize the fact it's not easy to do this, especially given what you do for a living, because you expose yourself to exactly that type of risk. But I have to ask you the next question, because you specifically mentioned in your opening testimony that it was somewhat worrisome, I don't remember your exact language, dealing with the DOJ and the IRS. So I guess my question is, are you worried about repercussions that go beyond just access to information?

Ms. GOODMAN. Always.

Mr. MULVANEY. I will yield back. Thank you.

Chairman CHAFFETZ. I thank the gentleman.

I now recognize the gentleman from Massachusetts, Mr. Lynch, for 5 minutes.

Mr. LYNCH. Thank you, Mr. Chairman. It's a great hearing.

I want to thank the witnesses for your input. I actually am the ranking Democrat on the National Security Committee, and I have a hard time. I've got top secret clearance and try to get information from the agencies that you are complaining about and the FBI and Department of Defense. And I have to say it's very, very difficult even under the circumstances we're under where you go into a secure room and you're not allowed to take notes and got to give up your electronics and then try to parse through some of these documents. So I am totally with you.

I just want to offer a couple of examples. With the FBI, through FOIA, we are able to get information that through their confidential informant program the FBI in 2011 and in 2012 allowed their confidential informants to commit crimes between 5,000 and 6,000 times. But when I asked what are those crimes, that is confidential. And when I asked how much are you paying these confidential informants, housing, payments, and a lot of them are career criminals, that is confidential. So we're facing the same basically shutdown in transparency that you all are.

The Department of Defense, recently the commanding general in Iraq, we on a quarterly basis get reports from the inspector general for the Department of Defense, and he tells us how much money they're spending and what they're spending it on. Well, the commanding general, General Campbell, recently said that Congress is no longer going to be able to get those classified reports on what they're spending, and the reason was because if the insurgents got that, if the terrorists got that information, it might somehow undermine their effort. So it is absolutely ridiculous.

So I want to get to something. And then even this morning, this morning I was at a press conference with some of my Republican and Democratic colleagues to try to get the 28 pages that have been redacted from the 9/11 investigation, trying to get that 28 pages, because I think it is very important that the American people get that information, that the families get that information. And I also think that the information in that 28 pages will inform Congress' security protocols and antiterrorism efforts enormously going forward. So it's good to have that information out there for instructive purposes.

So what I want to get at is, Ms. Attkisson, what you suggested in the beginning. You said we need to incentivize corporation and disincentivize the logjam. And I do believe that we have to criminalize—look, there's constitutional rights involved here.

Mr. Anderson, you were very articulate in your comments, the freedom of speech, the freedom of the press. There's also the freedom to petition your government, which I think implies a right to get a response.

So I do believe, I do believe, we have to penalize this ridiculous and obstructive conduct, number one, that amounts to criminal obstruction of justice and of information by our government agencies. I also think we need to turn it around so that the costs, the costs of citizens, including the press, in getting that information that is delayed unreasonably, the costs of all that with penalties should be borne by the agency so that we have direct responsibility on these agencies to respond. You have to incentivize good behavior. What we are looking for is them to be more responsive.

So I actually think we do need to have criminal or civil penalties against these individuals that are conducting this obstruction and again shift the costs on behalf of the taxpayer. I realize that eventually we pay for everything, but you need to penalize these agencies in some way so that it changes their behavior.

I've eaten up the bulk of my time, but if any of you have a thought on that, I'd like to hear it.

Mr. Anderson?

Mr. ANDERSON. Yes, sir. I think it's significant that you've heard here stories, not just from this administration or the previous administration or the administration before that. My adventures took place beginning in 1992.

Mr. LYNCH. Yeah. God bless you, by the way.

Mr. ANDERSON. And Senator Moynihan issued his report after 2 years of study about the same time in the mid-1990s, and I don't think any of us would suggest that the situation has gotten any better.

Mr. LYNCH. Thank you, sir. I yield back.

The CHAIRMAN. I thank the gentleman.

I now recognize the gentleman from Georgia, Mr. Hice, for 5 minutes.

Mr. HICE. Thank you, Mr. Chairman.

I want to begin with you, Ms. Attkisson, if we can. You mentioned in your testimony that the system is broken and that the Freedom of Information Act, in your opinion, is not broken by accident, but that it appears to be by design, a design of obstruction. Do you have evidence that you could provide for that statement? It's a strong statement.

Ms. ATTKISSON. I could probably compile something for you. It's repeat patterns from the same officials who at the end of the day have been found to have been holding documents that were legitimately public documents or redacted things that were improper or go to the courts over and over again only to at the end be told by the court that they should have provided this material originally and initially.

The patterns of the language they use when they're denying requests, the increase in the (b)(5) exemption almost as if there's

been some coordination among the agencies that they know they can expand the use of certain exemptions in certain ways, the across-agency language that has bloomed up more recently where they want you to narrow your requests, where they say that they're overbroad.

This is a fairly new one to me. Across the board the ones I deal with will say they don't understand it. I never used to get that. Now they say they don't understand your request. The request is very simple and straightforward.

So this, along with a lot of other anecdotal data, would lead anyone with commonsense to believe that there is some sort of willfulness. And also I've talked to FOIA officers, including one I reported a story on who used to work at the Commerce Department who talked about willful plans to withhold documents from the public and Congress.

Mr. HICE. Would you please provide that information to this committee?

Ms. ATTKISSON. Yes, sir.

Mr. HICE. Thank you.

If we can, I'd like a yes or no answer as much as possible from each of you, because I want to cover a couple of questions pretty quickly. Have each of you seen the breakdown in FOIA increase under this administration? I know we have had that question a couple times. Just yes or no, whatever your answer, Ms. Attkisson.

Ms. ATTKISSON. I don't have an apples-to-apples comparison.

Mr. HICE. Okay.

Mr. Leopold.

Mr. LEOPOLD. Yes.

Mr. HICE. Okay.

Mr. McCraw.

Mr. MCCRAW. No, I don't think it's worse than before.

Mr. HICE. Okay.

Ms. Goodman.

Ms. GOODMAN. I think that there's more stonewalling now, yes.

Mr. HICE. Okay.

Mr. ANDERSON. I don't qualify.

Mr. HICE. You don't qualify. Okay.

All right. With that, again yes or no, and this can go all the way back to 1992, whatever, but yes or no, do you believe that—obviously personnel, at least as a general rule, do not act without some directives from superiors. So from your experiences, do you believe that be it the current administration or other superiors are giving directives to agency personnel to obstruct FOIA requests?

Ms. ATTKISSON. Yes, and I've been told that firsthand by officers.

Mr. LEOPOLD. I can't answer that question. I have no evidence to support it.

Mr. MCCRAW. I agree with Mr. Leopold's answer.

Mr. HICE. Okay.

Ms. GOODMAN. I would say yes, yes.

Mr. ANDERSON. It seems to be more a matter of culture rather than directives. It's not necessary to order a bureaucrat to keep secrets.

Mr. HICE. Okay. Well, even there, a culture doesn't just happen by accident. Cultures are created. All right.

Yes or no again, one more time, have you personally experienced delays that you believe were designed to wait out the usefulness of the FOIA requests that you made?

Ms. ATTKISSON. Yes, sir.

Mr. LEOPOLD. Can I say hell yes? Yes.

Mr. HICE. You just did. Okay.

Mr. MCCRAW. I don't have the evidence of that, but it certainly would appear that way at times.

Ms. GOODMAN. I agree with Mr. McCraw, same thing. It looked like they're running down the clock, but I couldn't prove it.

Mr. ANDERSON. Absolutely. I think that was the entire purpose of the exercise.

Mr. HICE. Okay. All right. So, obviously, there is a problem here that is intentional, at least from every one of your perceptions. This is not accidental happenstance, this is purposeful. When we're dealing with a First Amendment that guarantees freedom of speech, you are prohibited from providing freedom of speech in your careers.

Mr. Chairman, I'm just concerned that these agencies, under whatever directives, be it from the White House or whatever authorities, are deliberately delaying and obstructing FOIA requests in order to hide politically sensitive information or whatever information they simply don't want the public to have. And this is something that we need to pull up by the roots, sir. And I thank you for having this hearing today. I yield back my time.

Chairman CHAFFETZ. I thank the gentleman.

I will now recognize the gentlewoman from Michigan, Mrs. Lawrence, for 5 minutes.

Mrs. LAWRENCE. Thank you, Mr. Chairman.

One thing I think has been clearly documented today, that we have a problem. It's a problem that didn't start with this administration because we talked about a culture and those who wait out administrations. So I want to shift it a little bit to how can we move beyond this.

The proposed Freedom of Information Act would allow OGIS, which is Office of Government Information Systems, the discretion to issue advisory opinions. The OGIS could issue an advisory opinion at the request of any party using that office's mediation services.

Mr. McCraw, do you think this provision is workable, and would it help OGIS in its mediation efforts?

Mr. MCCRAW. Yes, it would, Ms. Lawrence. That is a model that is used in many States, including New York State. There is a Committee on Open Government, which is a part of the Department of State, of New York State. They issue nonbinding opinion letters. Very helpful to us to know, you know what, we're asking for too much. Very helpful when we get one that says the agency is not doing what it should be doing. And a lot of times we can use that with the agency to change its behavior.

Mrs. LAWRENCE. I want it on the record that I feel that the concerns about docking someone's pay or culture, that if we want effective government we have to find a way to move to the point where we are effective. I'm very concerned about the same conversation being where we're cutting staff, we're cutting funding. And the

records have shown that, therefore, the Department of Justice alone, they received 64,000 requests last year alone. And then we consistently see staffing and budgets cut. So I feel that the proposed mediation process will help on both sides.

I have one other question, Mr. McCraw. These assessments will be provided directly to Congress while continuing to serve as a neutral, impartial mediation in the FOIA disputes. In your view, can OGIS provide candid assessments—you referenced New York—about agency performance without compromising its ability to serve as an impartial mediator in these disputes?

Mr. MCCRAW. You raise a very good question, and the mediation part is different than it is under state law in New York where that office did no provide those services. It's there to reflect on what the law should be and how it should be interpreted.

I have seen in New Jersey where they offer up mediation services through their state agency that oversees. And you can have it both ways, just as courts do it. It requires capable people. But it's not uncommon in Federal court to have the district court say the magistrate would like to mediate this or the district court judge himself or herself. So, yeah, I think it can be done. It's worth trying.

Mrs. LAWRENCE. Ms. Attkisson, are you coming back?

Ms. ATTKISSON. Yes, ma'am. I'm sorry. I have to go to the ladies' restroom.

Mrs. LAWRENCE. Okay.

I just want—I want a government that is responsive. I have worked with two government agencies and have been the official FOIA coordinator. Some requests seem excessive, some requests you can get from multiple agencies, but every single request requires manpower to respond.

There is a frustration when the media—and not only the media, requests from private citizens. Because this is bigger than just the media. I have a right, as a private citizen, to ask for information, and I feel that I deserve that. But we have to create an efficiency in our government that can be responsive. And while I hear the concerns of the media, I'm concerned about our overall responsibility.

I wanted to ask Mr. Leopold, what is your opinion of this mediation process and some of your frustrations that you've shared?

Mr. LEOPOLD. With regard to the Office of Government Information Services, I mean, basically, they have absolutely no power because the Office of Information Policy within the Justice Department that's supposed to ensure that all government agencies are adhering to Attorney General—former Attorney General Eric Holder's guidelines, they don't allow them to have any power. They're interfering with that role—with that role of the FOIA ombudsman. So it gets much deeper.

I want to also for the record state that I have never, ever received a response from any government agency, nor a phone call, that says, "We are experiencing budget constraints; therefore, we can't process your request, nor can we give you any records." Never heard that before. So I recognize that budget constraints exist within the Federal Government, but it has never, ever—I've never heard of it impacting my ability to access records.

And, you know, one thing about—one great thing about FOIA is that you cannot only—you don't—in addition to filing FOIA requests, you can actually file a request to find out how the specific agency is handling your request. I like to call it the meta-FOIA.

Mrs. LAWRENCE. Yeah.

Mr. LEOPOLD. And I ask for processing notes, and within the processing notes you can see how these agencies are handling the requests.

And, within the Office of Information Policy, I could tell you that I've obtained documents with regard to one of my requests where the FOIA officers and the attorneys are actually making fun of me and saying that I should belong to some sort of FOIA posse and perhaps that should even be my band name, which I think is—you know, may actually be a cool band name, but the point being that, you know, the FOIA cop is not doing its job and not allowing the FOIA ombudsman to be the FOIA ombudsman.

Mrs. LAWRENCE. Before I release my time, Mr. Chair, I just want to say, you bring up a good issue. Because if we need to give the power to that mediation body, the autonomy and the authority so that they can do their job, that's something we should look at in this act.

Thank you very much.

Chairman CHAFFETZ. I thank the gentlewoman.

We'll now recognize the gentleman from Georgia, Mr. Carter, for 5 minutes.

Mr. CARTER. Thank you, Mr. Chairman.

And thank each of you for being here today. We appreciate you taking time out to join us and participate in this.

Mr. Anderson, I've got some questions for you specifically, if it's okay. You mentioned in your testimony that you had, like, a 2–1/2-year battle with over 13 agencies for your FOIA request? Is that true?

Mr. ANDERSON. Yes, sir. I have to say that some of the agencies didn't take part in the battle; they simply retired and didn't take notice. But the Federal judge here appointed a special master—which he doesn't want to look at the things himself, so he gets somebody who can do it.

Mr. CARTER. Right.

Mr. ANDERSON. And we kept arguing over a progressively smaller and smaller pool of documents. As I would—he would win an order, I would get an order from him to say, "No, you can't deny those documents; give them to him"——

Mr. CARTER. Right.

Mr. ANDERSON. —and I'd get a couple of boxes. And then the next time we'd have another go-around.

And the significant thing to me was—and I don't know if this is still very common—FOIA has specific requirements for when you deny access. You're not allowed to just say, no, it's hodgepodge, you can't do that, you can't have it. You have to specifically justify not only each document but each part of the document as to what exemption you're claiming.

Mr. CARTER. Right.

Mr. ANDERSON. And it took us a year to get them to even give that list. Because, universally, when the first replies we got were, no, can't have it, secret, classified, no——

Mr. CARTER. Right. Well, let me ask you——

Mr. ANDERSON. —they were violating—from the beginning, they violated all of the deadlines, they violated the regulations. And all that happened was the judge eventually said, you know, give him all the documents he wants.

Mr. CARTER. Okay. Well, did you ever go through the appeals process?

Mr. ANDERSON. Yeah. Absolutely. I——

Mr. CARTER. Did you have to do it with all 13 or just a few——

Mr. ANDERSON. Yeah.

Mr. CARTER. —of them? With all 13——

Mr. ANDERSON. Yeah.

Mr.CARTER. —you went through the appeals process.

Mr. ANDERSON. And some of those appeal processes were simply never completed.

Mr. CARTER. Did a certain agency have a—were the appeals processes consistent among all the agencies——

Mr. ANDERSON. No.

Mr. CARTER. —or were they different? They were different among all the agencies?

Mr. ANDERSON. Yeah. Each of the agencies was different.

Mr. CARTER. Which one was the most difficult, would you say?

Mr. ANDERSON. I would say the two was CIA and the NSA.

Mr. CARTER. Okay.

Mr. ANDERSON. They both seemed to feel that nothing that they handled should be given to the public.

Mr. CARTER. Well, they must have been very difficult if it went on for more than 2 years, 2–1/2 years.

Mr. ANDERSON. The whole thing took 4 years.

Mr. CARTER. Wow.

Do you believe that the appeals process was clear for any of these agencies? Do you believe that they had a clear, stated policy of what the appeals process was supposed to be?

Mr. ANDERSON. Yes, sir. I believe the whole process is pretty clear. The regulations are clear; the law is clear.

Mr. CARTER. Was it clear to you about what the process was going to be like and what your rights were during the appeals process?

Mr. ANDERSON. Not at the beginning. I went—you see, I worked mostly overseas. I was a foreign correspondent.

Mr. CARTER. Right.

Mr. ANDERSON. And there aren't any other countries that have, you know, a Freedom of Information Act that you can file for information on.

Mr. CARTER. Sure. Sure.

Mr. ANDERSON. So when I came here and I told the people at the Freedom Forum this is what I'm going to do, I actually showed up early and said, I want to start these requests now, and I'm due to start my fellowship in 3 months, and when I get here, I'll have replies already from some of these agencies, and I can get started

getting to work. And the director just laughed. He said, "You've never done one of these before, have you?" And I said, "No, sir."

Mr. CARTER. Right.

Mr. ANDERSON. And he said, "Okay. You'll learn."

Mr. CARTER. Well, I don't know if you're familiar or if any of the panel members are familiar—and don't know that there would be any reason. I have introduced a bill, H.R. 1615, and it is called the DHS FOIA Efficiency Act of 2015. And it deals primarily, obviously, with DHS because, as I suspect you know, DHS has the largest backlog of any agency within the Federal Government, and it's something that I'm trying to address through this bill.

And it requires the chief FOIA officer of DHS to issue updated regulations, particularly as it pertains to the appeal process. And what I want to ask you is that, although this is obviously specific to DHS, do you feel like a standardized process would be beneficial throughout all agencies?

Mr. ANDERSON. I think, yes, it would be beneficial. Making things standardized and clear to everybody is always beneficial in these—in these things. Yeah.

Mr. CARTER. And, Ms. Attkisson, would you agree?

Ms. ATTKISSON. Yes, sir. Any clarity, I think, is always good. But I still think it goes back to the heart of the idea, if there are directives or a culture in which they're being told to find excuses not to give material, that may not be, you know——

Mr. CARTER. Right.

Ms. ATTKISSON. —as effective as it should be.

Mr. CARTER. Well, I would encourage all of you—and I want to thank all of you again for participating. I want to encourage you to keep an eye out for this because this is something we're going to be pushing very hard, again, H.R. 1615.

Thank you, Mr. Chairman, and I'll yield back.

Chairman CHAFFETZ. I thank the gentleman.

We'll now recognize the gentlewoman from the Virgin Islands, Ms. Plaskett, for 5 minutes.

Ms. PLASKETT. Good afternoon. Thank you all so much for the information and your testimony here today.

Thank you, Mr. Chairman, for the opportunity to speak with these witnesses.

I wanted to talk a little bit about the deliberative process and how that works and the timeframe in which it's allowed.

As a former Department of Justice official, I've sat around at the table in the Civil Division in discussions about what would or would not be part of a FOIA disclosure, and so it's very interesting for me now to be on this side and having this discussion with you about the impediments it creates in terms of transparency and having checks and balances in our government with the press.

So my understanding, from having worked previously as a prosecutor, is that the exemption covers information that would normally be privileged in the context of civil discovery. And the tenet is that it's supposed to allow the attorneys the process and the ability to be able to have conversations and to begin deliberation and investigations.

Mr. McCraw, would you agree that that is the basic tenet and what it's supposed to do?

Mr. MCCRAW. You've described it well.

Ms. PLASKETT. Okay.

Now, the exemption is described, "To safeguard the government's deliberative policymaking, the exemption encourages frank discussion of policy matters between agency officials by allowing supporting documents to be withheld from public disclosure." And that's in the "Citizens Guide to FOIA" published by this committee in 2012.

Does that sound right to everyone in this committee, that that's the purpose of it? And that it's supposed to be limited to an exemption for up to 25 years.

Mr. Leopold, what do you think about that 25-year timeframe in which those documents could be withheld?

Mr. LEOPOLD. Well, in terms of withholding them permanently? Or——

Ms. PLASKETT. Well, I mean, the rationale is that——

Mr. LEOPOLD. —saying sunset?

Ms. PLASKETT. Right. There's a limited amount of time that the agency is allowed to keep this information, and that's 25 years that they're supposed to be able to withhold it.

Mr. LEOPOLD. I'd like it tomorrow. So, I mean, whether——

Ms. PLASKETT. But do you agree that there is some information that may be——

Mr. LEOPOLD. Sure.

Ms. PLASKETT. —and to allow the attorneys to engage in proper investigation, that they should be withheld for a time period?

Mr. LEOPOLD. Yes, I agree that, when properly used, when Exemption 5 is properly applied, yes, that it should—that the information should be withheld.

Ms. PLASKETT. And who do you think would be the appropriate persons or person or agency to police that properly?

Mr. LEOPOLD. I think the Office of Information Policy. I mean, they are the—you're going to have Melanie Pustay here tomorrow, and I'm going to be back there listening.

Ms. PLASKETT. Are you going to be holding up stuff, questions for us, so you can prompt us with what you think?

Mr. LEOPOLD. If you send me your email address, I'll send you a long list of questions.

Ms. PLASKETT. Okay. Great.

Mr. LEOPOLD. One of them being, how come she has yet to—her office—turn over my request for emails that actually mention FOIA? I asked 2 years ago for emails that mention FOIA and haven't seen those yet.

To answer your question, I think that the Office of Information Policy—in fact, I don't think; they are the ones that are supposed to ensure that, you know, these agencies are adhering to, as I said, Attorney General—former Attorney General Eric Holder's guidelines.

Ms. PLASKETT. Now, you know, my understanding is, particularly from the freedom-of-information side and from the press side, that this is—most things are so subjective. So determining what should fit within this and what should not can lead to broad redactions.

And, Ms. Attkisson, you talked about that, that this can be, you know, so broad—used with a broad stroke that you have complete black pages in FOIA requests.

You used the term "withhold it because you want to" exemption. Can you talk a little bit more about that?

Ms. ATTKISSON. You discuss the context of privilege, maybe sort of an attorney-client privilege, but the example I used today and many examples I have are emails to a huge group of civilians, non-lawyers, who have emailed one another information about the public's business. Sometimes there are 50 people on the email, and they can all know about the public's business, and yet we are to not. And these are public officials being paid our money.

And I think it's very hard to justify just thousands and thousands of pages of these types of redactions. It's hard to know what's in them since they've redacted them, but it's pretty clear, when you see the pattern, that the redactions are so broad that they can't possibly apply to a narrow sort of attorney-client privilege, at least in those cases.

Ms. PLASKETT. So, Mr. McCraw, would you agree——

Chairman CHAFFETZ. Thank——

Ms. PLASKETT. Okay. I see my time——

Chairman CHAFFETZ. My apologies. We have a second panel that's still yet to come, and we're trying—we also have votes that will come up, so I'm going to need to enforce the time here.

And we'll now recognize the gentleman from Alabama, Mr. Palmer, for 5 minutes.

Mr. PALMER. Thank you, Mr. Chairman.

The last question Mr. Carter asked Ms. Attkisson was whether or not you thought it would be beneficial to have some standard practice for requiring compliance with these requests, and you said yes.

And then you, to paraphrase you, you added this little caveat, unless there is a culture that exists to the contrary—a culture, as I interpret it, to avoid compliance. Is that an accurate assessment of what you said?

Ms. ATTKISSON. Yes, sir. I think it's akin to, you know, the Titanic is sinking and somebody saying, "Quick, hurry and rearrange the deck chairs." That won't make much difference in the big picture if the problem that's causing—or the big issue that's causing the problem isn't addressed.

Mr. PALMER. Okay.

Ms. Attkisson, Mr. Leopold, Ms. Goodman, you're all investigative reporters.

Mr. McCraw, I assume that in your role as vice president and general counsel you have some idea about investigative reporting.

You all have expressed your frustration in your investigations of various Federal agencies in regard to the failure to comply with FOIA requests. Have any of you investigated or considered investigating FOIA violations?

And you can answer "yes" or "no."

Ms. ATTKISSON. Yes, sir.

Mr. PALMER. You have? Good.

Ms. ATTKISSON. I've considered and I've done some of it——

Mr. PALMER. Okay.

Ms. ATTKISSON. —yes, sir.

Mr. LEOPOLD. I not only have investigated it, I have written about it——

Mr. PALMER. All right.

Mr. LEOPOLD. —extensively.

Mr. MCCRAW. Like Mr. Leopold, we have FOIA'd the FOIA record to see how a prior request was being done.

Mr. PALMER. Okay. Good.

And in doing this, then, are you aware of any Federal agency being proactive and training employees on methods or tactics for avoiding compliance with FOIA requests?

Mr. LEOPOLD. I noted in my written testimony and my opening statement that the Pentagon has a policy in which FOIA requests that are deemed significant requests get department-level review. In other words, the process is politicized.

Mr. PALMER. Okay. Let me be clear. How about a Federal agency actually conducting a session to train your employees how to work with nongovernment groups so as to do government business outside official government infrastructure and communications channels?

We had a hearing in the Science Committee back in March, and one of the witnesses who testified is a former EPA employee, David Schnare, and he brought this up. And I have a copy of his testimony. I have it here.

And he talked about the EPA prepared an 83-page PowerPoint presentation on how to use electronic tools to collaborate with external partners. "This presentation encourages use of instant messaging, other realtime correspondence tools, and even encourages using AOL and Yahoo and asking third parties to set up chat rooms."

He went on to say, "But this presentation also documents the culture," Ms. Attkisson, "of disregard for agency duties under public regards and FOIA requirements. It characterizes FOIA and NARA rules as Federal laws that constrain Federal administration of public-facing Web collaboration tools."

I have a printed copy of the PowerPoint here.

He says, "The next section of the presentation describes creative solutions to dealing with Federal constraints." And here are the Federal constraints that they've mentioned: National Archives and Records Administration, Federal Advisory Committee Act, Paperwork Reduction Act, National Institute of Standards and Technology, and others.

He says that, specifically, EPA encourages its employees to help outside parties to sponsor the Web-based collaboration tools, noting that, as long as we are only participants, not administrators of a Web collaboration site, the site is not limited by those same FOIA and Public Records Act constraints.

How would you respond to that, Mr. Leopold?

Mr. LEOPOLD. You'll have to forgive me, but I am completely confused about that. I'm not quite sure what he's—you know, what he's saying there. So I'm not well informed about this idea and proposal.

Mr. PALMER. Ms. Attkisson is eager to respond, so go ahead.

Ms. ATTKISSON. Well, I understand what you're saying, sir. And I think—and I cut it from my verbal testimony for time, but there are new tactics. Even if FOIA is shored up, we've already seen that agencies—and I've written some on this—and officials instructs subordinatesto not put things in emails, to use instant messaging. Sometimes they use private service, private emails, pseudonyms, friends' accounts, and all kinds of other ways that even this problem wouldn't solve.

Mr. PALMER. That are not subject to a FOIA request——

Ms. ATTKISSON. Yes, sir.

Mr. PALMER. —or any other public records request.

I think—what I'm saying here, Mr. Chairman, if I may, is that you have a former EPA employee who, in testimony, sworn testimony, just in March, talked about what I consider a conspiratorial effort to avoid complying with Federal records.

Thank you, Mr. Chairman.

Chairman CHAFFETZ. I thank the gentleman.

We'll now recognize the gentleman from Virginia, Mr. Connolly, for 5 minutes.

Mr. CONNOLLY. Thank you, Mr. Chairman.

I come from a State, Virginia, where FOIA laws are actually very strict. I don't know how many of my colleagues on this committee actually were ever subject to FOIA. I come from local government, and I can tell you, in Virginia, my phone log was subject to FOIA, my schedule was subject to FOIA, my working documents were subject to FOIA, my files were subject to FOIA. And the county attorney was very strict about it, that, you know, you had 5 working days in which to respond. You know, if it was too much, we might ask the requester to help defray the cost of duplication, copying. But—there weren't really electronic files back then, but—so I'm used to a culture of very strict adherence to FOIA. We didn't engage in redaction or big exemptions. There were some exemptions involving privileged legal matters or personnel matters, but that was it. So, coming to the Federal Government, I'm somewhat surprised at this tension in how we implement FOIA.

If we step back, though, Mr. McCraw, the First Amendment guarantees a free press; is that correct?

Mr. MCCRAW. That is.

Mr. CONNOLLY. Is it not also correct, however, that the First Amendment fails in any way to enumerate the right of a free press to access to government documents?

Mr. MCCRAW. It is not in the text, that's correct.

Mr. CONNOLLY. Correct.

So, by virtue of adoption of the First Amendment, we also set up, whether we intended it or not, a dialectic. You want access to information, and there are some people who want to limit that or don't want you to have access to information. Fair enough?

Mr. MCCRAW. That is true.

Mr. CONNOLLY. So what we're debating here are what are the rules of the road.

Now, many of us, including the chairman of this committee, based on what he said, and certainly myself, believe freer access is better. The default should always be: Get it out before the public;

let's see where the chips fall. But, I mean, there are some exemptions.

And what I've heard here is an enumeration of, in a sense, bureaucratic obfuscation, using the technicalities of the law either with a (b)(5) exemption or redaction or not meeting deadlines in any kind of strict fashion and even saying, "Your scope is so broad, we can't possibly respond to it," which sometimes, by the way—I've been subject to press FOIAs that were overly broad, that were impossible to respond to, and we had to negotiate with that reporter, "Get it down, tell us what you're really looking for, and we'll try to respond."

So I take the points you make.

And, Mr. Leopold, you said there ought to be penalties in whatever legislation we consider so that there's an incentive to comply rather than an incentive, as Ms. Attkisson ably put it, not to comply. Would you make those civil or criminal or both, in terms of penalties?

Mr. LEOPOLD. If I were king, I would make them both. I mean, there are—you know, there are numerous instances in which, you know, I've been in court and the government has outright lied about certain records, about whether they possess certain records, whether they'll process certain records. It's become, you know, very clear. So, yeah, I would make it both.

Mr. CONNOLLY. Okay.

I just want to reiterate, though, the First Amendment kind of sets up this competition. And, you know, I'm more on your side than the other side on the competition, but there's not an absolute right guaranteed to access to any information.

Mr. LEOPOLD. No, there isn't, but I have the right to ask every Federal agency to give me every record that they have. They don't have to do that, and they have made it crystal-clear that they're not going to, but the law is clear.

Mr. CONNOLLY. Well, that's what I was——

Mr. LEOPOLD. The Freedom of——

Mr. CONNOLLY. That's what I was going to——

Mr. LEOPOLD. —Information Act is the law, and the law——

Mr. CONNOLLY. Mr. Leopold——

Mr. LEOPOLD. —is clear.

Mr. CONNOLLY. —that's what I was going to get at.

So, to try to clarify the First Amendment, laws get adopted; FOIA law is one of them. And it's an imperfect vehicle, but it's one that needs to be perfected. And that's certainly a conclusion I draw after listening to your testimony.

It works sometimes. It doesn't work perfectly. And, at other times, there's outright obfuscation, and that needs to be addressed. And it's not unique to this administration, but, since we're in this administration, we need to deal with it, as well.

I thank the chair for the time, and I thank all of the panelists for being here today. It's a very illuminating conversation.

Chairman CHAFFETZ. I thank the gentleman.

We'll now recognize the gentleman from Ohio, Mr. Jordan, for 5 minutes.

Mr. JORDAN. Thank you, Mr. Chairman.

Mr. Leopold, has it gotten—I may cover some ground that's already been covered—has it gotten worse? FOIA requests and requests for information, has it been more difficult for you to get the information you've requested?

Mr. LEOPOLD. It is. It's getting increasingly worse with the passage of years.

Mr. JORDAN. And more redactions than you ever used to see?

Mr. LEOPOLD. Yes. I mean, the more I request, the more records I request——

Mr. JORDAN. More deliberative process exemptions than you've ever seen before?

Mr. LEOPOLD. Oh, that, there's no question. I mean——

Mr. JORDAN. More other exemptions that apply for certain agencies than you've ever seen before?

Mr. LEOPOLD. I definitely would say (b)(7)(A) at FBI is overused.

Mr. JORDAN. Is this the first time that you've testified in front of Congress?

Mr. LEOPOLD. It is.

Mr. JORDAN. So first time on any issue and certainly the first time on this issue?

Mr. LEOPOLD. First time on any issue. Probably the last time, as well.

Mr. JORDAN. Understand. Understand. Which tells me something, on both ends.

Mr. LEOPOLD. Yeah.

Mr. JORDAN. And, Ms. Attkisson, is this the first time you've testified in front of Congress?

Ms. ATTKISSON. I testified on some similar issues on the Senate side not long ago, and these are both very much the first——

Mr. JORDAN. But—so this—was that this year?

Ms. ATTKISSON. Yes, sir.

Mr. JORDAN. Okay. So never before——

Ms. ATTKISSON. No, sir.

Mr. JORDAN. —the present? Okay.

Mr. McCraw, first time you've testified?

Mr. MCCRAW. It is.

Mr. JORDAN. And you've been in journalism a year or two? Not——

Mr. MCCRAW. That is so.

Mr. JORDAN. You look young. I'm not saying—insinuating that. I understand.

Ms. Goodman, you referenced——

Mr. MCCRAW. Thank you for putting that on the record.

Mr. JORDAN. —that in your testimony?

Mr. MCCRAW. Sir, could I just address the question, though——

Mr. JORDAN. Sure.

Mr. MCCRAW. —that you raised? I don't think it's gotten worse. I remember very well what it was like when I started doing this regularly——

Mr. JORDAN. But, still, the first you've been willing to come talk about it.

Mr. MCCRAW. First time I've been asked.

Mr. JORDAN. Okay.

Ms. Goodman?

Ms. GOODMAN. Yes.
Mr. JORDAN. First time.
Mr. Anderson?
Mr. ANDERSON. No. I've been before Congress——
Mr. JORDAN. On this issue?
Mr. ANDERSON. —Senate committee, which was discussing the use of journalistic cover by the CIA and was holding——
Mr. JORDAN. But it's the first time you've testified on FOIA?
Mr. ANDERSON. Yes, sir.
Mr. JORDAN. Okay.
I mean, that should—this is sort of where Mr. Mulvaney was earlier—that should tell us something. When the press has to come testify about restrictions on the press, that's pretty important. I mean, that's why this is sort of unprecedented that you're all here.
And I think, Ms. Goodman, I didn't catch most people's opening statement, but I caught part of yours.
So it brings us back to the fundamental question: Why? Why has it gotten worse? Why is it to a point where you think you now—why are we at this point? What's causing the delays, the exemptions, the redactions? What ultimately compelled you all to come here? What's the cause of it all?
Mr. Leopold, can you give me an answer to that? Because I've got an idea and I'll be happy to give it, but I'd rather hear what you all say here, at least first.
Mr. LEOPOLD. I came to Congress—or came here today because I was asked to testify. I think this is a really important issue. I use FOIA aggressively. The public benefits when——
Mr. JORDAN. No, no, no, not, not—you misunderstood me. I want to go back to the question of why you're having the—why is the problem getting worse, why are the redactions so much, why are the exceptions so much——
Mr. LEOPOLD. Yes, I was——
Mr. JORDAN. —the deliberative process.
Mr. LEOPOLD. I was just answering——
Mr. JORDAN. Go ahead.
Mr. LEOPOLD. —the last part of your question.
I mean, why are they getting worse? I don't know. As I indicated, I filed for processing notes, and that gives me insight as to how these agencies handle FOIA requests, what goes on behind the scenes. What I see is an increasing use of exemptions to withhold information that the government may feel——
Mr. JORDAN. Well, let me go right—I've got a minute. Sorry. Let me go right to this.
Mr. LEOPOLD. Okay.
Mr. JORDAN. And I'll stick with you, Mr. Leopold.
Has it increased under the Obama administration? Has it increased since we got this—this—the email, the letter that Mr. Craig, the White House Counsel, wrote to all of the general counsels at the respective agencies in the Federal Government?
Mr. LEOPOLD. I would say, my experience, it has increased. Let me just add——
Mr. JORDAN. I would think it would——
Mr. LEOPOLD. —the difference between this administration and the last administration is that this administration signed an execu-

tive order promising a new era of transparency and open government.

Mr. JORDAN. And it's——

Mr. LEOPOLD. During the Bush years, I knew I wasn't getting anything.

Mr. JORDAN. Yeah. But that's not my question. That may be true——

Mr. LEOPOLD. That—that—I just want to make that statement.

Mr. JORDAN. —but I want to go back to what you said earlier. You said it's gotten worse.

Mr. LEOPOLD. I believe it has gotten worse over the years——

Mr. JORDAN. It's gotten worse since April 15, tax day, 2009, the first year of Obama's presidency, right, since this went out?

Mr. LEOPOLD. I've been filing aggressively FOIA requests for the past 5 years——

Mr. JORDAN. When the White House Counsel says all document requests that may involve documents with White House equities, that's everything. I mean, you talk about a chilling impact that's going to have on general counsels in Federal agencies. When they say all that have any White House interest associated with them, that's pretty broad. And, as Mr. Mulvaney pointed out, that's a lot broader than the 1988 deal that—whoever was counsel when President Reagan was President. That would scare you.

To me, this is as obvious as it gets. The White House General Counsel tells all the general counsels at every respective—at every Federal agency, "Hey, hey, hey, before you send anything, check with us," of course they are going to redact everything. They're scared to death. I mean, we talk about the chilling effect in government all the time. It doesn't get any more chilling than that if you're a bureaucrat in the Federal agencies trying to comply with all your requests.

And it's that reason that made it so bad that, for the first time in all your careers, you said, you know what, I'm going to go talk about—the press has to testify because of these restrictions placed on the press. That is huge.

Mr. LEOPOLD. You can be sure that I'll be FOIA'ing that to find out what's going on behind the scenes.

Mr. JORDAN. I appreciate it.

Thank you, Mr. Chairman.

Chairman CHAFFETZ. I thank the gentleman.

And I think we've allowed each member to ask their questions. We have a second panel. And so we, first and foremost, want to thank this panel for your time and your expertise and your candidness in sharing your perspective. We thank you again for your participation here.

The committee is going to recess for about 4 minutes while we reset the table and get ready for our second panel.

But thank you again.

We stand in recess for about 4 minutes.

[Recess.]

Chairman CHAFFETZ. The committee will come to order. We have a second panel in our discussion today about FOIA. Let me introduce the second panel, then we'll swear you in and begin your testimony.

Tom Fitton is the president of Judicial Watch, the public interest group that investigates and prosecutes government corruption. As president of Judicial Watch since 1998 with nearly 25 years experience in public policy, Mr. Fitton has helped turn Judicial Watch into one of America's largest and most effective government watchdog organizations. Mr. Fitton is the author of the New York Times bestseller "The Corruption Chronicles" and the executive producer of a documentary movie, "District of Corruption."

In 2015, the American Conservative Union, the ACU, awarded Fitton with the Defender of the Constitution award during its annual Conservative Political Action Conference, also known as CPAC.

Cleta Mitchell is a partner and political law attorney in the Washington, D.C., office of Foley Lardner LLP and a member of the firm's political law practice. With more than 40 years of experience in law, politics, and public policy, Ms. Mitchell advises nonprofit issue organizations, corporations, candidates, campaigns, and individuals on state and Federal campaign finance law, election law, and compliance issues related to lobbying, ethics, and financial disclosures.

She practices before the Federal Election Commission, the Ethics Committees of the United States House and Senate, and similar state and local enforcement bodies and agencies. She has served as legal counsel of the National Republican Senatorial Committee and the National Republican Congressional Committee.

Nate Jones is the director of the Freedom of Information Act Project for the National Security Archive. He oversees thousands of Freedom of Information Act, or FOIA, and mandatory declassification reviews, also known as MDRs, requests, and the hundreds of FOIA and MDR appeals that the Archive submits each year.

An active member of the American Society of Access Professionals, the professional association of government FOIA officers, he acts as the liaison between the Archive analysts and agency FOIA officers and serves as the Archive's FOIA counselor to the public. He's the editor of the Archive's blog Unredacted, where we writes about newly declassified documents and FOIA policy.

He has authored the Archive's past five government-wide FOIA audits, including the 2015 eFOIA audit, "Most Agencies Falling Short on Mandate for Online Records."

Ms. Garcia, Lisette Garcia, is the founder of the FOIA Resource Center. Founded in 2013, the FOIA Resource Center's mission is to put the most salient public records of the day quickly and cost effectively in the hands of the most immediately impacted.

Ms. Garcia is celebrating the first anniversary of her firm, where she works to wrest government documents from a reluctant bureaucracy using the Freedom of Information Act. Her clients are often lawmakers, trade groups, journalists, whose ranks once included her. She moved to Washington to attend Howard University School of Law and graduated in 2008.

Gabe Rottman is the legislative counsel and policy advisor in the Washington Legislative Office of the American Civil Liberties Union, often referred to as the ACLU. He advocates in Congress and the Federal agencies on an array of issues in the intersection of technology and civil liberties, including privacy, cybersecurity,

free expression, telecommunications and Internet policy, government transparency, as well as intellectual property.

Mr. Rottman practiced law from 2007 to 2012 at Simpson Thatcher & Bartlett LLP in Washington, D.C., with a focus on antitrust and foreign investment review. From 2001 to 2005 he worked in the ACLU's Washington Legislative Office as a communication staffer and senior writer.

And finally we have Anne Weismann, who's the executive director for the Campaign for Accountability, a new nonprofit that uses research, litigation, and communication to expose misconduct and malfeasance in public life.

She served for 10 years as the chief counsel for the Citizens for Responsibility and Ethics in Washington. She worked for the Federal Communications Commission as the deputy chief of the Enforcement Bureau. She also worked for the Department of Justice as the assistant branch director, where she supervised government information litigation, including FOIA.

We appreciate you all being here today. We've had a good, robust discussion with our first panel, and we welcome you to this discussion as well.

Pursuant to committee rules, all witnesses are to be sworn before they testify. If you would please rise and raise your right hand.

Do you solemnly swear or affirm that you will tell the truth, the whole truth, and nothing but the truth?

Let the record reflect that all witnesses answered in the affirmative. And as they now take their seats, I would encourage you, in order to allow time for discussion, to please limit your testimony to 5 minutes as best you can. Your entire written statement will be entered into the record. And as members have votes coming up on the floor, there may be submissions from Congress that we would appreciate if you would follow back up on.

Chairman CHAFFETZ. But with that, we will start with our first witness, Mr. Fitton of Judicial Watch.

And we thank you, sir, for being here, and we now recognize you for 5 minutes.

WITNESS STATEMENTS

STATEMENT OF TOM FITTON

Mr. FITTON. Thank you, Mr. Chairman, for allowing me to testify on behalf of Judicial Watch.

Transparency is an important issue to the American people. We're a conservative group, but we are nonpartisan, and we have over 360,000 active supporters. And there are few more widely supported groups in the country than Judicial Watch.

And, obviously, our focus is on the Freedom of Information Act. We're the most active requester, most active litigator without a doubt today, and we've used the open records laws to root out corruption in the Clinton administration and to take on the Bush administration's penchant for improper secrecy. You may recall we sued the administration of President Bush all the way up to the Supreme Court over the Cheney Energy Task Force.

We've been around for 21 years, but I can tell you our government is bigger than ever, and it's, frankly, the most secretive in re-

cent history. President Obama promised the most transparent administration in history, but Federal agencies are often black holes in terms of disclosure.

We have filed nearly 3,000 Freedom of Information Act requests with the Obama administration, and our staff attorneys have been forced to file around 225 lawsuits in Federal court against this administration. Overwhelmingly, these lawsuits are just designed to get a yes or no answer from the administration.

Administratively, agencies have built additional hurdles and stonewalled even the most basic FOIA requests. The Obama administration's casual law breaking, and it is law breaking, when it comes to FOIA is a national disgrace and shows contempt for the American people's right to know what their government is doing.

Thomas Jefferson, the Founding Fathers all thought transparency was important. Jefferson said if we are to guard against ignorance and remain free it is the responsibility of every American to be informed. And FOIA increasingly is not working in that regard.

Transparency is about self-government. If we don't know what the government is doing, how is that self-government? Frankly, how is it even a republic?

Now, we have this transparency crisis here in Washington, D.C. The government's doing more than ever, but is even less transparent. Never in our history has so much money been spent with so little accountability. Frankly, all of Congress should focus on government reform and oversight instead of assigning it to just one or two committees.

Americans are rightly worried that they're losing their country. We have the forms of democracy—elections, campaigns, votes, political fundraising, ads—but when Congress authorizes a trillion-and-a-half dollars in spending after just 3 days of debate and when the executive branch won't tell you much unless you're willing to make a Federal court case out of an issue, frankly, that isn't democracy and it certainly isn't self-government.

Mr. FITTON. But FOIA shows that there is a way forward out of this transparency crisis. And it's a corruption crisis, as well. We've shown that one citizen group, using the FOIA, an independent oversight, can help the American people bring their government back down to earth and under control. And Judicial Watch obviously has succeeded in uncovering documents that have been denied to Congress.

On Benghazi, it's been over a little over a year since Judicial Watch uncovered a declassified email showing that then-White House Deputy Strategic Communications Advisor Ben Rhodes and other Obama administration officials, not intelligence officials, put out the talking points used by Susan Rice that—the big lie, that the Benghazi attack was rooted in Internet video and not a failure of policy. Now there's a select committee because of those disclosures. The select committee, to put it charitably, doesn't seem to be getting much of anywhere, and Judicial Watch's litigation continues to be the go-to place for information about what's going on in the Benghazi scandal.

The IRS scandal. Judicial Watch litigation forced the agency to admit that Lois Lerner's emails were supposedly lost, and it was

Judicial Watch's litigation that forced the IRS to admit that her emails were not actually lost.

And only Judicial Watch uncovered the troubling revelation that the Obama, IRS, and Justice Department were collaborating on prosecuting the same groups that the IRS had lawlessly suppressed.

We're still getting screwed around by the IRS. We just filed today a filing that the IRS—updating the court on the IRS' machinations with Lois Lerner's lost emails. They told us there were no tapes. It turns out there were tapes. They made us go through all sorts of hoops to figure out where the lost emails might be. They made the court go through all sorts of hoops. And then it turns out that the Treasury Inspector General had this information and had these tapes. They had turned over those tapes 1 day after they'd been requested, the IRS to TIGTA. They didn't tell us that. And they made us go through this fight with them over where these lost emails would be. They knew where they were.

And then, once TIGTA found the emails that were lost, IRS said, "Well, they're not subject to FOIA. They're TIGTA's records, not the IRS' records." Then, a few weeks ago, they said, "Oh, we've got some emails from TIGTA, so now they're our records, and we'll get to them when we get to them." Really outrageous conduct.

And then, of course, we have the most egregious violation of Federal transparency law since FOIA was passed 50 years ago, and that is Mrs. Clinton's use of a secret email account to avoid disclosure under the Federal Records Act, to avoid disclosure under FOIA. And when you have the State Department agency tell Judicial Watch they looked for records and they couldn't find anything and groups like Judicial Watch end their lawsuits based on no records being found, that was a lie. They didn't look for the records.

Mrs. Clinton was head of the agency, and she had a legal responsibility to maintain those records. And there is criminal liability already for failure to maintain those records. It's called concealment. You can't conceal records. You can't take them away if they're Federal records, and that was what Mrs. Clinton did. And there is a longstanding law that prohibits that, and, certainly, in the least, that should be subject to criminal investigation independently.

And I'll just finally close. Obviously, Congress is not subject to FOIA. It ought to be. The courts aren't subject to FOIA. They ought to be. But the problem is the executive branch is avoiding FOIA. FOIA reform is important, and we support serious, impactful legislation. And we encourage you to keep on working on that, and we'll work with you as appropriate.

Thank you for your time.

[prepared statement of Mr. Fitton follows:]

Opening Statement
Tom Fitton, President
Judicial Watch

Hearing of the House Committee on Oversight and Government Reform

"Ensuring Transparency through the Freedom of Information Act (FOIA), Part I"

June 2, 2015
2154 Rayburn House Office Building

Good morning, I'm Tom Fitton, president of Judicial Watch. Judicial Watch is a conservative, non-partisan educational foundation dedicated to promoting transparency, accountability and integrity in government, politics and the law. We are the nation's largest and most effective government watchdog group.

Judicial Watch is, without a doubt, the most active Freedom of Information Act (FOIA) requestor and litigator operating today. Thank you, Chairman Chaffetz and Congressman Cummings for allowing me to testify on this important topic. Judicial Watch used the open records laws to root out corruption in the Clinton administration and to take on the Bush administration's penchant for improper secrecy. Founded in 1994, Judicial Watch has over 21years' experience using FOIA to advance the public interest.

Our government is bigger than ever, and also the most secretive in recent memory. President Obama promised the

Transparency is about self-government. If we don't know what the government is doing, how is that self-government? Frankly, how is that even a republic?

Congressional oversight is sorely lacking – lacking on all fronts. Congress is like a fire department that shows up after your house burns down and shouts "fire." Even President Obama, flailing for an excuse over his IRS' massive oppression of his political opponents, suggested that the government was too big and he had no way of effectively monitoring his own agencies.

And, too often, the fourth estate acts as PR rep for big government and fails to do the hard work of keeping watch on government waste, fraud and abuse. And even under FOIA law, the courts have deferred to the whims of the executive branch and have applied FOIA in a way that makes it more difficult for the American people to find out how their tax dollars are being used or misused.

Now, this has all led to the transparency crisis here in D.C.

Never in our history has so much money been spent with so little accountability. Frankly, all of Congress should focus on "government reform and oversight," instead of assigning it to one or two committees.

Americans are rightly worried they are losing their country. We have the forms of democracy – elections, campaigns, votes, political fundraising, etc. – but when Congress authorizes $1.5 trillion in spending after just three days of debate, and when the executive branch won't tell you much

obstruction and perjury laws by top officials of this administration.

With respect to the IRS scandal, Judicial Watch litigation forced the agency to admit that Lois Lerner emails were supposedly lost. And it was Judicial Watch FOIA litigation that forced the IRS to admit that her emails were not actually necessarily lost. Only Judicial Watch uncovered the troubling revelation that the Obama IRS and Justice Department were collaborating on prosecuting the same groups that the IRS had lawlessly suppressed. Again, Congress has seemed to have lost interest in the IRS scandal but JW continues to do the job of oversight and remains the key vehicle for revelations about the continuing abuse of the IRS.

And then we have perhaps one of the most egregious violations of federal transparency law since FOIA was passed nearly 50 years ago.

On March 2, 2015, *The New York Times* reported then-Secretary Clinton used at least one non-"state.gov" email account to conduct official government business during her entire tenure as the secretary of state.

There are at least 18 lawsuits, 10 of which are active in federal court, and about 160 Judicial Watch Freedom of Information Act (FOIA) requests that could be affected by Mrs. Clinton and her staff's use of secret email accounts to conduct official government business. I can tell you that we dismissed several lawsuits based on lies by the State Department that it searched all of Hillary Clinton's emails and couldn't find anything relevant to our requests. In Judicial Watch's various FOIA lawsuits, our lawyers have informed attorneys for the Obama

> previously produced in another litigation ... Judicial Watch has no reason to believe that the State Department would have ever disclosed that its search was compromised had Judicial Watch not asked for search affidavits when it reviewed the draft *Vaughn* index and limited production.

A statement by the State Department in a February 2, 2015, status report was the first notice to the public and the court that other records had not been searched: "[The State Department] has discovered that additional searches for documents potentially responsive to the FOIA must be conducted."

The State Department's early response to the scandal has not been encouraging. While new records will be searched in response to future FOIA requests, there are no plans to go back and review the accuracy of what has already been produced in response to FOIA, Marie Harf, a State Department spokeswoman has said.

The State Department is obligated to secure the accounts as soon as possible to protect classified materials, retrieve any lost data, protect other federal records, and search records as required by court orders in our various FOIA lawsuits, and in response to congressional subpoenas, etc.

Rather than allowing Hillary Clinton's campaign advisers to review email and release material to the government, the agency should assert its ownership, secure the material and prohibit private parties from illicitly reviewing potentially classified and other sensitive material.

On April 30, 2015, Judicial Watch sent a letter to Kerry "notifying him of the unlawful removal of the Clinton emails and requesting that he initiate enforcement action pursuant to the FRA," including working through the attorney general to recover the emails.

Patrick Kennedy, under secretary of state for management, responded on Secretary Kerry's behalf on May 14. The letter ignored Judicial Watch's demands that the secretary comply with the FRA.

Kerry's actions represent "an abuse of discretion" that has led to the continued withholding of official government records from the American people.

To be clear, Mrs. Clinton's actions, and maybe the actions of other administration officials, require a serious and independent criminal investigation.

The courts are taking notice. Last month, a federal court judge did something we had never seen before – U.S. District Court Judge Reggie B. Walton reopened a Judicial Watch Freedom of Information Act (FOIA) lawsuit because of the "new" evidence of Hillary Clinton's hidden emails.

In the meantime, Judicial Watch filed eight lawsuits (including six on one day) against the Obama administration to get answers on the Hillary Clinton email scandal.

Many, including members of both parties in Congress, ask how is it that Judicial Watch gets documents that Congress can't get even under subpoena.

people. And speaking of FOIA reform, Congress should apply the freedom of information concept to itself and the courts, the two branches of the federal government exempt from the transparency laws that presidents must follow.
Founding Father John Adams was keenly aware of the relationship between secrecy and corruption --- and the preservation of liberty:

> Liberty cannot be preserved without a general knowledge among the people, who have a right, from the frame of their nature, to knowledge, as their great Creator, who does nothing in vain, has given them understandings, and a desire to know; but besides this, they have a right, an indisputable, unalienable, indefeasible, divine right to that most dreaded and envied kind of knowledge; I mean, of the characters and conduct of their rulers.

Thank you.

Chairman CHAFFETZ. I thank the gentleman.

Ms. Mitchell, you are now recognized for 5 minutes.

STATEMENT OF CLETA MITCHELL

Ms. MITCHELL. Thank you, Mr. Chairman, members of the committee. Thank you for having a hearing on this really important topic.

I have in my testimony explained my experiences with FOIA with a number of my clients over the past several years, nonprofit grassroots citizen groups. I want to focus today on just one of those experiences, and that is with the IRS and Treasury on behalf of the Tea Party Patriots.

When the IRS and Treasury issued its 501(c)(4) regulations which would restrict and allow the IRS to govern free speech and political activities of 501(c)(4) organizations, regulations that were developed in secret, that were not included on the plan for rulemaking that all Federal agencies are supposed to publish regularly, and were released the day after Thanksgiving, on Black Friday, November 2013, we wanted information about where do these regulations come from, what were they about, how were they developed. So, on behalf of Tea Party Patriots, in early December 2013, we filed FOIA requests with the IRS and Treasury seeking information and the documents related to the development of the regulations.

The Department of Treasury wrote back and said, "We're going to invoke our 15-day automatic extension." And that was all we ever heard from the Treasury Department until we sued them.

The IRS wrote back and said, "We're invoking our 15-day extension, but we're not going to be able to answer within the statutory period. We'll answer your FOIA requests April the 7th of 2014." April the 7th, I get a letter saying, "We're not going to be able to answer your FOIA request as we promised. You'll need to give us until July the 2nd."

So I called the woman who sent the letter and said, "Tell me what the progress is, how are we doing," at which point she said, "Well, you know, I process the request, and I send them to the appropriate people within the agency, and then I don't ever hear anything back." I said, "You've never heard anything back?" She said, "No." I said, "Well, how did you come up with these dates?" She said, "Well, I was estimating." I said, "So you made them up." She said, "Basically."

So, 1 week later, we filed a lawsuit in Federal court here in D.C., a FOIA appeal. And we reached an agreement with the Department of Justice where they would provide monthly rolling productions from the IRS and Treasury.

And I have brought the binders with me, if you would like to see them. And this is the most recent—these are the most recent production, which I got yesterday—day before yesterday. It is page—you can't see it—page after page of documents that are either totally or partially redacted.

This, ladies and gentlemen, this is the deliberative process privilege in action. We have not received one substantive document in all of these binders. We have received—we finally—we did agree with the Justice Department that they would produce a Vaughn index, which is like a privilege log. So we do have a list of thou-

sands of pages of documents they haven't produced at all. And the pages they have produced are either totally blacked out or partially blacked out such that all significant information is removed.

So what we have really, effectively, learned is that the deliberative process privilege has completely subverted and destroyed the purpose of FOIA. And the Tea Party Patriots have spent tens of thousands of dollars just to try to understand regulations—which were withdrawn, so I have a question as to why the deliberative process privilege would still apply to regulations that have been withdrawn. But we now know they're still working on reviewing them. But we're asking about the last set.

But the point is this: We have spent—my client has spent tens of thousands of dollars, we've spent many, many hours trying to get information to which we are entitled, and all we've gotten are these binders full of redacted documents.

And so I have this to say, which is that FOIA is completely broken. What has happened is the courts and the agencies have rendered it essentially meaningless. And so I have three recommendations.

Number one, this legislation that is pending in the House and the companion bill in the Senate needs to have one provision added. Congress should eliminate the deliberative process privilege. It is the deliberations of the agencies and the process by which the decisions are made that the people have a right to know about. That's the basic information that we seek. And so Congress should eliminate by statute, just X out the deliberative process privilege.

And, number two, I also recommend that there have to be penalties that are imposed for individual government employees and agency heads who fail to comply with FOIA.

And, number three, Congress should take all of the money—I've heard the conversation about, well, you know, we've cut their budgets and all. Let me tell you, this took a lot of extra work. It would've been a lot less expensive for the IRS and Treasury to just copy the documents and send them to us, but going through and redacting takes a lot of extra processing time.

But I would say this: Congress should go through every Federal agency and take the money that is now spent, the tens of millions of dollars now being spent for the public affairs offices, who put out press releases, who tell us propaganda, whether it's true or not, that they want us to know, and reallocate all of those funds to FOIA processing.

And then I think Congress should keep a scorecard and should know how agencies are doing in terms of responding to FOIA and should take that into account at appropriations time.

So I would say this: Only Congress can fix FOIA. Nobody else can fix it. Congress needs to revive FOIA, to bring life back into the system, and to make it the transparency act that it was intended to be almost 50 years ago.

Thank you for this opportunity to testify.

[Prepared statement of Ms. Mitchell follows:]

TESTIMONY OF CLETA MITCHELL, ESQ.

HEARING ON THE FREEDOM OF INFORMATION ACT

HOUSE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

TUESDAY, JUNE 2, 2015

Mr. Chairman, Mr. Ranking Member, Members of the Committee:

Thank you for inviting me to testify today about a subject that is of great interest to me, to my clients and to the American people. The Freedom of Information Act. "FOIA" was enacted by Congress in 1966 to give the citizenry access to information and documents that *they* have paid for.

But the reality is that federal agencies today refuse to comply with the letter or the spirit of FOIA. The USA.gov website has a downloadable brochure about the *Freedom of Information Act* that describes the Freedom of Information Act as "*the law that gives you the right to access information from the federal government.*"

The problem is, while that is what the law is supposed to do, it is *not* how federal agencies handle FOIA requests in real life.

My experience with FOIA has been on behalf of several grassroots citizens' organizations over the past several years, as these groups began to wonder why various federal agencies had either targeted them, subjected them to what they believed were violations of their rights under the statute or were proposing draconian new regulations that would impact them and others similarly situated.

And in each and every instance, the simple process outlined in the USA.gov brochure is *not* what these citizens' groups experienced. Instead, it has become clear that only by filing litigation does a federal agency begin to produce documents in its possession responsive to the FOIA request. And if the litigation is a FOIA appeal, the agency invokes one of several non-statutory exceptions to FOIA as the means of withhold responsive documents and information from the people.

Let me share some of my clients' FOIA experiences:

True the Vote / King Street Patriots / Catherine Engelbrecht. In the spring of 2013, Catherine Engelbrecht, who has testified before this Committee, filed FOIA requests with the federal agencies who had landed on her doorstep within the months immediately following her filing of applications for exempt status for two conservative grassroots organizations: a 501(c)(3) organization, True the Vote and a 501(c)(4 organization, King Street Patriots. Her requests were for documents related to the surprise audits, inspections and agency contacts to her organizations and to her family businesses. The FOIA requests were either ignored, largely redacted, or produced deliberately false responses. Note in particular the response(s) to Ms. Engelbrecht's FOIA request to OSHA which resulted in false statements from the agency. That information is attached to my testimony. Essentially, all the FOIA requests produced zero information and no documents responsive to her requests.

Fast forward, early 2015, once again, Ms. Engelbrecht filed FOIA requests with the same federal agencies, including the IRS, the Department of Justice, and the Bureau of Alcohol, Tobacco and Firearms, again seeking documents that reference True the Vote, Catherine Engelbrecht and/or King Street Patriots. As of

today, none of the agencies have produced documents responsive to these FOIA requests. A chronology of the interactions between the organization and various federal agencies over the past six months is attached to my testimony.

Two years and multiple requests have produced nothing.

National Organization for Marriage. In the spring of 2012, the National Organization for Marriage ("NOM") became aware that its confidential donor schedule from its IRS Form 990 had been released by the IRS and posted on the website of its ideological opponent, the Human Rights Campaign. NOM immediately filed a demand with the Treasury Inspector General for Tax Administration ("TIGTA") to investigate the illegal release by the IRS of its donor schedule, which is, by law, not a public filing. After some time passed and NOM was not provided any information about the results of the investigation, NOM requested a copy of the TIGTA investigation report through a FOIA request. What NOM received in response to its FOIA request were mostly documents NOM had provided the agencies and no documents responsive to the FOIA request. NOM filed another request seeking the specific documents pertinent to the illegal release of its Schedule B donor information. Again, no documents responsive to the FOIA request were forthcoming. Indeed, the IRS and Treasury department took the position that there were either no responsive documents or the documents that did exist could not be provided to NOM because providing such documents to NOM would violate the Section 6103 or other "privacy" rights of those being investigated for the illegal release of NOM's confidential Schedule B. In all, there were at least three separate FOIA requests from NOM to the IRS and Treasury, seeking documents that would reveal the sources of the release of NOM's Schedule B. And each time, both the IRS and Treasury claimed that they had produced all responsive documents and any other documents could not be released

without violating the statutory rights of the individuals who were investigated by TIGTA.

NOM ultimately sued the IRS, not as a FOIA appeal, but in a cause of action under the tax code to recover damages from the IRS for the agency's violation of the provisions of law that protect the confidentiality of NOM's donor information. The IRS in discovery in the litigation was required to produce thousands of pages of documents related to the illegal release of the NOM donor schedule...documents that it had claimed didn't exist in response to the FOIA requests seeking those same documents. Only then was NOM able to learn the true story of how its confidential donor schedule had been obtained illegally from the IRS by someone who hates the organization.

Tea Party Patriots. Tea Party Patriots filed FOIA requests in May 2013 seeking all documents from the IRS related to the group's application for exempt status for Tea Party Patriots, a 501(c)(4) organization and the application for exempt status of its companion 501(c)(3) organization, the Tea Party Patriots Foundation. As of this date, no documents have been received by either entity. Rather, a series of letters essentially every 90 days for the past two years arrive from the IRS, including the latest letter dated April 29, 2015, stating that the agency needs 'more time' to process the FOIA requests and then granting itself another 90 days to produce responsive documents. Copies of the FOIA requests and the IRS response letters are attached to my testimony.

The same circumstance arose when Tea Party Patriots filed FOIA requests with the IRS and Treasury in early December 2014, days after the IRS had issued proposed new regulations governing and restricting the political speech and association of 501(c)(4) organizations. Those proposed regulations were issued the

day after Thanksgiving 2014 and clearly had been in process for many months prior to their public release during the Thanksgiving holiday. There was no public notice of the rulemaking because the entire process was conducted 'off-plan' which means that the IRS and Treasury department did not include the development of regulations governing 501(c)(4) speech and association in the listing of regulations the agencies were developing – meaning that the rulemaking was conducted in total secrecy within the IRS and the highest levels of the Treasury department.

Because the proposed regulations would directly impact the operations and activities of Tea Party Patriots – as well as every other citizens group in America, Tea Party Patriots filed a FOIA request with both the IRS and Treasury asking for documents regarding the proposed rules. The statute requires an agency to provide responsive documents within thirty (30) days of the request, with an additional fifteen days if the agency cannot meet the 30 day deadline.

Both the IRS and Treasury responded that it would take the full 45 days to be able to respond to the FOIA request, which would have meant that the documents would be provided to Tea Party Patriots at the end of January 2014, a month before the deadline for filing comments regarding the proposed regulations.

Except that isn't how it works in real life.

The Treasury department invoked its additional fifteen day extension....and then never responded again.

The IRS invoked its fifteen day extension...and then went on to advise that the documents would not be forthcoming until early April 2014 – fully one month after the deadline for filing comments on the proposed regulations.

When the April deadline came, we received another letter from the IRS advising that it would be July 2014 before the documents could be provided.

I contacted Ms. Denise Higley, the individual who signed the FOIA letters from the IRS and asked if she could provide any information on how the agency was coming in terms of fulfilling the statutory requirements of searching, identifying and producing responsive documents.

Ms. Higley advised that after she confirms the FOIA requests, she then directs those to the appropriate agency personnel. And that she had heard nothing from anyone since. I asked, "how did you arrive at the April 2014 date?" She indicated that she had estimated that that would be sufficient time for the IRS to produce the documents. When I asked, "well, how did you then arrive at the July date in your latest letter?", she advised that she was 'estimating' as to how much additional time would be needed.

My question was, "So you just basically make up these dates because you never hear from anyone within the agency?" And she said, that was correct.

What she was telling me is that if a citizen wants information and documents from the IRS – and likely for any other federal agency, at least in this Administration – be prepared to file a federal lawsuit because if you don't, you will not get anything from the agency.

Tea Party Patriots did file suit against the IRS and Treasury department seeking to enforce its FOIA requests. That suit was filed in April 2014 and one year later, we have received monthly document productions. Here is what we have received:

- Thousands of pages of documents fully, or largely redacted so as to be completely devoid of substantive information
- Vaughn indexes that describe thousands of documents that are being withheld by both agencies and not produced at all
- Thousands of emails that are redacted, except for the dates and times of sending and *most* (but not all) of those on the email chain – to the point that no actual substantive documents have been produced in a year's worth of rolling document productions.
- We have learned only three things in the course of seeking full disclosure of information and documents related to the 501(c)(4) regulations:
    - We have learned that the regulations were primarily the handiwork of Ruth Madrigal, an Attorney-Advisor in the Office of Tax Policy of the Treasury Department. She is responsible for advising the Assistant Secretary (Tax Policy) on all matters involving tax-exempt organizations – and she has emerged as the leader of this project, but documents related to why Ms. Madrigal undertook this project in the first place and who initiated the secret 501(c)(4) regulations have either not been produced, or the information is contained in the produced documents but is blacked out. So we know that the effort to regulate, stifle and restrict the free speech rights of citizens groups originated at the highest levels of the Obama administration. We should be able to see that information in the documents – but it has been obliterated to keep us from learning any of those specific details.

- We have learned that the original plan was for the proposed regulations to be issued on the Friday of Labor Day weekend, 2013 and, in fact, the regulations had already been sent to the Federal Register for publication on that Friday. For reasons that are blacked out in the documents we have received, the proposed regulations were withdrawn from the Federal Register and underwent another 2 ½ months of work....all of which is redacted and invisible to us...and then when the powers-that-be concluded they were in shape to be published, the IRS worked overtime to make absolutely certain that the proposed regulations were issued Thanksgiving week, and NOT the Friday before Thanksgiving in 2013.
- We have learned that the IRS does not respond to FOIA requests unless a lawsuit is filed in federal court and then, the documents that are produced are largely useless because of the manner in which the IRS invokes certain 'privileges' against disclosure.

Congress, in enacting FOIA, identified 9 exemptions to the types of records and documents federal agencies are required to provide to citizens. Those exemptions are very specific and narrow, at least when Congress envisioned them. The exemptions cover:

1. classified national defense and foreign relations information,
2. internal agency personnel rules and practices,
3. information that is prohibited from disclosure by another law,

4. trade secrets and other confidential commercial information,

5. inter-agency or intra-agency communications that are protected by legal privileges,

6. information that would invade someone's personal privacy,

7. certain information compiled for law enforcement purposes,

8. information relating to the supervision of financial institutions, and

9. geological information on wells.

The IRS and many other federal agencies have successfully persuaded various judges over the years that these narrow exemptions authorized by Congress should be much broader and all too often, federal judges have sided with the agencies, against the citizens – to the point that FOIA is neutered almost beyond usefulness.

In the Tea Party Patriots FOIA appeal, the redactions and withheld documents rely almost exclusively upon the 'deliberative process' privilege…which the IRS and Treasury contend applies to any substantive document that would provide any real information as to what the IRS and Treasury intended with their proposed regulations, why they intended it and where the regulations originated, their purpose and meaning. All the kinds of information that FOIA is supposed to guarantee to the citizens.

Copies of all the FOIA requests in Tea Party Patriots, Inc. vs the IRS and Treasury litigation and all the CD roms with the documents produced to date in the litigation have been provided to the Committee.

The 'deliberative process' privilege is used by the IRS and Treasury in our FOIA appeal to shield the agencies from providing documents to answer the basic questions about these proposed regulations that came out of nowhere, with no intervening Congressional action and which would have – and may yet – adversely impact thousands of citizens organizations nationwide.

After more than 160,000 comments were filed opposing the (c)(4) regulations, they were withdrawn, not surprisingly, late on the Thursday of the Memorial Day holiday last year…but the IRS Commissioner publicly stated that the agencies are continuing to rework the proposed regulations and plans to reissue them at some point.

Since we know the pattern of the IRS and Treasury is to spring important matters during holiday weeks and weekends – and since they weren't issued this past Memorial Day, we will be on the lookout on July 2 – as that is the next holiday weekend.

The IRS has evidenced a pattern of stealth and arrogant disregard for the statutory rights of the American people to know what their government is doing to and about them. The IRS develops these very significant regulations, suddenly releases them during holidays, withdraws them on a holiday weekend…. so it should not come as a surprise to anyone that the IRS – and the Dept of Treasury – would thumb their noses at their FOIA obligations which are for the purpose of transparency, a concept that has long been vanquished from the IRS and Treasury.

Most people do not have the time or the money to file appeals in federal court when the IRS or any federal agency simply disregards their FOIA requests. And even when a FOIA appeal is filed, Tea Party Patriots experience in our FOIA appeal has resulted in our receiving reams and reams of worthless pieces of paper from which any actual information has been removed.

I must point out my personal favorite was the April document production from the Department of Treasury – in which all of these documents – ALL of them – are drafts, emails, redrafts, and revisions to ONE press release....the press release regarding the publication of the c4 regulations. The drafts and redrafts are all redacted, but the entire month's document production last month was with regard to that one press release.

The month before that, the document production was of law review articles, the Congressional Record and other public documents regarding the Internal Revenue Code and the history of exempt organizations.

The Department of Justice FOIA page on its website describes FOIA as follows:

The Freedom of Information Act (FOIA) is a law that gives you the right to access information from the federal government. It is often described as the law that keeps citizens in the know about their government

I have learned through painful experiences with and on behalf of my clients that that is high-sounding verbiage but it has long since stopped being a true description of FOIA.

FOIA is almost fifty years old. And FOIA at fifty isn't aging very well. Congress should close the loopholes that allow federal agencies to ignore FOIA requests altogether until and unless they are sued – and should plug the various loopholes that agencies have continued to expand in their never-ending quest to deny to the American people information to which we are entitled and which Congress has emphatically stated that we should have.

I am happy to answer any questions the Members of the Committee may have. Thank you again for allowing me to testify today. ###

TRUE *the* VOTE

May 29, 2015

FALSE RESPONSE TO FOIA REQUEST FROM OSHA

In May 2013, both Engelbrecht Manufacturing[1] and Rep. Ted Poe (Texas)[2] filed FOIA requests with OSHA seeking available records related to the agency's recent site inspection of my company's premises. Letters included requests for "documents related to the instigation and source(s) of any complaint(s) generated or filed" to inspire the event. No such instigating documents were provided, only copies of letters already given to me citing violations.[3]

After I opted to take my timeline of government targeting public, a Madison, Wisconsin-based reporter managed to get a Department of Labor spokesperson to claim on record that my company had been selected as "as part of an OSHA initiative to inspect fabricated metal products manufacturers" in Texas and other southern states.[4] My research team found an ongoing OSHA Emphasis Program for Safety & Health Hazards in the Manufacture of Fabricated Metal Products for all Group 34 manufacturers in Texas[5] however, my company is categorized as a Group 35 entity. An additional FOIA request confirmed that no such Emphasis Program existed for Group 35 companies in Texas at that time.[6]

Respectfully Submitted,

Catherine Engelbrecht
Founder
True the Vote

[1] Engelbrecht Manufacturing, Inc. FOIA letter to OSHA (5/10/2013), https://www.scribd.com/doc/147843126/5-10-13-OSHA-FOIA?secret_password=mfevnjs02ktxnibzxer
[2] U.S. Rep. Ted Poe (Texas) FOIA letter to OSHA (5/3/2013), https://www.scribd.com/doc/147842564/5-3-13-FOIA-OSHA-Engelbrecht-Poe?secret_password=197jvbwfs6ntqs9wqqm5
[3] U.S. Department of Labor OSHA citation file for Engelbrecht Manufacturing, Inc. (10/11/2012), https://www.scribd.com/doc/145524378/Engelbrecht-MFG-OSHA-Citation-10-11-2012?secret_password=1v9evy86nqdzgyipx7s
[4] The Cap Times (WI); Face checking Ron Johnson's 'victim' Catherine Engelbrecht's OSHA claims (6/3/2013), http://host.madison.com/news/local/writers/steven_elbow/fact-checking-ron-johnson-victim-catherine-engelbrecht-s-osha-claims/article_3d237f86-9893-5b7b-be0b-55fb66dc0ce4.html
[5] OSHA Regional Notice Emphasis Program for Safety & Health Hazards in the Manufacture of Fabricated Metal Products (https://www.osha.gov/dep/leps/RegionVI/reg6_fy2014_Fabricated-Metal_REP_FY14.pdf)
[6] FOIA email correspondence with OSHA (7/31/2013), https://www.scribd.com/doc/255238546/OSHA-Regional-Emphasis-FOIA?secret_password=5zH94CLskPRyfqNXzYWl

TRUE *the* VOTE

May 29, 2015

TRUE THE VOTE FOIA REQUESTS DEC 2014 - PRESENT

Chronology:

December 2, 2014: TTV asks TIGTA for metadata on all recovered emails from Lois Lerner; copies of correspondence redacted as required; calendar invites found between IRS and whitehouse.gov domains.

December 23, 2014: TIGTA declines 12/2 request on law enforcement exception grounds.

February 11, 2015: FOIA to BATFE seeking documents between IRS, Congress, other agencies and 3rd parties re TTV.

February 11, 2015: FOIA to FBI seeking documents between IRS, Congress, other agencies and 3rd parties re TTV.

February 11, 2015: FOIA to DOJ-Public Integrity seeking documents between IRS, Congress, other agencies and 3rd parties re TTV.

February 11, 2015: FOIA to DOJ-Civil Rights seeking documents between IRS, Congress, other agencies and 3rd parties re TTV.

February 11, 2015: FOIA to DOL-OSHA seeking documents between IRS, Congress, other agencies and 3rd parties re TTV.

February 18, 2015: DOL-OSHA acknowledges 2/11 request. No further action to date.

March 3, 2015: DOJ-Civil Rights acknowledges 2/11 request yet offers no determination on expedited processing or ETA. No further action to date.

March 5, 2015: FOIA to TIGTA for clarification on the number of responsive emails/pages of documents regarding TTV found in the recovered email archives belonging to Lois Lerner.

March 12, 2015: FBI declares exemption to 2/11 request on the grounds that all responsive documents are being held under investigation.

March 12, 2015: DOJ-Public Integrity acknowledges receipt of 2/11 request, denied expedited processing. No further action to date.

March 11, 2015: FOIA to DOJ-Main seeking documents between IRS defendants; Congress; other agencies; 3rd parties; correspondence with Robert F. Bauer, Valerie Jarrett; known alias email accounts for Eric Holder and Thomas Perez re TTV.

March 23, 2015: DOJ-Main acknowledges 3/11 request, claims "unusual circumstances," and grants expedited processing. No further action to date.

March 27, 2015: TIGTA denies 3/5 request due to untimeliness.

April 7, 2015: FOIA to TIGTA for email recovery software license information; list of employees/contractors tasked with email recovery; purchasing vehicles; physical copies of backup tapes shared with 3rd parties.

April 9, 2015: TIGTA acknowledges 4/7 request.

April 30, 2015: FOIA to TIGTA for copies of all emails within the 6,400 document recovery belonging to Lois Lerner re TTV; Copies of all documents, to include emails, memoranda, retained meeting notes and software licensing information regarding disclosures that said software utilized to decode recovered emails from their respective stored format(s) "stripped" metadata.

May 1, 2015; TIGTA acknowledges 4/30 request.

May 6, 2015: TIGTA requests a 10 business day extension on 4/7 request.

May 20, 2015: TIGTA requests an additional 20 business day extension on 4/7 request.

taylor | english

Steven J. Whitehead
Direct Dial: (678)336-7268
E-mail: pmunger@taylorenglish.com

May 22, 2013

VIA CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

Internal Revenue Service
Disclosure Scanning Operations
Stop 93-A
P.O. Box 621506
Atlanta, GA 30362-3006

RE: Tea Party Patriots, Inc.

Dear Disclosure Officer:

On behalf of Tea Party Patriots, Inc., please produce for our inspection the materials described in the list attached hereto as Exhibit A. This request is being made under the full rights provided by the Freedom of Information Act (as amended), the Privacy Act of 1974 (as amended), 26 U.S.C. § 6103, the regulations underlying those two acts, and all other laws, practices and procedures that permit access to information.

We agree to pay for the costs of copying, but would appreciate an estimate of the copying charges as soon as it is convenient for you.

Finally, please note that consistent with the regulations, I have attached a Power of Attorney and a Verification of Authority and Identity. If you have any questions, please do not hesitate to contact me.

Thank you in advance for your assistance with this matter.

Sincerely,

Steven J. Whitehead
For Taylor English Duma LLP

SJW/js

cc: Paul C. Munger
'Scot Burton

REQUEST FOR FILES
EXHIBIT A

1. For the taxable years ending on December 31, 2010 through December 31, 2012, and through the date of the processing of this request, any and all applications, submissions, correspondence, or other income tax or information returns or elections filed by Tea Party Patriots, Inc., including without limitation, that certain Form 1023 Application filed by Tea Party Patriots, Inc. on or about December 1, 2010, and any supplements, amendments, and additional correspondence related thereto.

2. For the taxable years ending on December 31, 2010 through December 31, 2012, and through the date of the processing of this request, any and all administrative files, notes and other records, whether in written or electronic (computer) form, including, without limitation, any and all reports, opinions, notes, interviews, work papers, protests, memorandums, computations, summaries, discussions, agreements or other documents prepared by any IRS examining agent', revenue agent or other employees, including without limitation, those relating to the above referenced Form 1023, and any supplements, amendments, and additional correspondence related thereto.

3. For the taxable years ending on December 31, 2010 through December 31, 2012, and through the date of the processing of this request, any and all communications related to Tea Party Patriots, Inc., including, but not limited to correspondence, memoranda, interoffice or intra-office communications, e-mail, analysis, statistical data and computer records within your possession, custody, or control, including without limitation, communications, including attachments or enclosures that were sent or may have been sent or transmitted to ProPublica or any other third parties.

4. To the extent not covered by the documents requested in paragraphs 1, 2, and 3 above, any and all documents related to Tea Party Patriots, Inc. that are indentified or referenced in Treasury Inspector General For Tax Administration dated May 14, 2013, reference number 2013-10-053.

5. Any documents that discuss, refer to or relate to the process by which the IRS decides to segregate applications for 501(c)(3) or 501(c)(4) status, including without limitation any documents related to the IRS' be on the lookout ("BOLO") process.

6. Any documents, applications, internal memoranda, policy statements, questionnaires, letters of inquiry to applicants, any lists of organizations or individuals deemed by the IRS or any of its agents or employees as conservatives, persons or organizations teaching the United States Constitution or its principles, persons or organizations advocating for smaller government, or criticizing the Obama administration.

7. In addition to the documents requested above, with respect to any Tea Party or Tea Party Patriot group, local, affiliate or organization, foundation (collectively "organization") or individual acting on behalf of any such organization, all of the following documents:

   A. All applications for 501(c)(3) or 501(c)(4) status and any correspondence, including all emails, from the Internal Revenue Service regarding such applications from any such organization;

   B. Any correspondence from IRS employees Joseph Herr, Ron Bell, Holly Paz, John Shafer, Gary Muthert, and/or Liz Hofacre to any such organization or person acting on behalf of any such organization;

   C. All Request for Taxpayer Advocate Service Assistance documents from any such organization or person acting on behalf of such organization;

   D. Any documents in the IRS's possession, custody or control that advocate or discuss screening, flagging, looking for or alerting for applications from or containing any one or more of the terms "Tea Party," or segregating "Tea Party Patriot," "patriot" "Constitution," "Constitutional," "9/12" "Republican," "Romney" or "conservative."

   E. Any documents in the IRS' possession, custody or control that advocate or discuss screening, flagging, looking for, alerting for or segregating applications on any other basis other than 7-D listed above.

   F. Any documents, notes, records or correspondence between anti-Tea Party National Treasury Employees Union President Colleen Kelley and any IRS employee, including without limitation, the EO Acting Manager(s) of the Technical Unit during tax years 2010 and 2011.

8. The documents requested in paragraphs 1, 2, 3, 4, 5, 6 and 7 above includes without limitation originals, copies, non-identical copies, facsimiles, preliminary, intermediate and final drafts, modifications, changes and amendments, as well as audio or visual reproductions of all statements, conversations, or events and any materials stored in a computer readable form.

9. Any and all documents cited, quoted, referred to or relied upon in the Treasury Inspector General for Tax Administration Report on Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review dated May 14, 2013.

10. Any and all organizational charts, telephone books/listings, office/building directories, or any other documents in the IRS's possession, custody or control that disclose personnel working in Cincinnati Office of the IRS for the Exempt Organization Determinations Unit at any time during the period from December 1, 2010 through the date of the processing of this request.

VERIFICATION OF AUTHORITY AND IDENTITY

Verification of Authority.

I, Jenny Beth Martin, on behalf of Tea Party Patriots, Inc., authorize Taylor English Duma LLP to request and receive any and all documents and information available under the Freedom of Information Act, the Privacy Act of 1974, the regulations underlying these two acts, and any other law, practice or procedure including those documents specified in Exhibit A of the Freedom of Information Act Request.

Dated: 5/21/13

Jenny Beth Martin
Jennifer Martin

State of Georgia
County of Cobb

BEFORE ME, the undersigned authority, on this day personally appeared Jenny Beth Martin, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that she executed the same for purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL, this 21st day of May, 2013.

NOTARY PUBLIC
My commission Expires:

DARLENE DAVIS NOTARY PUBLIC CHEROKEE COUNTY GEORGIA EXPIRES MAY 21, 2017

[SEAL]

Verification of Identity.

I, Deborah A. Ausburn, know Jenny Beth Martin and recognize the signature set forth above as hers. Furthermore, I certify that I understand the penalties provided in 5 U.S.C. Section 552(a)(i)(3) for requesting or obtaining access to records under false pretenses.

Deborah A. Ausburn

Dated: 5/21/13

Form **2848** (Rev. March 2012)
Department of the Treasury
Internal Revenue Service

Power of Attorney and Declaration of Representative

► Type or print. ► See the separate instructions.

OMB No. 1545-0150

For IRS Use Only
Received by:
Name
Telephone
Function
Date / /

Part I Power of Attorney

Caution: *A separate Form 2848 should be completed for each taxpayer. Form 2848 will not be honored for any purpose other than representation before the IRS.*

1 Taxpayer information. Taxpayer must sign and date this form on page 2, line 7.

Taxpayer name and address	Taxpayer Identification number(s)	
Tea Party Patriots, Inc. **1025 Rose Creek Drive** **Woodstock, GA 30189**	**27-0470227**	
	Daytime telephone number **678-336-7263**	Plan number (if applicable)

hereby appoints the following representative(s) as attorney(s)-in-fact:

2 Representative(s) must sign and date this form on page 2, Part II.

Name and address		
Deborah A. Ausburn, Taylor English Duma LLP **1600 Parkwood Circle, Suite 400** **Atlanta, GA 30339**	CAF No. PTIN Telephone No. **678-336-7263** Fax No. **770-434-7376**	
Check if to be sent notices and communications ☐	Check if new: Address ☐	Telephone No. ☐ Fax No. ☐
Name and address		
Scot Burton, Taylor English Duma LLP **1600 Parkwood Circle, Suite 400** **Atlanta, GA 30339**	CAF No. **0308-89043R** PTIN **PO 1528541** Telephone No. **678-336-7223** Fax No. **770-434-7376**	
Check if to be sent notices and communications ☐	Check if new: Address ☐	Telephone No. ☐ Fax No. ☐
Name and address		
Steven J. Whitehead, Taylor English Duma LLP **1600 Parkwood Circle, Suite 400** **Atlanta, GA 30339**	CAF No. PTIN Telephone No. **678-336-7268** Fax No. **770-434-7376**	
	Check if new: Address ☐	Telephone No. ☐ Fax No. ☐

to represent the taxpayer before the Internal Revenue Service for the following matters:

3 Matters

Description of Matter (Income, Employment, Payroll, Excise, Estate, Gift, Whistleblower, Practitioner Discipline, PLR, FOIA, Civil Penalty, etc.) (see instructions for line 3)	Tax Form Number (1040, 941, 720, etc.) (if applicable)	Year(s) or Period(s) (if applicable) (see instructions for line 3)
FOIA		**2010, 2011, 2012, 2013**
Income	1023	**2010, 2011, 2012, 2013**

4 Specific use not recorded on Centralized Authorization File (CAF). If the power of attorney is for a specific use not recorded on CAF, check this box. See the instructions for Line 4. Specific Uses Not Recorded on CAF . . . . . ► ☐

5 Acts authorized. Unless otherwise provided below, the representatives generally are authorized to receive and inspect confidential tax information and to perform any and all acts that I can perform with respect to the tax matters described on line 3, for example, the authority to sign any agreements, consents, or other documents. The representative(s), however, is (are) not authorized to receive or negotiate any amounts paid to the client in connection with this representation (including refunds by either electronic means or paper checks). Additionally, unless the appropriate box(es) below are checked, the representative(s) is (are) not authorized to execute a request for disclosure of tax returns or return information to a third party, substitute another representative or add additional representatives, or sign certain tax returns.

☐ Disclosure to third parties; ☐ Substitute or add representative(s); ☐ Signing a return;

☐ Other acts authorized:

(see instructions for more information)

Exceptions. An unenrolled return preparer cannot sign any document for a taxpayer and may only represent taxpayers in limited situations. An enrolled actuary may only represent taxpayers to the extent provided in section 10.3(d) of Treasury Department Circular No. 230 (Circular 230). An enrolled retirement plan agent may only represent taxpayers to the extent provided in section 10.3(e) of Circular 230. A registered tax return preparer may only represent taxpayers to the extent provided in section 10.3(f) of Circular 230. See the line 5 instructions for restrictions on tax matters partners. In most cases, the student practitioner's (level k) authority is limited (for example, they may only practice under the supervision of another practitioner).

List any specific deletions to the acts otherwise authorized in this power of attorney:

6 **Retention/revocation of prior power(s) of attorney.** The filing of this power of attorney automatically revokes all earlier power(s) of attorney on file with the Internal Revenue Service for the same matters and years or periods covered by this document. If you do not want to revoke a prior power of attorney, check here . . . . . ▶ ☐
YOU MUST ATTACH A COPY OF ANY POWER OF ATTORNEY YOU WANT TO REMAIN IN EFFECT.

7 **Signature of taxpayer.** If a tax matter concerns a year in which a joint return was filed, the husband and wife must each file a separate power of attorney even if the same representative(s) is (are) being appointed. If signed by a corporate officer, partner, guardian, tax matters partner, executor, receiver, administrator, or trustee on behalf of the taxpayer, I certify that I have the authority to execute this form on behalf of the taxpayer.

▶ **IF NOT SIGNED AND DATED, THIS POWER OF ATTORNEY WILL BE RETURNED TO THE TAXPAYER.**

Signature	Date	Title (if applicable)
	5/21/13	President

Jenny Beth Martin

Print Name	PIN Number	Print name of taxpayer from line 1 if other than individual
	☐☐☐☐☐	

Part II Declaration of Representative

Under penalties of perjury, I declare that:

- I am not currently under suspension or disbarment from practice before the Internal Revenue Service;
- I am aware of regulations contained in Circular 230 (31 CFR, Part 10), as amended, concerning practice before the Internal Revenue Service;
- I am authorized to represent the taxpayer identified in Part I for the matter(s) specified there; and
- I am one of the following:

a Attorney—a member in good standing of the bar of the highest court of the jurisdiction shown below.

b Certified Public Accountant—duly qualified to practice as a certified public accountant in the jurisdiction shown below.

c Enrolled Agent—enrolled as an agent under the requirements of Circular 230.

d Officer—a bona fide officer of the taxpayer's organization.

e Full-Time Employee—a full-time employee of the taxpayer.

f Family Member—a member of the taxpayer's immediate family (for example, spouse, parent, child, grandparent, grandchild, step-parent, step-child, brother, or sister).

g Enrolled Actuary—enrolled as an actuary by the Joint Board for the Enrollment of Actuaries under 29 U.S.C. 1242 (the authority to practice before the Internal Revenue Service is limited by section 10.3(d) of Circular 230).

h Unenrolled Return Preparer—Your authority to practice before the Internal Revenue Service is limited. You must have been eligible to sign the return under examination and have signed the return. **See Notice 2011-6 and Special rules for registered tax return preparers and unenrolled return preparers in the instructions.**

i Registered Tax Return Preparer—registered as a tax return preparer under the requirements of section 10.4 of Circular 230. Your authority to practice before the Internal Revenue Service is limited. You must have been eligible to sign the return under examination and have signed the return. **See Notice 2011-6 and Special rules for registered tax return preparers and unenrolled return preparers in the instructions.**

k Student Attorney or CPA—receives permission to practice before the IRS by virtue of his/her status as a law, business, or accounting student working in LITC or STCP under section 10.7(d) of Circular 230. See instructions for Part II for additional information and requirements.

r Enrolled Retirement Plan Agent—enrolled as a retirement plan agent under the requirements of Circular 230 (the authority to practice before the Internal Revenue Service is limited by section 10.3(e)).

▶ **IF THIS DECLARATION OF REPRESENTATIVE IS NOT SIGNED AND DATED, THE POWER OF ATTORNEY WILL BE RETURNED. REPRESENTATIVES MUST SIGN IN THE ORDER LISTED IN LINE 2 ABOVE.** See the instructions for Part II.

Note: For designations d–f, enter your title, position, or relationship to the taxpayer in the "Licensing jurisdiction" column. See the instructions for Part II for more information.

Designation—Insert above letter (a–r)	Licensing jurisdiction (state) or other licensing authority (if applicable)	Bar, license, certification, registration, or enrollment number (if applicable). See instructions for Part II for more information.	Signature	Date
a	GA	028610	Deborah A. Anderson	5-21-13
a	GA	097897		5-17-13
a	GA	755480	Stan J. Whitehead	5-20-13

taylor | english

Steven J. Whitehead
Direct Dial: (678)336-7268
E-mail: pmunger@taylorenglish.com

May 22, 2013

VIA CERTIFIED MAIL,
RETURN RECEIPT REQUESTED

Internal Revenue Service
Disclosure Scanning Operations
Stop 93-A
P.O. Box 621506
Atlanta, GA 30362-3006

RE: Tea Party Patriots Foundation, Inc.

Dear Disclosure Officer:

On behalf of Tea Party Patriots Foundation, Inc., please produce for our inspection the materials described in the list attached hereto as Exhibit A. This request is being made under the full rights provided by the Freedom of Information Act (as amended), the Privacy Act of 1974 (as amended), 26 U.S.C. § 6103, the regulations underlying those two acts, and all other laws, practices and procedures that permit access to information.

We agree to pay for the costs of copying, but would appreciate an estimate of the copying charges as soon as it is convenient for you.

Finally, please note that consistent with the regulations, I have attached a Power of Attorney and a Verification of Authority and Identity. If you have any questions, please do not hesitate to contact me.

Thank you in advance for your assistance with this matter.

Sincerely,

Steven J. Whitehead
For Taylor English Duma LLP

SJW/js

cc: Paul C. Munger
Scot Burton

REQUEST FOR FILES
EXHIBIT A

1. For the taxable years ending on December 31, 2010 through December 31, 2012, and through the date of the processing of this request, any and all applications, submissions, correspondence, or other income tax or information returns or elections filed by Tea Party Patriots Foundation, Inc., including without limitation, that certain Form 1023 Application filed by Tea Party Patriots Foundation, Inc. on or about December 1, 2010, and any supplements, amendments, and additional correspondence related thereto.

2. For the taxable years ending on December 31, 2010 through December 31, 2012, and through the date of the processing of this request, any and all administrative files, notes and other records, whether in written or electronic (computer) form, including, without limitation, any and all reports, opinions, notes, interviews, work papers, protests, memorandums, computations, summaries, discussions, agreements or other documents prepared by any IRS examining agent', revenue agent or other employees, including without limitation, those relating to the above referenced Form 1023, and any supplements, amendments, and additional correspondence related thereto.

3. For the taxable years ending on December 31, 2010 through December 31, 2012, and through the date of the processing of this request, any and all communications related to Tea Party Patriots Foundation, Inc., including, but not limited to correspondence, memoranda, interoffice or intra-office communications, e-mail, analysis, statistical data and computer records within your possession, custody, or control, including without limitation, communications, including attachments or enclosures that were sent or may have been sent or transmitted to ProPublica or any other third parties.

4. To the extent not covered by the documents requested in paragraphs 1, 2, and 3 above, any and all documents related to Tea Party Patriots Foundation, Inc. that are indentified or referenced in Treasury Inspector General For Tax Administration dated May 14, 2013, reference number 2013-10-053.

5. Any documents that discuss, refer to or relate to the process by which the IRS decides to segregate applications for 501(c)(3) or 501(c)(4) status, including without limitation any documents related to the IRS' be on the lookout ("BOLO") process.

6. Any documents, applications, internal memoranda, policy statements, questionnaires, letters of inquiry to applicants, any lists of organizations or individuals deemed by the IRS or any of its agents or employees as conservatives, persons or organizations teaching the United States Constitution or its principles, persons or organizations advocating for smaller government, or criticizing the Obama administration.

7. In addition to the documents requested above, with respect to any Tea Party or Tea Party Patriot group, local, affiliate or organization, foundation (collectively "organization") or individual acting on behalf of any such organization, all of the following documents:

   A. All applications for 501(c)(3) or 501(c)(4) status and any correspondence, including all emails, from the Internal Revenue Service regarding such applications from any such organization;

   B. Any correspondence from IRS employees Joseph Herr, Ron Bell, Holly Paz, John Shafer, Gary Muthert, and/or Liz Hofacre to any such organization or person acting on behalf of any such organization;

   C. All Request for Taxpayer Advocate Service Assistance documents from any such organization or person acting on behalf of such organization;

   D. Any documents in the IRS's possession, custody or control that advocate or discuss screening, flagging, looking for or alerting for applications from or containing any one or more of the terms "Tea Party," or segregating "Tea Party Patriot," "patriot" "Constitution," "Constitutional," "9/12" "Republican," "Romney" or "conservative."

   E. Any documents in the IRS' possession, custody or control that advocate or discuss screening, flagging, looking for, alerting for or segregating applications on any other basis other than 7-D listed above.

   F. Any documents, notes, records or correspondence between anti-Tea Party National Treasury Employees Union President Colleen Kelley and any IRS employee, including without limitation, the EO Acting Manager(s) of the Technical Unit during tax years 2010 and 2011.

8. The documents requested in paragraphs 1, 2, 3, 4, 5, 6 and 7 above includes without limitation originals, copies, non-identical copies, facsimiles, preliminary, intermediate and final drafts, modifications, changes and amendments, as well as audio or visual reproductions of all statements, conversations, or events and any materials stored in a computer readable form.

9. Any and all documents cited, quoted, referred to or relied upon in the Treasury Inspector General for Tax Administration Report on Inappropriate Criteria Were Used to Identify Tax-Exempt Applications for Review dated May 14, 2013.

10. Any and all organizational charts, telephone books/listings, office/building directories, or any other documents in the IRS's possession, custody or control that disclose personnel working in Cincinnati Office of the IRS for the Exempt Organization Determinations Unit at any time during the period from December 1, 2010 through the date of the processing of this request.

VERIFICATION OF AUTHORITY AND IDENTITY

Verification of Authority.

I, Jenny Beth Martin, on behalf of Tea Party Patriots Foundation, Inc., authorize Taylor English Duma LLP to request and receive any and all documents and information available under the Freedom of Information Act, the Privacy Act of 1974, the regulations underlying these two acts, and any other law, practice or procedure including those documents specified in Exhibit A of the Freedom of Information Act Request.

Dated: 5/21/13

Jenny Beth Martin
Jennifer Martin

State of Georgia
County of Cherokee

BEFORE ME, the undersigned authority, on this day personally appeared Jenny Beth Martin, known to me to be the person whose name is subscribed to the foregoing instrument, and acknowledged to me that she executed the same for purposes and consideration therein expressed.

GIVEN UNDER MY HAND AND SEAL, this 21st day of May, 2013.

NOTARY PUBLIC
My commission Expires:

[SEAL]

Verification of Identity.

I, Deborah A. Ausburn, know Jenny Beth Martin and recognize the signature set forth above as hers. Furthermore, I certify that I understand the penalties provided in 5 U.S.C. Section 552(a)(i)(3) for requesting or obtaining access to records under false pretenses.

Deborah A. Ausburn

Dated: 5/21/13

Form **2848**
(Rev. March 2012)
Department of the Treasury
Internal Revenue Service

Power of Attorney and Declaration of Representative

► Type or print. ► See the separate instructions.

OMB No. 1545-0150

For IRS Use Only
Received by:
Name
Telephone
Function
Date / /

Part I Power of Attorney

Caution: *A separate Form 2848 should be completed for each taxpayer. Form 2848 will not be honored for any purpose other than representation before the IRS.*

1 **Taxpayer information.** Taxpayer must sign and date this form on page 2, line 7.

Taxpayer name and address	Taxpayer identification number(s)	
Tea Party Patriots Foundation, Inc. 1025 Rose Creek Drive Woodstock, GA 30189	27-3893819	
	Daytime telephone number 678-336-7263	Plan number (if applicable)

hereby appoints the following representative(s) as attorney(s)-in-fact:

2 **Representative(s)** must sign and date this form on page 2, Part II.

Name and address	CAF No. / PTIN / Telephone No. / Fax No.
Deborah A. Ausburn, Taylor English Duma LLP 1600 Parkwood Circle, Suite 400 Atlanta, GA 30339	CAF No. PTIN Telephone No. 678-336-7263 Fax No. 770-434-7376
Check if to be sent notices and communications ☐	Check if new: Address ☐ Telephone No. ☐ Fax No. ☐
Name and address	CAF No. 0308-89043R
Scot Burton, Taylor English Duma LLP 1600 Parkwood Circle, Suite 400 Atlanta, GA 30339	PTIN PO 1528541 Telephone No. 678-336-7223 Fax No. 770-434-7376
Check if to be sent notices and communications ☐	Check if new: Address ☐ Telephone No. ☐ Fax No. ☐
Name and address	CAF No. PTIN Telephone No. 678-336-7268 Fax No. 770-434-7376
Steven J. Whitehead, Taylor English Duma LLP 1600 Parkwood Circle, Suite 400 Atlanta, GA 30339	
	Check if new: Address ☐ Telephone No. ☐ Fax No. ☐

to represent the taxpayer before the Internal Revenue Service for the following matters:

3 **Matters**

Description of Matter (Income, Employment, Payroll, Excise, Estate, Gift, Whistleblower, Practitioner Discipline, PLR, FOIA, Civil Penalty, etc.) (see instructions for line 3)	Tax Form Number (1040, 941, 720, etc.) (if applicable)	Year(s) or Period(s) (if applicable) (see instructions for line 3)
FOIA		2010, 2011, 2012, 2013
Income	1023	2010, 2011, 2012, 2013

4 **Specific use not recorded on Centralized Authorization File (CAF).** If the power of attorney is for a specific use not recorded on CAF, check this box. See the instructions for Line 4. Specific Uses Not Recorded on CAF . . . . . ► ☐

5 **Acts authorized.** Unless otherwise provided below, the representatives generally are authorized to receive and inspect confidential tax information and to perform any and all acts that I can perform with respect to the tax matters described on line 3, for example, the authority to sign any agreements, consents, or other documents. The representative(s), however, is (are) not authorized to receive or negotiate any amounts paid to the client in connection with this representation (including refunds by either electronic means or paper checks). Additionally, unless the appropriate box(es) below are checked, the representative(s) is (are) not authorized to execute a request for disclosure of tax returns or return information to a third party, substitute another representative or add additional representatives, or sign certain tax returns.

☐ Disclosure to third parties; ☐ Substitute or add representative(s); ☐ Signing a return;

☐ Other acts authorized:

(see instructions for more information)

Exceptions. An unenrolled return preparer cannot sign any document for a taxpayer and may only represent taxpayers in limited situations. An enrolled actuary may only represent taxpayers to the extent provided in section 10.3(d) of Treasury Department Circular No. 230 (Circular 230). An enrolled retirement plan agent may only represent taxpayers to the extent provided in section 10.3(e) of Circular 230. A registered tax return preparer may only represent taxpayers to the extent provided in section 10.3(f) of Circular 230. See the line 5 instructions for restrictions on tax matters partners. In most cases, the student practitioner's (level k) authority is limited (for example, they may only practice under the supervision of another practitioner).

List any specific deletions to the acts otherwise authorized in this power of attorney:

6 **Retention/revocation of prior power(s) of attorney.** The filing of this power of attorney automatically revokes all earlier power(s) of attorney on file with the Internal Revenue Service for the same matters and years or periods covered by this document. If you do not want to revoke a prior power of attorney, check here . . . . . ▶ ☐
YOU MUST ATTACH A COPY OF ANY POWER OF ATTORNEY YOU WANT TO REMAIN IN EFFECT.

7 **Signature of taxpayer.** If a tax matter concerns a year in which a joint return was filed, the husband and wife must each file a separate power of attorney even if the same representative(s) is (are) being appointed. If signed by a corporate officer, partner, guardian, tax matters partner, executor, receiver, administrator, or trustee on behalf of the taxpayer, I certify that I have the authority to execute this form on behalf of the taxpayer.

▶ **IF NOT SIGNED AND DATED, ~~THIS POWER OF~~ ATTORNEY WILL BE RETURNED TO THE TAXPAYER.**

Signature	Date	Title (if applicable)
	5/21/13	President

Jenny Beth Martin

Print Name	PIN Number	Print name of taxpayer from line 1 if other than individual
	☐☐☐☐☐	

Part II Declaration of Representative

Under penalties of perjury, I declare that:

- I am not currently under suspension or disbarment from practice before the Internal Revenue Service;
- I am aware of regulations contained in Circular 230 (31 CFR, Part 10), as amended, concerning practice before the Internal Revenue Service;
- I am authorized to represent the taxpayer identified in Part I for the matter(s) specified there; and
- I am one of the following:

a Attorney—a member in good standing of the bar of the highest court of the jurisdiction shown below.

b Certified Public Accountant—duly qualified to practice as a certified public accountant in the jurisdiction shown below.

c Enrolled Agent—enrolled as an agent under the requirements of Circular 230.

d Officer—a bona fide officer of the taxpayer's organization.

e Full-Time Employee—a full-time employee of the taxpayer.

f Family Member—a member of the taxpayer's immediate family (for example, spouse, parent, child, grandparent, grandchild, step-parent, step-child, brother, or sister).

g Enrolled Actuary—enrolled as an actuary by the Joint Board for the Enrollment of Actuaries under 29 U.S.C. 1242 (the authority to practice before the Internal Revenue Service is limited by section 10.3(d) of Circular 230).

h Unenrolled Return Preparer—Your authority to practice before the Internal Revenue Service is limited. You must have been eligible to sign the return under examination and have signed the return. **See Notice 2011-6 and Special rules for registered tax return preparers and unenrolled return preparers in the instructions.**

i Registered Tax Return Preparer—registered as a tax return preparer under the requirements of section 10.4 of Circular 230. Your authority to practice before the Internal Revenue Service is limited. You must have been eligible to sign the return under examination and have signed the return. **See Notice 2011-6 and Special rules for registered tax return preparers and unenrolled return preparers in the instructions.**

k Student Attorney or CPA—receives permission to practice before the IRS by virtue of his/her status as a law, business, or accounting student working in LITC or STCP under section 10.7(d) of Circular 230. See instructions for Part II for additional information and requirements.

r Enrolled Retirement Plan Agent—enrolled as a retirement plan agent under the requirements of Circular 230 (the authority to practice before the Internal Revenue Service is limited by section 10.3(e)).

▶ **IF THIS DECLARATION OF REPRESENTATIVE IS NOT SIGNED AND DATED, THE POWER OF ATTORNEY WILL BE RETURNED. REPRESENTATIVES MUST SIGN IN THE ORDER LISTED IN LINE 2 ABOVE.** See the instructions for Part II.

Note: For designations d–f, enter your title, position, or relationship to the taxpayer in the "Licensing jurisdiction" column. See the instructions for Part II for more information.

Designation—Insert above letter (a–r)	Licensing jurisdiction (state) or other licensing authority (if applicable)	Bar, license, certification, registration, or enrollment number (if applicable). See instructions for Part II for more information.	Signature	Date
a	GA	028610	Deborah J. Anstine	5-21-13
a	GA	097897		5-17-13
a	GA	755489	Steven J Whitehead	5-20-13

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, DC 20224

PRIVACY, GOVERNMENTAL
LIAISON AND DISCLOSURE

January 23, 2014

Steven Whitehead
Taylor English Duma LLP
1600 Parkwood Circle
Suite 400
Atlanta, GA 30339

Dear Steven Whitehead:

I am responding to your Freedom of Information Act (FOIA) request dated May 22, 2013 that we received on May 23, 2013.

On October 23, 2013, I asked for more time to obtain the records you requested. I am still working on your request and need additional time to collect, process and review any responsive documents. I will contact you by April 25, 2014, if I am still unable to complete your request.

Once again, I apologize for any inconvenience this delay may cause.

If you have any questions please call Tax Law Specialist Denise Higley ID # 1000142331, at (801) 620-7638 or write to: Internal Revenue Service, HQ Disclosure, 2980 Brandywine Road, Stop 211, Chamblee, GA 30341. Please refer to case number F13149-0066.

Sincerely,

Denise Higley
Tax Law Specialist
Headquarters (HQ) Disclosure Office

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, DC 20224

PRIVACY, GOVERNMENTAL
LIAISON AND DISCLOSURE

January 23, 2014

Steven Whitehead
Taylor English Duma LLP
1600 Parkwood Circle
Suite 400
Atlanta, GA 30339

Dear Steven Whitehead:

I am responding to your Freedom of Information Act (FOIA) request dated May 22, 2013 that we received on May 23, 2013.

On October 23, 2013, I asked for more time to obtain the records you requested. I am still working on your request and need additional time to collect, process and review such responsive documents. I will contact you by April 25, 2014, if I am still unable to complete your request.

Once again, I apologize for any inconvenience this delay may cause.

If you have any questions please call Tax Law Specialist Denise Higley ID # 1000142331, at (801) 620-7638 or write to: Internal Revenue Service, HQ Disclosure, 2980 Brandywine Road, Stop 211, Chamblee, GA 30341. Please refer to case number F13149-0069.

Sincerely,

Denise Higley

Denise Higley
Tax Law Specialist
Headquarters (HQ) Disclosure Office

Lerner

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, DC 20224

PRIVACY, GOVERNMENTAL
LIAISON AND DISCLOSURE

February 3, 2015

Scot Burton
Taylor English Duma LLP
1600 Parkwood Circle
Suite 400
Atlanta, GA 30339

Dear Scot Burton:

I am responding to your Freedom of Information Act (FOIA) request dated June 6, 2013 that we received on June 10, 2013.

On October 31, 2014, I asked for more time to obtain the records you requested. I am still working on your request and need additional time to collect, process, and review any responsive records. I will contact you by May 7, 2015, if I am still unable to complete your request.

Once again, I apologize for any inconvenience this delay may cause.

If you have any questions please call Tax Law Specialist Denise Higley ID # 1000142331, at (801) 620-7638 or write to: Internal Revenue Service, HQ Disclosure, PO Box 621506, Stop 211, Atlanta, GA 30362. Please refer to case number F13161-0103.

Sincerely,

Denise Higley

Denise Higley
Tax Law Specialist
Headquarters (HQ) Disclosure Office

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, DC 20224

PRIVACY, GOVERNMENTAL
LIAISON AND DISCLOSURE

January 26, 2015

Steven Whitehead
Taylor English Duma LLP
1600 Parkwood Circle
Suite 400
Atlanta, GA 30339

Dear Steven Whitehead:

I am responding to your Freedom of Information Act (FOIA) request dated May 22, 2013 that we received on May 23, 2013.

On October 22, 2014, I asked for more time to obtain the records you requested. I am still working on your request and need additional time to collect, process and review any responsive documents. I will contact you by April 30, 2015, if I am still unable to complete your request.

Once again, I apologize for any inconvenience this delay may cause.

If you have any questions please call Tax Law Specialist Denise Higley ID # 1000142331, at (801) 620-7638 or write to: Internal Revenue Service, HQ Disclosure, PO Box 621506, Stop 211, Atlanta, GA 30362. Please refer to case number F13149-0066.

Sincerely,

Denise Higley

Denise Higley
Tax Law Specialist
Headquarters (HQ) Disclosure Office

PRIVACY, GOVERNMENTAL LIAISON AND DISCLOSURE

DEPARTMENT OF THE TREASURY
INTERNAL REVENUE SERVICE
WASHINGTON, DC 20224

April 29, 2015

Steven Whitehead
Taylor English Duma LLP
1600 Parkwood Circle
Suite 400
Atlanta, GA 30339

Dear Steven Whitehead:

I am responding to your Freedom of Information Act (FOIA) request dated May 22, 2013 that we received on May 23, 2013.

On January 26, 2015, I asked for more time to obtain the records you requested. I am still working on your request and need additional time to process and review any responsive documents. I will contact you by July 31, 2015, if I am still unable to complete your request.

Once again, I apologize for any inconvenience this delay may cause.

If you have any questions please call Tax Law Specialist Denise Higley ID # 1000142331, at (801) 620-7638 or write to: Internal Revenue Service, HQ Disclosure, PO Box 621506, Stop 211, Atlanta, GA 30362. Please refer to case number F13149-0066.

Sincerely,

Denise Higley

Denise Higley
Tax Law Specialist
Headquarters (HQ) Disclosure Office

Chairman CHAFFETZ. Thank you.

Mr. Jones, you're now recognized for 5 minutes.

STATEMENT OF NATE JONES

Mr. JONES. Mr. Chairman, distinguished members of the committee, thank you very much for this opportunity.

At the National Security Archive, we have filed more than 50,000 FOIA requests, conducted 14 government-wide FOIA audits that have displayed the inner workings, or nonworkings, of over 250 FOIA shops. Our White House email lawsuits against every President from Reagan to Obama have saved hundreds of millions of messages and set a standard for digital preservation that the rest of government has not yet achieved.

The key point I'd like to convey to you today is that the tremendous promise of the Freedom of Information Act, a tool that citizens can use to efficiently and effectively gain access to records produced by the government, has not been fulfilled. Unlike some in the previous panels or others, I wouldn't say it's broken. One need only look to the National Security Archive's Web site and see the millions of pages of documents we've got declassified that have rewritten history and helped write policy, or look at Jason Leopold's scoops. But the act has certainly not fulfilled its promise.

So today I'd like to present three of the largest barriers to FOIA requesters and how I believe the committee's legislation—thank you for already passing—will already help these barriers.

But before I begin on barriers, I have to note that there actually are dozens of exemplary FOIA agencies and hundreds of star FOIA professionals who really do have transparency in their bones and placed the requirements of the FOIA above bureaucratic concerns and fear of government—and fear of embarrassment. Excuse me. To these agencies and FOIA specialists, thank you. I guess, in this case, the reward for competence is inconspicuousness.

But back to barriers. The first negative interaction a FOIA requester experiences with an agency is over fees, because many agencies have adopted a strategy of using the specter of high FOIA fees to deter people from making legitimate requests.

This practice is fiscally unnecessary—FOIA fees cover just less than 1 percent of the cost of implementing FOIA—and it's also often legal. The 2007 FOIA amendments make it very clear that anytime an agency misses its FOIA deadline it can't charge most FOIA fees. But many agencies, with the very troubling support of Department of Justice, have improperly skirted the crystal-clear intent of these provisions so they can use sticker shock to head off requests without processing them.

Fortunately, both FOIA bills include language which should prohibit these high jinks once and for all.

The second barrier: an improper withholding of information. This Sunshine Week, White House spokesperson Josh Earnest repeated a Department of Justice talking point touting a 91-percent FOIA release rate, but this figure is extremely misleading. DOJ numbers ignore 9 of the 11 reasons FOIA requests are denied. The actual FOIA release rate is just over 50 percent.

And many of those partial releases—you see them right here. Reams and reams of wholly blacked-out pages are classified as partial and go into the DOJ's figure as such.

More startling, the AP's recent finding that, when challenged, government agencies admit they wrongly withhold information almost a third of the time.

As this committee well knows, the most oft-abused exemption is Exemption 5, the go-to exemption that agencies use to withhold embarrassing, incriminating, or even burdensome-to-process documents. Happy to talk more about that later. But I do laud both of the (b)(5) fixes in the bill. They are very good.

The third barrier: the inability for agencies to leverage technology to improve FOIA and recordkeeping procedures. Because of this, your bill's language instructing agencies to make information public to the greatest extent possible through modern technology is very welcome.

FOIA shops are far behind the private sector utilizing e-discovery and automated front-end redaction tools to process requests, and they are also far behind making their releases digitally available to the world. Just 40 percent of the agencies follow the intent of the 1996 E–FOIA amendments by routinely posting documents online as they're released.

Now, the good news is there are some good examples. The FOIAonline agencies post documents as a matter of practice. And the Department of State, for all of its other FOIA and recordkeeping problems, does have the best online FOIA reading room that posts all of its releases online.

Email. Today, right now, Federal agencies are still not required to digitally preserve their emails. The deadline is not until December 2016. Until then, Federal employees will continue to be allowed to select themselves which emails they believe to be Federal records, print them out, and file them in a box. As long as this practice is allowed to continue, it's unrealistic to expect that any Federal agency will properly search emails in response to FOIAs or that their email preservation rate will be any better than the State Department's .006 percent department-wide.

The final overarching point I'd like to make is that the root cause of these problems that you've heard today is a lack of an independent, robust organization that monitors and enforces FOIA compliance throughout the Federal Government, a FOIA beat cop.

The current process of encouraging agency compliance—that's what the DOJ does—at the same time it defends agency withholdings and abuses and reviewing agency compliance—that's what OGIS does—after it gets OMB approval to review are clearly not establishing agency compliance with the FOIA. My fear is that, without robust enforcement, your excellent bill won't fix the root cause of the problem.

Thank you very much for this hearing. Thank you for passing the excellent bill out of committee.

[prepared statement of Mr. Jones follows:]

Statement of Nate Jones

Director of the Freedom of Information Act Project of the National Security Archive,
George Washington University

http://www.nsarchive.org

Before the United States House of Representatives Committee on Oversight and Government Reform on "Ensuring Transparency through the Freedom of Information Act"

Rayburn House Office Building, Room 2154, Washington D.C.

Tuesday, June 2, 2015

Mr. Chairman, distinguished members of the Committee: thank you very much for your invitation to testify today about ensuring transparency through the Freedom of Information Act. My name is Nate Jones and I am the Director of the Freedom of Information Act Project of the independent, non-governmental National Security Archive, based at the George Washington University.

At the National Security Archive, we have filed more than 50,000 Freedom of Information Act requests in our efforts to challenge government secrecy, inform the public debate, ensure government accountability, and defend the right to know. We have conducted fourteen government-wide Freedom of Information Act audits that have displayed the inner-workings (or non-workings) of over 250 government agency and component FOIA shops. Our White House e-mail lawsuits against every President from Reagan to Obama have saved hundreds of millions of messages, and set a standard for digital preservation that the rest of the government has not yet achieved –as we know from the State Department. The Archive has won prizes and recognition including the James Madison Award for championing the public's right to government information, an Emmy Award for news and documentary research, and the George Polk Journalism Award for "piercing self-serving veils of government secrecy."

The key point that I would like to convey to you in my testimony is that the tremendous promise of the Freedom of Information Act –a tool that citizens can use to effectively and efficiently gain access to records produced by their government– has not been fulfilled. As any FOIA requester will likely tell you, using the FOIA to gain access to government records is far too frequently a huge challenge –often because government agencies want it to be one.

I would like to present to you today three of the largest barriers for Freedom of Information Act requesters; what I believe to be the overarching reason for these barriers; and how I believe

the Committee can help to reduce them. The first barrier is agencies' problematic (and fiscally unnecessary) use of FOIA fees to deter requesters from requesting government information. The second barrier is the increasing trend of agencies using FOIA exemptions, often Exemption Five, to censor embarrassing or inconvenient information that should be released. The third barrier is the inability of the federal government to harness technology to process FOIA requests and post FOIA releases online so that the public can have access to these released records more quickly. And finally, I'd like to point to the overarching problem that there is no real oversight of federal FOIA programs; no FOIA beat cop to ensure that agencies are effectively processing requests, not improperly withholding information, adhering to the spirit of the Freedom of Information Act, and effectively and efficiently releasing information to their public.

But before I begin on barriers, I must note that there are dozens of exemplary agencies that have up-to-date FOIA regulations, complete most or all requests within the required time limit, waive FOIA fees as a matter of policy, consistently release as much information as is truly possible, and post releases online. Likewise, there are hundreds of star FOIA professionals that I have met during my service with the American Society of Access Professionals who really do have "transparency in their bones," and place the requirements of the Freedom of Information Act above bureaucratic concerns and fear of embarrassment. To these agencies and FOIA specialists, thank you! I guess, in this case, the reward for competence is inconspicuousness.

Frequently, the first negative interaction a FOIA requester experiences with an agency is over fees; often because many agencies have adopted a strategy of using the specter of high FOIA fees to deter people from making requests. The Federal FOIA Advisory Committee, made up of government and non-government members including myself, has identified fees as the most frequently contentious issue in the FOIA process for those both inside and outside government. Miriam Nisbet, the former director of the FOIA Ombuds office, recently confirmed that some agencies use fees to dissuade people from filing FOIA requests.

The need for exorbitant fees to pay for FOIA requests is unnecessary from a fiscal perspective. According to the government's own most recent figures (FY 2014), the 100 agencies covered by FOIA processed 714,231 requests at a cost of $441 million dollars –well worth it considering the value of a government accessible to its citizens. Total fees paid by FOIA requesters were just $4.2 million, *less than one percent* of the cost of implementing the Act.

The use of fees to dissuade people from making requests becomes even more questionable when one understands that the money collected from fees goes to the U.S. Treasury's General Fund, not to defray actual agency FOIA costs; and, that as the statute is written, educational, scientific, and media FOIA requesters are not required to pay most FOIA fees, only everyday requesters are.

Many high fee estimates are also probably illegal. The 2007 FOIA amendments make it very clear that any time an agency misses its twenty-day statutory deadline to process a request, the agency is only allowed to charge copying fees to non-commercial requesters. Agencies, with the support of the Department of Justice, have improperly skirted the intent of these provisions so often that both FOIA bills currently pending in Congress include language (the Senate's is ironclad) which should prohibit these fee hijinks, once and for all.

The second major barrier I would like to address is the improper withholding of information requested under FOIA. This Sunshine Week, White House spokesperson Josh Ernest repeated a Department of Justice figure touting a 91% release rate under FOIA. But this figure is extremely misleading. DOJ numbers ignore nine of the eleven reasons FOIA requests are denied, including improper no records responses, administrative closures, and "fee related reasons." If you include all the reasons FOIAs were denied to get your data, the actual release rate is just over 50 percent –and many of those "partial releases" contain swaths of completely redacted pages.

More startling is the *Associated Press'* recent finding that almost a third of all FOIA denials that are appealed lead to the release of more information. That is: when challenged, government agencies admit they wrongly withhold information from requesters almost a third of the time. The DOJ reports that in the last fiscal year, just 12,754 requests (3 percent of denials) were appealed. Extrapolating, this means that it is possible a staggering 71,024 or more requests were closed by agencies that withheld too much, or all of the information that requesters sought.

As this committee well knows, the most oft-abused FOIA exemption is Exemption Five, which allows agencies to choose to withhold any "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" as well as an agency-claimed "draft." This exemption, earlier characterized by John Podesta the "withhold it because you want to" exemption, is the go-to tool that agencies use to withhold embarrassing, incriminating, or –sometimes even– burdensome-to-process documents. In an emblematic (and ironic) misuse of Exemption Five, the Federal Election

Commission once used it to censor its own guidance on when to use Exemption Five –even though it had already been posted on the FEC's website.

Certainly, not all evocations of Exemption Five are improper. There are of course occasions where Exemption Five can and should be invoked to protect attorney client privilege and candid advice between officials. But its ever-rising use shows that it is being abused far more than it is being properly used. Just a week ago *The Washington Post's* Al Kamen published an email about a potential traffic delay sent within the Department of Justice (the agency required to "encourage compliance" of the FOIA). This innocuous email was marked "ATTORNEY-CLIENT PRIVILEGED COMMUNICATION", "ATTORNEY WORK PRODUCT", and "SENSITIVE/PRIVILEGED COMMUNICATION". The implication is clear: emails are marked this way so they can be "knee-jerk" denied using Exemption Five in response to FOIA requests.

Infuriatingly, Department of State officials are continuing their painstaking review of former Secretary of State Hillary Clinton's emails to withhold information under Exemption Five (a discretionary exemption) even though she herself stated that she wants them released for the public to see. Just days ago, the Department of State improperly used Exemption Five to attempt to censor a line where the former Secretary noted that "using private security experts to arm the [Libyan] opposition should be considered." We must remain vigilant as their review continues that our access to our history of knowledge of our government's operations is not "B5'ed away."

Exemption Five's power to deny records can be even stronger than the security classification system. Recently the Central Intelligence Agency cited Exemption Five's deliberative process, not national security risks, to withhold the "Panetta Review," an internal account of its torture program, from *Vice* reporter Jason Leopold. The reason: a declassification review would have in-all-likelihood led to the release of portions of the report; the broad latitude of Exemption Five allowed the CIA to withhold it all.

The Central Intelligence Agency may have learned of "the power of Exemption Five" during its declassification battles with the National Security Archive. The Archive has had much success convincing declassification reviewers and judges that many historic CIA documents no longer merit continued classification; we have had less success when the CIA uses Exemption Five. The Agency continues to hide the final volume of its history of the 1961 Bay of Pigs Invasion not by claiming that it contains classified national security secrets, but by claiming it is a "draft," that

its release could "confuse the public" and that, therefore, this document should remain hidden indefinitely.

Last summer, in a two-to-one decision, the DC Court of Appeals agreed with the agency. It wrote: "According to the FOIA requester, the CIA's interest in protecting any contentious or sensitive issues discussed in the draft of Volume V has diminished over time. But unlike some statutes, such as certain provisions of the Presidential Records Act, see 44 U.S.C. § 2204(a), Exemption 5 of FOIA does not contain a time limit. We must adhere to the text of FOIA and cannot judicially invent a new time limit for Exemption 5."

Fortunately, your Committee has taken up the Court's challenge. The bipartisan FOIA Oversight and Implementation Act of 2015, HR 653, that you unanimously passed out of Committee this February contains two important provisions that will go a very long way toward curtailing agency Exemption Five abuse. It amends the law so that agencies cannot use Exemption Five to withhold information that is older than 25 years. (The Presidential Records Act forbids the use of Exemption Five for all documents beginning twelve years after the president leaves office. Certainly, agency documents should not be withheld when presidential documents cannot be.) Second, the bill's language stating that "records that embody the working law, effective policy, or the final decision of the agency" cannot be withheld under Exemption Five is highly lauded by the National Security Archive –and no doubt the 50 other organizations on the record supporting the most robust strengthening of the Freedom of Information Act as possible.

One warning though: as Congress closes some loopholes used to withhold information from the public, agencies will look for new ones. The current 2016 National Defense Authorization Act includes a dangerous provision for the vast expansion, government-wide, of the amount of information that can be withheld under FOIA's Exemption Two, which covers internal agency practices. (The Supreme Court wisely curtailed this expansive exemption in its 2011 *Milner v. Department of Navy* decision).

Likewise, the National Security Archive has heard that the State Department is or will soon ask Congress for a new "Statutory" Exemption Three provision to exclude foreign government information. This, to quote my Director Tom Blanton, "Is a terrible idea." As he correctly explained to the Senate Judiciary Committee: "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...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."

Thanks to the members of this Committee and their staffs for presenting legislation that will roll back the most oft-abused FOIA exemptions and for continuing to monitor, flag, and push back against potential new statutory exemptions which could undermine the FOIA.

The third barrier to access to information that I would like to highlight is the inability of agencies to harness technology to improve the records management and FOIA processes, a problem that members of the Committee have long sought to improve.

Perhaps a silver lining to the State Department's email fiasco is that the public now has an inkling as to just how anachronistic record keeping systems are at the Department of State, and indeed across the federal government. When agencies, in 2015, still practice a "print and physically file" system to preserve email records, we know there is something direly wrong with the federal IT system.

According to a Department of State Office of Inspector General report, in 2011 just .006 percent of emails throughout the entire Department were saved. The sad irony is that although former Secretary Clinton was likely in breach of record keeping laws and best practices, her personal email system preserved emails better than that the State Department's system. Of course, neither Clinton's emails nor the billions of deleted Department of State emails were searched and processed in response to FOIA requests. Because the Department of State relied primarily upon a "print and file" system to save digital records, a generation of our records has been lost.

The Department of State has borne the brunt of criticism for its willful deletion of federal record emails, but the problem is government-wide. 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 –seven years ago– 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. Despite ruling

after ruling requiring White House emails to be saved, the Office of Management and Budget and the National Archives and Records Administration did not act until 2012 to require agencies to preserve their email. Even then, agencies received a four-year grace period to start doing what the White House has done since 1994.

Today, right now, federal agencies are still not required to digitally preserve their emails. The deadline, set by NARA, is December 31, 2016 for all federal agency e-mail records to be managed, preserved, and stored electronically. Three years later, in 2019, agencies are supposed to be managing all their records electronically. Until then, federal employees will continue to be allowed to select themselves which emails they believe to be federal records, print them out, and file them in a box. As long as this practice continues, it is unrealistic to expect that more than .006 percent of all emails across the federal government will be preserved or searched in response to FOIA requests.

Additionally, the majority of agencies are not harnessing technology to improve FOIA processing. This year, the Department of Justice pointed to an increasing number of FOIA requests (probably a good thing more citizens are interested in obtaining federal documents!) and the "increasing complexity" of requests received as reasons for the government's growing backlogs and oft-slow response times. I would add one more reason: the government's slow adoption of technology to more quickly and efficiently process requests. It is my hope this Committee can prod government FOIA shops to follow the private sector's lead (which also deals with larger and larger amounts of "big data") and utilize e-discovery tools, automated tools to redact privacy and other information which must be withheld, and continue to move FOIA processing from a paper based FOIA process to a digital one.

The National Security Archive is also extremely concerned that twenty years after the passage of the E-FOIA Act, only 40 percent of federal agencies are following the intent of the law. Just 67 out of over 165 agencies covered by the Archive's latest FOIA Audit --coauthored with my esteemed colleague Lauren Harper-- are routinely posting documents released through FOIA and reducing the processing burden on the agencies and on the public.

Long FOIA delays and growing FOIA backlogs make proactive disclosure even more important. 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; older requests slowing down our new ones, especially if they apply to multiple records systems. The Department of State argues that since it is now processing former Secretary Clinton's emails, all

other FOIA requesters need to take a number, have a seat, and wait (or sue). 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. 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 some assertions that it is just too difficult to post released FOIA records online. The excuse most frequently given against online posting is about complying with disability 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 today are already required to be 508-compliant, and widely-available tools like Adobe Acrobat automatically handle the task for older records with a few clicks.

The Department of State, notwithstanding its problems of FOIA and records management, leads all federal agencies in its approach to posting FOIA releases online. 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 were classified), they should be posted onto State's online reading room, which will provide a real public service for those reading her e-mails.

In light of these problems, I strongly agree with the language in your bill that requires that agencies shall "make information public to the greatest extent possible through modern technology." They have a long way to go, but it is high time agencies began harnessing the power of modern tech.

The final, overarching point that I would like to make for the Committee today is that the root cause for the FOIA problems and the underlying reason for much of the public unhappiness with the Freedom of Information Act that you've heard today is the lack of an independent,

robust, organization that monitors, and forces FOIA compliance throughout the federal government –a FOIA beat cop, if you will.

The Office of Government Information Service, created by the FOIA reforms of 2007, may have been envisioned by Congress to play this role, but in my opinion, it has not yet. It certainly doesn't help that it has not had a director for more than six months, notwithstanding the efforts of Acting Director Nikki Gramian.

This February, OGIS's past director Miriam Nesbit testified to your Subcommittee on Government Operations: "If you want recommendations, reports, and testimony that have not had to be reviewed, changed, and approved by the very agencies that might be affected, then you should change the law." She was right. As of now, OGIS is not independent and thus cannot serve its Ombuds role. Fortunately, your pending legislation will go a long way to fixing this.

Unfortunately, at least from my perspective, Ms. Nesbit also testified that while she believed OGIS should be independent, she did not believe OGIS "wants to or will be the FOIA police." Nevertheless, when it was created in 2007, Congress gave OGIS the power to "issue advisory opinions if mediation has not resolved [a FOIA] dispute." OGIS has completed over 3,000 FIOA mediations, but unfortunately in my view, has yet to issue a single advisory opinion.

I believe some type of "FOIA police" is needed to fix and prevent many of the incidences of unfair fee levying, decades-long FOIA waits, and improper withholdings that your Committee has heard about today. OGIS, to me, could be potentially well-suited to serve this role, but is not currently and unfortunately does not aspire to.

The Department of Justice Office of Information Policy also is not a FOIA beat cop that requesters can turn to. Its mission is to "to provide legal and policy advice to all agencies on administration of the FOIA" and also to "encourage[] agency compliance with the law and for overseeing agency implementation of it." (OGIS is charged to "review" compliance.) Having worked with the professionals DOJ OIP for over five years, my sense is that the office does a superb job helping agencies with legal and policy advice, but has done far too little "encouraging" agency compliance with the law. When members of the Federal FOIA Advisory Committee met with the DOJ OIP last year, the office confirmed that the extent of the compliance was ensuring that agencies properly submitted their annual reports.

So the problem remains. Congress can and will pass good legislation with good ideas such as requiring agencies to regularly post FOIA releases online (1996) and prohibiting agencies from charging many FOIA fees if they miss their deadline (2007), but without a FOIA enforcer –from OGIS, DOJ, the White House, or some other entity– some agencies will continue to flout the law without consequence.

According to reporting from the *Wall Street Journal,* this is precisely what happened at the Department of State. A high-level political appointee intervened and stopped the release of documents State Department FOIA professionals had determined could be viewed by the public without harm. A FOIA specialist was called into high level policy meetings to advise on how to hide documents from disclosure (including by marking them "deliberative process"). Other problems at State likely continue today, the *Journal* reports, "that there is no pressure on bureaus or embassies to respond to document searches in a timely fashion; that FOIA specialists hold little stature; and that there are no consequences for people who don't produce documents requested." The most troubling aspect is that these issues are not isolated to one department. Due to the absence of FOIA beat cops, this behavior –which your Committee has now seen many examples of– spans the federal government.

The current processes of "encouraging" and "reviewing" agency compliance with FOIA are not actually *establishing* agency compliance with FOIA. My fear is that without a robust enforcement entity, the Freedom of Information Act reforms included in HR 653 will not fundamentally fix the root cause of the problems your Committee has heard today.

Esteemed members of this committee: thank you again for holding this hearing today and for your support of the Freedom of Information Act. Thank you for your unanimous passage of HR 653, the FOIA Oversight and Implementation Act of 2015. Your dedication to this issue makes me hopeful that this strong FOIA reform will be enacted this session and that more documents will be released to more people, more quickly.

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.

Chairman CHAFFETZ. Thank you, Mr. Jones.

Ms. Garcia, you're now recognized for 5 minutes.

STATEMENT OF LISETTE GARCIA

Ms. GARCIA. Mr. Chairman, thank you so much for having me. Actually, we're coming up on our second anniversary, and you're welcome to join us at our rooftop party.

In the meantime, my written remarks and planned remarks have already been submitted for the record, so I thought I might take the time allotted to me to address some other issues already raised by the committee, if that's possible.

Mr. Chairman, you did an excellent job of laying out the land of FOIA. There are a lot of—an article went out last night that's going viral right now inviting 25-year-olds to come and watch how their government works. They are learning for the first time that they're entitled to public records under the law. It's, like, crazy. So I definitely appreciate you laying out the, sort of, parameters of the law.

One thing I would clarify is that, of the nine exemptions that are listed in the FOIA statute, only six of them are discretionary. Three of them are exclusions. Three are—you know, according to the law, you're not allowed to have these records. But six of them are discretionary, which means that agencies are not compelled to conceal those records. They actually have some judgment and can say, you know what, maybe we'd like to keep these back, but, honestly, it wouldn't hurt; let's give them out. Right now, the agencies are treating them as de facto exclusion, so all nine exemptions are now being withheld.

To Mr. Cummings' point, the ranking member, I'm afraid I would dispute the records, the numbers that are self-reported by the agencies. The full-time employee rate, although it's gone down, it's been far surpassed by a spike in contractor workers replacing government employees. While they shouldn't, according to the Federal Acquisition Regulation, be performing inherently governmental functions, in many cases they are. I've actually requested the records, and even something as small as CBP is paying a quarter-million dollars per staffer outside of the government employment environment.

So another thing that's actually causing a spike in spending—in requests—Mr. Cummings raised the issue of requests spiking under the Obama administration—it's actually—I think amnesty is responsible for the spike in requests. There is a league of immigration advocates who have encouraged all individuals who would like to be approved for amnesty to file a FOIA request seeking their record, their file, their immigration file, and this is actually singularly responsible for that spike in requests.

To go on to whether agencies are punishing FOIA officers, I actually think it's the reverse, sir. It's actually the case that the FOIA chief that was in charge at the IRS over the time of Lois Lerner delaying release and not knowing where the records were, in fact, that person has been promoted and is now in charge of withholding Obamacare records over at CMS. And so they're actually rewarded for keeping the government secrets rather than punished for leaving them out.

And those are pretty much the issues that I wanted to raise.

In my written remarks, I raise the issue of fees also, just like Mr. Jones. The idea that the regular American citizen cannot file a FOIA request, that you have to be somebody as big as the AP or Bloomberg, it's just unacceptable. OGIS right now doesn't—it's where records requests actually go to die.

So, in a sense, I'm like the citizens' OGIS. I don't have a big, dramatic story to tell you that I don't get the records, because I actually do get the records without going to court. And one example is what I got for ProEnglish, where they were able to get the records of Obamacare being promoted in languages other than English.

But getting back to OGIS, they've actually been tasked—their enabling authorization legislation tasks them with providing agencies with procedural guidelines so that they can actually improve their FOIA requests. Four years later, the Government Accountability Office did a report and found that, in fact, OGIS wasn't doing that at all. And so, if it hasn't done what it was initially established for, I'm not sure why we should trust it for more responsibilities.

And, lastly, with regard to the continued treatment of DOJ as the "FOIA cop" I think I heard earlier today, in fact, as was pointed out by Mr. Silver, DOJ is actually the litigator that fights to the death all these FOIA requests. And so I think it's quite a conflict of interest for them to position themselves as the leader in the FOIA world.

And, in point of fact, the courts have told them they are not. There is no single agency responsible for administration of the FOIA under the law, according to the Administrative Procedure Act. And so DOJ has positioned itself that way by hosting trainings where they teach FOIA officers across the Federal agencies how to avoid fulfillment of FOIA requests. So it's DOJ that's positioned themselves that way. We continue to give them that credit because they bamboozle media, unfortunately, into believing that they are the FOIA chiefs, and it just sort of becomes a circular process.

So that those are my remarks. I'm happy to answer any questions. Thanks.

[Prepared statement of Ms. Garcia follows:]

Lisette Garcia, J.D.
www.foiaresource.center
Submitted May 29, 2015

Thank you, Chairman Chaffetz, Ranking Member Cummings, for allowing me to share with you some of my experiences helping lawmakers, journalists, and nonprofit organizations quickly and cost-effectively obtain the executive agency records they most need. It is a privilege to lend my expertise to this committee's important work ensuring the administration's compliance with our nation's laws.

And that's really why we are here: because even as technology has put every record just a click away, the Obama administration has grown increasingly defiant of the Freedom of Information Act (FOIA). Indeed, this administration's unparalleled intransigence is what prompted me to found the FOIA Resource Center, a no-frills consulting firm, in July 2013. But for agencies' chronic failure to release records in accordance with scheduled rates, my firm based here in DC -- but serving the world at large via social media -- would not exist.

Unlike the federal judiciary, FOIA Resource Center does not define substantially prevailing in a FOIA matter as forcing release of public records by compulsion of the court following a two-year wait and cost-prohibitive lawsuit. Rather, FOIA Resource Center defines success as bringing agencies into prompt compliance with all applicable disclosure laws without having to go to court.

Many areas of FOIA can and have been reviewed by others as benefiting from reform. Today I bring you evidence of a more nuanced issue not previously addressed by any formal body, but which poses the single greatest barrier between the American people and their records. The issue I raise is one of fees -- specifically: how FOIA fees are imposed, why they are so high, what constitutional implications the current protocol raises, and how to get fees back under control. While FOIA Resource Center's supporting examples may not appear as extreme as others you have been asked to consider, these are all the more telling of a systemic problem for the amount of defense they demonstrate the agencies earnestly leveling at such modest and narrowly-tailored requests. Fortunately, the tools for reversing this trend are already at the Committee's disposal, without the need for further legislation.

I. Background

When FOIA was launched from its nest in section three of the Administrative Procedure Act, agencies were granted authority to recover the cost of searching for records and reviewing them for redaction. The agencies could come up with their own fee regulations so long as the rates charged did not exceed caps set by the Office of Management & Budget (OMB). The agencies were also barred from imposing fees totaling less than they would cost to collect. Exemptions from full or total payment were also made for news outlets and academics. While new media has turned the definition of journalism -- and, with it, this exempt class on its head -- that exemption is not our primary focus here today.

II. Ten-Day Administrative Closure Device

Instead, I'd like to draw your attention to another novel aspect of FOIA fee application -- namely, the ten-day administrative closure procedure. It was a practice I first encountered several years ago in pursuing a request with the Federal Reserve Board of Governors for proof of salary

Lisette Garcia, J.D.
www.foiaresource.center
Submitted May 29, 2015

packages exceeding $225,000. The 10-day closure procedure has since gained widespread acceptance among agencies looking to chop mounting backlogs by any means necessary.

A. 10-day Closure Protocols
Prior to conducting any search whatsoever, an agency issues a general guesstimate of what locating and redacting responsive records would cost -- even if none were ultimately released or even found. The guesstimate letter warns that, without payment or a promise to pay the quoted fee within 10 days of the date of the letter (usually sent surface post), the request will be "administratively closed." The guesstimate letter further warns that fees owed by the requester may prove much higher upon conclusion of an actual search. It emphasizes that the fees charged will be due and owing regardless of whether the agency ultimately finds responsive records, or chooses not to release any responsive record it happens to find. (Failure to pay a final bill results in refusal to accept any future FOIA requests.)

While the guesstimate letter stops short of seeking collateral to support a pledge, I need not tell you that the prospect of owing the U.S. government $2,000 or more for records an agency may ultimately choose to withhold is not a reasonable risk for a midsize news outlet or single-issue nonprofit to incur in conducting an investigation into any topic from the million-dollar art collection under lock and key at the Fed to the distribution of bullet-proof vests along the U.S.-Mexico border.

B. Bifurcating Payment from Fee Waiver
Now, if a fee waiver petition accompanied the substantive request, the guesstimate letter typically also says one of two more things:

> your request for a fee waiver is being considered (while going on to enumerate factors that demand further evidence in order to be decided); or, your request for a fee waiver has been denied in whole or in part, a decision you may appeal within -- depending on the agency -- anywhere from 10 to 65 days.

As you can see, bifurcating the pledge to pay from its attendant fee waiver determination is coercive. In the first scenario, the requester agrees to pay an impossibly large and unbounded fee with no guarantee of return. In the second, the requester decides not to promise to pay and his fee appeal is rendered moot by the agency's "administrative closure" of the underlying request. Either result is unconscionable and constitutionally untenable.

C. Due Process Denial in 10-Day Closure
The constitutional aspect of FOIA is not often discussed. But it is not a matter of largesse that causes the government to open its books. Rather, the founders knew what I often say which is that our democracy only operates well under the strictest supervision. How we verify that this is indeed a government of laws and not of men is by examination of the records generated by these civil servants in performance of official duties.

Lisette Garcia, J.D.
www.foiaresource.center
Submitted May 29, 2015

At bottom, every jot and tittle recorded in the performance of official duties belongs to the people of the United States. Federal workers are but trusted servants, safeguarding these records until their true owners -- the American people -- express a desire to see them. The desire may be speculative or it may be expressed in support of other rights, such as the First Amendment's right of redress. Without FOIA or something like it, it would be nearly impossible to establish when some protection has been unequal or provide the documentation necessary to mount a viable challenge to an abusive practice performed under color of law.

Due Process Minima: Notice & Response

That said, how do we enforce any property right that is entrusted to the government to disburse, apportion, or deny? Due process, at a minimum, entails adequate notice and a meaningful opportunity to respond. Adequacy of notice means a statement of sufficient clarity as to make its recipient aware of rights or benefits about to be lost through some action or inaction on the recipient's part within a certain timeframe or through particular means. Meanwhile, to be meaningful, the opportunity to respond must be capable of effecting a change in the outcome once the arbiters have afforded the recipient's challenge due consideration.

1. 10-Day Cutoff Denies Adequate Notice

Notice is not adequate when it reaches a FOIA requester after the opportunity to act has lapsed because -- despite the ubiquity of electronic correspondence -- an agency insists on using its fanciest paper letterhead and a forever stamp to order a 10-day drop dead cutoff but, through normal bureaucratic delays, that fancy letterhead doesn't wind up leaving the agency's mailroom for another five more days. Nor is notice adequate when it demands, on penalty of killing the underlying request, payment or a pledge to pay an unbounded, unfounded bill.

2. 10-Day Cutoff Renders Response Moot

Neither is the opportunity to respond meaningful when the response is rendered moot by the death of the underlying FOIA. As noted above, printed letters take time to leave the building and even more time to reach a requester by surface post. So common is this phenomenon that the Federal Reserve has written into its 10-day cutoff a safe harbor inviting requesters to make a compelling argument for an extension of time in which to consider the requester's fee appeal.

Long-Term Outlook

On the surface the Fed's safe harbor provision may seem like a sufficient corrective measure. I assure you it is not because it converts the constitutional guarantee of due process into a matter of agency discretion which a requester is presumptively denied and has the burden to overcome. Our concern at FOIA Resource Center is that just as the Fed's 10-day cutoff protocol has gained widespread acceptance across federal agencies, so may this constitutionally infirm burden-shifting safe harbor. FOIA has due process baked into its codified appeals process. Why allow agencies to circumvent these protections? Unfortunately, courts are loath to entertain APA-style challenges to FOIA procedures, making judicial review of this practice quite unlikely and ineffective.

Lisette Garcia, J.D.
www.foiaresource.center
Submitted May 29, 2015

III. FOIA Defense Dollars

Compounding the problem above is the phenomenon of skyscraper fees even as near-universal automation has dramatically decreased the cost of search and production. In quoting a dramatically high estimate, with no guarantee of responsive documents and a disclaimer that the ultimate search could indeed cost more, many requesters are forced to give up rather than fight. Those who do challenge an agency's initial fee determination face a formidable battle.

According to self-reported figures at FOIA.gov, agencies spend 15-25% of their FOIA budgets (including money spent on litigation) resisting production on various grounds. These FOIA defense dollars are not further subdivided to reflect how much is devoted to denying fee waivers per se. However, the attached examples indicate the inordinate effort expended in denying a public interest classification for records sought pro bono for the sole sake of investigating apparent agency violations of other laws. The agencies go to great pains at taxpayer expense to protect themselves from effective citizen oversight.

Problem: Overreliance on Contractors

Undoubtedly, as FOIA offices seek to improve and professionalize their performance, higher level employees are tasked with processing requests. Rightly or wrongly, this trend necessarily increases fees incurred, which has a severe chilling effect on every class of requester not in a position to spend the time or money that filing suit entails. This professionalization at many agencies has led to widespread outsourcing. While contractor support of FOIA functions is not necessarily barred, contractor performance of inherently governmental functions is expressly prohibited.

Withholding is Largely Discretionary

An endrun arises where a FOIA contractor makes a determination involving agency discretion. (Six of the nine exemptions enumerated in the statute, as well as all fee classifications, are permissive rather than mandatory, making these by definition discretionary.) To avoid running afoul of the Federal Acquisition Regulation, a full-time government employee must incur time reviewing a contractor's initial withholding recommendations. This mechanism in essence doubles a bill. Moreover, the contractor's relationship to the agency being more tenuous, the incentive to withhold or deny or abort a request altogether is exacerbated by the desire to renew the contractor's own employment.

Solution 1: Perform an Audit

One solution is to request that the Government Accountability Office conduct an audit of FOIA contracting across the federal workforce. An easy examination was possible prior to the recent "upgrade" of usaspending.gov. But now that contract descriptions have been eliminated from that portal, as well as keyword searches across contracts, it is no longer possible to see how much each agency is devoting to outsourcing its FOIA functions.

Solution 2: Cap FOIA Litigation Funds

While increased reliance on contractors for FOIA processing incentivizes withholding and denial of fee waivers, there is no countervailing pressure balancing the scales. This is to say that to the extent a department excessively denies, provoking an abundance of legal challenges, the Justice

Lisette Garcia, J.D.
www.foiaresource.center
Submitted May 29, 2015

Department appears to rise to the challenge without the ordinary limitations imposed by governmental budgets. For instance, the Obama administration has defended its failure to prosecute illegal entry to or stays in the United States on grounds that the Attorney General has a finite budget for doing so and must exercise prosecutorial discretion on how to prioritize limited resources. No such limitation appears to exist in the realm of FOIA. As a result, agencies do not have any reason to compromise or settle. Even assuming denial of a record or a classification was legally plausible and within an agency's discretion, there is no benefit to surrendering a position not worth the money to insist upon as far as the agency is concerned.

To the extent that inherent constraints exist in the prosecution of murder and rape, how much more reasonable and necessary is it to impose a cap on how much the federal government is allowed to allot to fighting compulsory release of government records subject to FOIA?

Thank you Chairman Chaffetz and Ranking Member Cummings for your time and attention to this matter. I am happy to answer any questions.

Lisette Garcia, J.D.
www.foiaresource.center
Supplemented June 8, 2015

Thank you, Chairman Chaffetz, Ranking Member Cummings, and members of the U.S. House of Representatives Oversight and Government Reform Committee ("the Committee") for the invitation to supplement my written statement submitted May 29, 2015 in support of my oral testimony of June 2, 2015. Ensuring government transparency through the Freedom of Information Act (FOIA), 5 U.S.C. 552, is at the heart of what my no-frills consulting firm, FOIA Resource Center, accomplishes daily for lawmakers, journalists, and nonprofit organizations since opening our doors on July 23, 2013. It is a privilege to lend our expertise to the 114th U.S. Congress for the benefit of the American people and the legitimacy of our democracy as a whole.

I. Background

Although the FOIA Oversight and Implementation Act of 2015, H.R. 653, was reported out of committee on March 25, 2015 as drafted, the Committee at its June 2, 2015 hearing expressed a willingness to consider new avenues by which the U.S. House of Representatives could effect more meaningful oversight of executive agencies, including further amendments to the contemplated FOIA reform already underway. To this end, FOIA Resource Center adds to its earlier recommendations of a spending audit and funding cap, the elimination of all FOIA fees for the reasons set forth below.

II. FOIA Fees Are Prone to Partisan Abuse

In *Kissinger v. Reporters Committee for Freedom of the Press*, the U.S. Supreme Court noted that "5 U.S.C. § 552 (a)(4)(A) provid[es] for recovery of certain costs incurred in complying with FOIA requests." 445 U.S. 136, 153 (1980)."This section," the Court reasoned, "was included in the Act in order to reduce the burdens imposed on the agencies." *Id.* And, yet, far from sparing agencies any burden, quantifying and resisting FOIA's current fee provisions has consumed more agency resources than has implementation of all other areas of the transparency law combined.

A. FOIA Fees Burden Agencies & Requesters

A review of recent docket and federal register entries establishes as much. Of 128 FOIA cases decided since January 1, 2015, roughly one-third involved fee disputes, including five months of motions practice on behalf of the Executive Office of U.S. Attorneys in order to refuse disclosure of records about a requester himself pending his payment of $51.90. *See Bartko v. U.S. Dep't of Justice*, Civ. No. 13-1135 (D.D.C. May 6, 2015). Thirty-five percent hardly seems like a reasonable share of resources to devote to recouping FOIA costs. Indeed, it violates 5 U.S.C. 552 (a)(4)(A)(iv)(I) prohibiting imposition of fees where the cost of collection are likely to equal or exceed the fee itself.

Lisette Garcia, J.D.
www.foiaresource.center
Supplemented June 8, 2015

B. FOIA Lawsuits Underrepresent Total Impact

Moreover, the share of fee battles that can be examined through court documents grossly understates the chilling effect of agency intractability on this point: hundreds of requests are being spurned weekly on the same basis; but we never learn of these failed attempts at freedom because these petitions are filed by those who cannot afford to continue the fight for affordable release of the people's papers beyond an in-house administrative agency appeal.

C. Federal Regulations All But Supersede FOIA

Similarly, no ink has been spared on new federal regulations where approximately 100,000 more words have been published thus far this year that would further restrict fee waiver qualifications while expanding billable costs, even in this age of virtually total automation. *See, e.g., Procedures for Disclosure Under the Freedom of Information Act & Privacy Act*, Gulf Coast Ecosystem Restoration Council, 40 CFR 1850 (available at https://federalregister.gov/a/2015-12459)(last visited June 7, 2015). Indeed, the dizzying volume of FOIA regulations, directives, policies, action plans and circulars published under the current administration in the name of greater clarity has rendered virtually meaningless the fee waiver classifications established by Congress at 5 U.S.C. 552 (a)(4)(A).

D. Fee Waiver Justifications Curb Free Speech

Despite the disparate nature of fee regulations across the federal government, one common feature is the requirement that a requester seeking a reduction establish a direct nexus between the records sought and the public interest which disclosure of the requested records would tend to serve. As different segments of the American public hold an array of views as to what issues merit the most public attention at any given time, this entirely subjective factor gives agencies too much power to delay and deny release of properly requested records based entirely on the identity of the requester and how far that requester's views diverge from the administration's contemporaneous policy goals.

III. Judicial Review Clogs Up Courts

Even assuming everyone facing excessive charges for properly requested records was willing and able to enlist a court's aid in seeking relief, the courts offer little solace to requesters who oppose the administration in power.

A. Judges Favor FOIAs On Their Pet Causes

Despite well-settled precedent that no agency's interpretation of fees is entitled to any special deference, judges frequently decide FOIA disputes in favor of the government based on agencies' own versions of the law as outlined in their endless stream of regulations and directives.

Cf. Schoenman v. Federal Bureau of Investigations, 604 F. Supp. 2d 174, 191 fn9 (D.D.C. 2009)("this Circuit does not defer to an agency's interpretation of the FOIA fee waiver provision") *with National Security Counselors v. U.S. Dep't of Justice*, Civ. No. 13-0556 (D.D.C. Feb. 18, 2015)(reframing the issue of agency deference as being congressionally ordained in the area of fees). So the FOIA backlog experienced by the agencies is only being shifted elsewhere in exacerbation of the growing docket complained of by jurists.

B. Activist Judges Imitate the President

Lastly, it is a sad fact that, while Obama-appointees represent only one-tenth of the federal judiciary, they have decided one third of FOIA cases -- nearly all in favor of the government -- since the start of this calendar year. Two striking examples of biased dispositions this lopsided assignment has produced are embodied in *American Immigration Council v. U.S. Dep't of Homeland Security*, Civ. No. 11-1972 (D.D.C. Mar. 10, 2015)(awarding $82,513.42 in attorney's fees for compelling release of 154 pages detailing steps taken to provide lawyers at U.S. taxpayer expense to deportation candidates) and *Martinez v. U.S. State Dep't*, Civ. No. 3-14-1616 (M.D. Tenn. Jan. 14, 2015)(ordering expedited release of the requester's naturalization record to defend against extradition to Mexico where he faced death-eligible criminal charges).

IV. Conclusion

In each of the foregoing cases, judges who had been nominated by President Barack Obama concluded that the policy rationale for fulfilling each of these FOIA requester's petitions was sufficiently high to overcome ordinary objections from DOJ litigators respecting fee classes or backlog. This sort of content-based decision-making is the exact opposite of the free speech, due process, and equal protection principles that FOIA is designed to make manifest. Precisely in the pan-partisan arena of open government, the lack of an independent judiciary to safeguard constitutional rights such as these represents as undemocratic an approach to fair government as the American people could have ever hoped for.

Nevertheless, I remain inspired by the House Oversight and Government Reform's unflinching leadership on FOIA and thank you, Chairman Chaffetz, Ranking Member Cummings, and Members of the Committee, for including FOIA Resource Center in the 114th Congress's ongoing task of ensuring adequate agency oversight through meaningful FOiA reform. We are happy to provide any additional information the Committee deems necessary to this undertaking.

Chairman CHAFFETZ. Thank you. Appreciate it.
Mr. Rottman, you're now recognized for 5 minutes.

STATEMENT OF GABRIEL ROTTMAN

Mr. ROTTMAN. Thank you, Mr. Chairman, Ranking Member Cummings, and members of the committee. Thank you for inviting the American Civil Liberties Union to testify today on the Freedom of Information Act.

The ACLU believes that the right to know what the government is doing in our name is a necessary corollary and prerequisite to the exercise of our First Amendment rights to freedom of speech, press, assembly, and petition. We simply cannot enjoy these rights to the fullest extent of the Framers' intent without an informed populace. The Freedom of Information Act should be, but often is not, the most important tool in guaranteeing this right to know, and we applaud the committee for holding this crucial hearing.

As detailed in our written testimony, we offer a number of reforms that could easily and quickly be adopted and that would improve the process for users and government agencies alike. For instance, Congress could mandate the creation of a government-wide portal that would provide users with a one-stop shop for the submission of FOIA requests to any agency or agencies that would track all requests, and it would allow requesters to easily check the status of their requests. Congress could require the posting of all released documents online in an easily text-searchable format and require agencies to store electronic documents, including emails, also in an easily searched format.

Congress should clarify that agencies may not falsely issue "no record," responses when, in fact, records exist but contain sensitive law enforcement material or the existence of those records is classified and the records are therefore subject to the exclusions of section 552(c). In such cases, agencies should not lie, but should simply offer what amounts to a Glomar response; that is, they should say: "We interpret all or part of your response as a request for records that, if they exist, would not be subject to the disclosure requirements of FOIA pursuant to section 552(c), and we will therefore not process that portion of your request."

Importantly, Congress should resist the creation of new exemptions to FOIA, such as that proposed in the Senate's cybersecurity information-sharing bill, which is currently pending in that chamber. As others have noted, Congress should pass the FOIA reform legislation which is currently pending in both Chambers, which would create the portals I mentioned above and would codify the presumption of disclosure absent foreseeable harm, which is currently applicable in the agencies through executive directive.

Congress should also reintroduce from earlier versions of the bill a balancing test for Exemption 5, which would allow agencies and the courts to order the disclosure of records covered by Exemption 5 privileges or the work product doctrine if in the public interest. And relatedly, Congress must address the growing problem of secret law, which is anathema in a participatory democracy and is epitomized in secret court opinions permitting, for instance, the wholesale collection of telephone metadata under foreign intel-

ligence surveillance laws and the Office of Legal Counsel opinions authorizing torture and targeted killing.

The Freedom of Information Act and our open and transparent system of democratic government is the ultimate safeguard of our essential freedoms. This notion was at the very heart of Congressman John Moss' decade-long fight to pass FOIA almost 50 years ago in 1966. Indeed, on the floor of the House during debate over the measure he made that clear. Information about government, he said, is as basic to the intellectual diet as are proper seasonings to the physical diet.

Our Constitution recognized this need by guaranteeing free speech and a free press. Mr. Speaker, those wise men who wrote that document, which was then and is now a most radical document, could not have intended to give us an empty right. Inherent in the right of free speech and of our free press is the right to know. It is our solemn responsibility as inheritors of that cause to do all in our power to strengthen those rights and to give them meaning. Our actions today in this House will do precisely that. And it is in that spirit that I thank the committee for holding this essential hearing on how to further strengthen those rights through an improved Freedom of Information Act.

Thank you.

[The statement of Mr. Rottman follows:]

Written Testimony of Gabe Rottman on behalf of the American Civil Liberties Union Before the U.S. House of Representatives Committee on Oversight and Reform

Hearing on

"Ensuring Transparency through the Freedom of Information Act"

Tuesday, June 2, 2015 at 2:00 p.m.

Submitted by the
ACLU Washington Legislative Office

For further information, contact Gabe Rottman, Legislative Counsel and Policy Advisor, at grottman@aclu.org.

The American Civil Liberties Union ("ACLU") welcomes this opportunity to testify before the House Committee on Oversight and Government Reform on "Ensuring Transparency through the Freedom of Information Act."

We urge members of the committee to support a number of common sense reforms to the Freedom of Information Act ("FOIA") both to bring this essential law further into the digital age and to close a number of loopholes that threaten transparency and, consequently, accountability.

For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures and communities to defend and preserve the individual rights and liberties that the Constitution and laws of the United States guarantee everyone in this country. With more than a million members, activists and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico and Washington, D.C., to preserve American democracy and an open government.

FOIA, which will celebrate its half-century birthday next year, embodies James Madison's warning that "[a] popular government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy – or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own Governors must arm themselves with the power which knowledge gives." We strongly support an expansive application of the law, and fear, among other things, excessive and unnecessary secrecy in the name of "national security."

Accordingly, we offer the committee a series of recommendations, both substantive and procedural, that would increase the effectiveness and consistency of FOIA compliance across government. In brief, Congress should:

- Mandate the creation of a government-wide automated portal that would provide a "one-stop shop" for the submission of FOIA requests to any agency, track all requests and allow requesters to easily check the status of their requests;

- Require posting of all disclosed documents online in an easily text-searchable format and require agencies to store all electronic documents, including emails, also in an easily searchable format;

- Clarify that agencies are not permitted to claim falsely that no responsive documents have been located when, in fact, they could assert a "Glomar" response (i.e., the existence of the documents is itself classified and the agency is neither "confirming nor denying" the presence of responsive documents) or could give notice that is truthful and informative, yet does not confirm that possibly excluded records exist under the narrow exclusions set forth in 5 U.S.C. § 552(c) (2006);

- Resist the creation of new exemptions, such as those proposed in the cybersecurity legislation that recently passed the House of Representatives and is pending in the Senate;

- Pass the FOIA reform legislation currently pending in both chambers, and reintroduce from earlier reform bills the public interest balancing test for exemption 5, which has been repeatedly misused to resist disclosure of governing law for law enforcement and national security agencies; and

- Address the growing problem of secret law, which is antithetical to a participatory democracy and is embodied by, among other things, the classified opinions permitting "bulk" surveillance of innocent Americans under dubious legal reasoning and the unreleased opinions drafted by the Department of Justice's Office of Legal Counsel ("OLC") authorizing, for instance, torture or targeted killing.

We address each of these in turn below.

1. Create a Central FOIA Portal for Requesters

For several years now, various stakeholders, including the Office of Government Information Services ("OGIS"),[1] have recommended the creation of a "one-stop shop" for FOIA requesters that would provide a central portal for requests to any agency or agencies, track all requests and give requesters an easy way to check the status of their requests.[2] This portal would eliminate inefficiencies and duplication of both work and technology across different agencies. It would also encourage novice requesters to use the system and permit greater coordination and centralization of more complex searches involving, for instance, field office coordination or multi-agency responses.

Such a portal could also work hand-in-glove with new initiatives to improve coordination among various entities when preparing a FOIA response. The OGIS, for instance, could leverage the portal to serve its desired function as the central point-of-contact for multi-agency FOIA requests and for relaying information found to requesters as appropriate.[3]

Some limited progress has been made toward a central portal, most notably with FOIAOnline, a partnership among several government entities to permit a requester to submit requests to all relevant agencies, to search for other requests and to search material already released.[4]

---

[1] OGIS Recommendations to Improve the FOIA Process, http://1.usa.gov/1EH8RHB.

[2] Please note that the FOIA reform bills pending in the House would mandate the creation of such a portal. *See* FOIA Act, H.R. 653, 114th Cong., 1st Session § 2(a) (2015). Though we recommend passage of FOIA reform legislation below, we address the need for a central portal separately given the ease with which it could be created and its potentially exceptional value in streamlining the FOIA process and making it more accessible and user-friendly to novice requesters.

[3] *OGIS Recommendations* at 1.

[4] FOIAOnline, foiaonline.regulations.gov. Current participants include the Environmental Protection Agency, the Department of Commerce (except the U.S. Patent & Trademark Office), the U.S. Customs and Border Protection, the Office of General Counsel at the National Archives and Records Administration, the Merit Systems Protection Board, the Federal Labor Relations Authority, the Pension Guaranty Corporation, the Department of the Navy, the General Services Administration, the Small

FOIAOnline, though limited to more recent records and participating agencies, could serve as a model for a future government-wide portal, which would significantly reduce duplicative efforts and technology and would facilitate the submission process for novice and experienced requesters alike.

2. Require the Posting of All Releasable Records in Text-Searchable Format, and Mandate that Agencies Store Electronic Documents also in an Easily Searchable Format

The FOIA Act, currently pending in this chamber, would require agencies to post "frequently requested" documents (those that have been sought three or more times) online "regardless of form or format."[5] This would be a helpful reform, but we urge Congress and the relevant agencies to explore the posting online of all documents and records found to be releasable, in an easily searchable format. In addition to providing an easily searchable repository of records for the original requester, an online database with all FOIA releasable records would present efficiencies and cost savings for government.

Relatedly, agencies should also not wait for specific FOIA requests before releasing and posting documents of clear interest to the public, including, for instance, records detailing agency operations or procedures. In other words, agencies should take an expansive view of the mandatory disclosure requirements in the so-called "Reading Room" provisions of 5 U.S.C. § 552(a)(1)-(2) (2006).

Finally, agencies should be required to store all electronic documents, including emails, in an easily searchable format. Agencies have resisted ACLU FOIA requests on the grounds that it would be too burdensome to search archived documents.

3. Clarify That Agencies May Not Falsely Deny that Records Exist When Truthful Alternatives to Disclosure Exist

In 2011, the Department of Justice proposed a set of new FOIA regulations, one of which would have allowed components of the department to effectively lie when faced with requests that they determine are covered under the exclusions of 5 U.S.C. § 552(c) (2006).[6]

This section, enacted as an amendment to FOIA in 1986, was meant to cover the very limited set of circumstances where acknowledging whether responsive documents existed could imperil an ongoing law enforcement action. That is, the statute authorizes the government to "treat records as not subject to the requirements of FOIA" in three narrow circumstances: (1) where the request concerns an investigation into the requester and the requester is not yet aware of the

---

Business Administration and the Federal Communications Commission. Privacy Act requests must be sent directly to the appropriate agency.

[5] H.R. 653, 114th Cong. § (a)(1)(A)(iii) (2015).

[6] Freedom of Information Act Regulations, Proposed Rule, 76 Fed. Reg. 15,236, 15,239 § 16.6(f)(2) (March 21, 2011) (to be codified at 28 C.F.R. pt. 16).

investigation (and where disclosure could impair the investigation);[7] (2) where the requester seeks information about a specific informant and the informant's identity has not been publicly confirmed;[8] and (3) where the request seeks FBI records pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information.[9]

As proposed, the new regulation would have mandated that the DOJ component "respond to the request as if the excluded records did not exist. This response should not differ in wording from any other response given by the component."[10]

As detailed in comments submitted by the ACLU, Citizens for Responsibility and Ethics in Washington ("CREW") and Openthegovernment.org, nowhere in the legislative history of FOIA or its amendments, or in any of the governing case law, is there authority for the agency to lie to a requester. Rather, the appropriate response to a legitimate § 552(c) exclusion could mirror the appropriate response in a legitimate "Glomar" case, in which an agency claims that the existence of the records itself is classified and responds that it will therefore neither confirm nor deny the existence of the records.[11] As articulated in these joint comments, agencies responding to a request implicating the exclusions should say so: "we interpret all or part of your request as a request for records that, if they exist, would not be subject to the disclosure requirements of FOIA pursuant to section 552(c), and we therefore will not process that portion of your request."[12]

Such a response would protect the government's interests by neither confirming nor denying the existence of the records. At the same time, it would permit a FOIA requester to challenge an agency's claim that, as a legal matter, the subject matter of the request falls within one of the exclusions. (Some agencies subsequently provided similar notice, but it is not at all clear that all agencies have adopted a uniform policy that bars false representations to FOIA requestors (and, potentially, the courts)).[13]

---

7 5 U.S.C. § 552(c)(1)(A)-(B) (2006).

8 § 552(c)(2).

9 § 552(c)(3).

10 76 Fed. Reg. at 15,239 § 16.6(f)(2).

11 Comments from the ACLU et al. to Caroline A. Smith, Office of Information Policy, Dep't of Justice, Re: Docket No. OAG 140; AG Order No. 3259-2011; RIN 1105-AB27 (Oct. 19, 2011) [hereinafter *ACLU Comments*].

12 *Id.* at 2.

13 *See Islamic Shura Council of S. California v. F.B.I.*, 779 F. Supp. 2d 1114, 1117 (C.D. Cal. 2011) (finding that FBI made "blatantly false" statements to FOIA requestor and the court when it apparently relied on section 552(c) and denied the existence of responsive documents). Notice to FOIA requestors and the courts is necessary to facilitate judicial review. *Id.* at 1166 ("The FOIA does not permit the

Following public outcry over the proposed regulation, the Justice Department pulled the offending provision. Unfortunately, in recent months, the ACLU received a response from the Bureau of Prisons ("BOP"), a DOJ component, that we have reason to believe is a false claim that records do not exist.

Earlier this year, the ACLU submitted a FOIA request to the BOP in connection with an episode detailed in the executive summary of the Senate Select Committee on Intelligence's report on the CIA's interrogation program post 9/11 ("SSCI Executive Summary"). According to the summary, BOP personnel inspected and assessed a "black site" prison in Afghanistan known as Detention Facility Cobalt or the "Salt Pit" on or around November 2002.[14]

In response, the BOP flatly stated that no responsive records were found, and did not invoke any of the exemptions, any of the exclusions under § 552(c) or provide a "Glomar" response.[15] Such a response is deeply concerning given the implausibility of there being no responsive records of the BOP visit. According to the SSCI Executive Summary, in November 2002, a delegation of BOP personnel visited Cobalt for a multi-day inspection and provided "recommendations and training" to CIA personnel.[16] The executive summary further cites a series of emails with the subject line "Meeting with SO & Federal Bureau of Prisons."[17]

At the very least, such a delegation would have produced travel planning documents, internal discussions of who should attend and interagency communications with the CIA to coordinate the logistics of the trip, as well as more substantive documents like assessments, briefings and debriefings, training documents and notes from visiting personnel. Accordingly, we have reason to believe that the BOP's claim that no responsive records exist is false. Rather than asserting a false claim, which violates FOIA, to the extent the agency believes the existence or non-existence of responsive records is itself not subject to disclosure, it should be required to assert either a Glomar response or invoke notice language indicating that to the extent § 552(c) applies, it is being invoked.[18] These alternatives permit judicial review of the agency's claims in keeping with FOIA and its object and purpose.

---

government to withhold information from the court. Indeed, engaging in such omissions is antithetical to FOIA's structure which presumes district court oversight.").

[14] *Id.* at 1.

[15] Glomar responses were first articulated in *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976), in response to a FOIA request to the CIA seeking records on the Glomar Explorer, a deep sea drilling vessel built secretly for the CIA to recover the Soviet submarine K-129.

[16] Executive Summary of the Senate Select Committee on Intelligence's Study of the Central Intelligence Agency's Detention and Interrogation Program 60 ("SSCI Report").

[17] *Id.* at 60 nn. 299-301.

[18] The ACLU believes that neither would be appropriate given the public disclosure of the BOP's visit in the SSCI Executive Summary, but a false response certainly is a violation of the FOIA.

Congress should clarify that false responses reporting that no documents exist are absolutely forbidden. Such responses have no place in a democratic society, especially in cases involving national security issues, which are already often cloaked in unmerited secrecy and overclassification. Further, were such falsehoods to become routine, they would have the perverse result of encouraging needless FOIA litigation. Groups like the ACLU would increasingly be unwilling to take "no responsive documents" responses at face value and would be forced to go to court to "look behind" the asserted "no responsive documents" claim each and every time.

4. Resist the Creation of New Exemptions to FOIA

In April, the House of Representatives passed two cybersecurity "information sharing" bills, the Protecting Cyber Networks Act ("PCNA")[19] and the National Cybersecurity Protection Advancement Act ("NCPAA"),[20] which were drafted by the House intelligence committee and House homeland security committee, respectively. Initially both included a broad new "exemption 10" for FOIA that would cover information shared with the government pursuant to the new laws, but also threatened to exempt from disclosure documents revealing misuse or abuse of the new information sharing authorities.

Fortunately, both committees stripped out the new blanket exemption 10 before final passage, though it still remains in the Senate's Cybersecurity Information Sharing Act ("CISA"),[21] currently pending before that chamber. Unfortunately, both the PCNA and NCPAA still include language specifying that "cyber threat indicators" (broadly defined) and defensive measures (also broadly defined) are exempt from disclosure "without discretion" under 5 U.S.C. § 552(b)(3) (2006), which may also exempt from disclosure documents that are clearly in the public interest and eliminate agencies' traditional discretion to disclose documents even if technically withholdable.

Both the blanket exemption 10 in CISA and the "without discretion" withholding under exemption 3 would set a dangerous precedent and could shield from public view documents disclosing fraud, wrongdoing, waste or illegality in the new cybersecurity information sharing regime proposed in these bills. Worse, these broad amendments to the existing exemptions—which have remained unmolested for many decades—are unnecessary given that the bills clarify that information shared with the government pursuant to the new law is done so voluntarily, which creates a legal presumption against disclosure as confidential business information under exemption 4.

Congress should resist any new exemptions unless proponents can compellingly demonstrate both a need unmet under existing FOIA exemptions and that the proposal is narrowly tailored to permit maximum disclosure of material in the public interest. Recklessly creating exemptions

---

[19] H.R. 1560, 114th Cong. (2015).

[20] H.R. 1731, 114th Cong. (2015).

[21] S. 754, 114th Cong. (2015).

would set a precedent that could lead to further exemptions, ultimately undercutting the broad intended scope of FOIA.

5. Narrow the Scope of Exemption 5 Through Passage of a Revised FOIA Act

Currently pending in the House of Representatives is the FOIA Oversight and Implementation Act of 2015 (also called the "FOIA Act"),[22] which contains a number of salutary and important reforms. We support the proposals in the bill, and are especially enthusiastic about a number of these proposed reforms. For instance, the bill would:

- Clarify that documents subject to mandatory disclosure under § 552(a)(1)-(2) must be made available to the public in an electronic, publicly accessible format;
- Post records online of general interest that inform the public of the operations and activities of the government or that have been requested three or more times;[23]
- Mandate that the Office of Management and Budget create an online centralized portal to permit a member of the public to submit a FOIA request to any agency from a single website;
- Codify the president's mandated presumption of openness by prohibiting an agency from withholding information under FOIA unless the agency reasonably foresees that disclosure would cause specific identifiable harm to an interest protected by an exemption to FOIA or unless the disclosure is prohibited by law;
- Create new auditing and reporting requirements to better assess compliance; and
- Clarify that agencies cannot assess search or duplication fees if they have failed to comply with the statutory deadline and have not submitted a written notice to the requester justifying the fees requested.

Although we continue to support FOIA reform legislation, including the FOIA Act, we strongly urge members to reinsert a provision that was stripped out of the previous versions of these bills last Congress that would have created a public interest balancing test for exemption 5. Exemption 5 has been interpreted to cover "deliberative process" and attorney-client privileges and the attorney work product doctrine but has been invoked to withhold government documents that effectively represent final decisions carrying the force of law on quintessential issues of public interest. For instance, exemption 5 was wrongly deployed in an attempt to block

---

[22] H.R. 653, 114th Cong. (2015).

[23] Again, we would go further and suggest that all documents released under the law be made available in an electronic, publicly accessible format (though perhaps with exceptions where a requester seeking documents including sensitive information about him or herself would be able to opt out of posting online).

disclosure of OLC memorandums dealing with targeted killing and the collection of phone records without legal process.[24]

Another major exemption 5 problem is the use of the attorney work product doctrine to insulate controlling executive branch legal interpretations from disclosure under FOIA. For instance, the National Association of Criminal Defense Attorneys ("NACDL") is currently litigating to obtain the DOJ's criminal discovery manual—known as the "Bluebook"—which constitutes official guidance for prosecutors but remains secret law.[25]

Notably, the Bluebook was issued following the failed prosecution of Sen. Ted Stevens to head off legislation that would have imposed new requirements on criminal discovery procedure. Now, however, the DOJ will not let anyone see the rules it adopted, claiming they qualify as attorney work product. The ACLU has been litigating a similar case with respect to the notice policy for surveillance under the FISA Amendments Act (i.e., surveillance of communications between individuals in the United States and people abroad). The DOJ has failed to give notice of such surveillance as required by law but refuses to disclose the grounds for withholding notice or the policy governing notice under exemption 5.

Even without a narrowing of exemption 5, the FOIA reform bills currently pending in Congress offer important and needed reforms. That said, we strongly urge Congress to reintroduce the exemption 5 proposals to allow judges to order documents released that technically fall under exemption 5 if the public interest demands it.

6. Address the Ongoing Problem of Secret Executive and Judicial Branch Lawmaking

Secret lawmaking, by either quasi-judicial bodies in the executive branch like the OLC or by the judiciary itself, as with the Foreign Intelligence Surveillance Court ("FISC"), has no place in a modern democracy. Unfortunately, since the attacks of September 11, 2001, secret lawmaking has become de rigueur, and has been used—often backed by untested and therefore what many experts say is less than vigorous legal analysis—to justify, among many other things, torture, indefinite detention, targeted killing and suspicionless "bulk" surveillance.

In 1788, Alexander Hamilton said, "citizens . . . will stand ready to sound the alarm when necessary, and to point out the actors in any pernicious project." But they can only do so if the "public papers [are] expeditious messengers of intelligence to the most remote inhabitants of the Union." Secret lawmaking means that these public papers are kept private, and the issues with which they deal—including the preservation of basic civil liberties or their abrogation—are likewise kept from public view.

---

[24] *See* Sophia Cope, *Congress Must Pass FOIA Reform Legislation*, Elec. Frontier Found., Mar. 19, 2015, http://bit.ly/1C8tC2h.

[25] *See* Memorandum in Support of Plaintiff's Cross Motion for Summary Judgment and Opposition to Defendants' Motion for Summary Judgment, Nat'l Assoc. of Criminal Defense Lawyers v. Dep't of Justice, Civil Action No. 14-cv-00269-CKK (D.D.C. filed July 23, 2014).

Congress should be wary of such secret lawmaking and should guarantee in law that any agency action that has the force of law should be disclosed and/or disclosable through FOIA. To the extent that the legal analysis is intertwined with sensitive factual material, the relevant agency should be required either to segregate the two and release an unredacted discussion of the legal analysis or to draft and disclose a summary of the legal analysis. Similar proposals were included in the original National Security Agency surveillance reform bills, and are an important first step in shining the "best disinfectant" of sunlight on secretive post-9/11 signals intelligence activities.[26]

We strongly urge Congress to continue to explore creative ways to combat secret lawmaking at all levels of government, which will serve to increase transparency, improve accountability, facilitate oversight by this body and the public and, ultimately, better perfect our union.[27]

7. Conclusion

Again, we thank the committee for its attention to this crucial issue and its dedication to principles of openness, transparency and accountability.

---

[26] *See, e.g.*, Uniting and Strengthening America by Fulfilling Rights and Ending Eavesdropping, Dragnet-Collection, and Online Monitoring Act ("USA Freedom Act"), H.R. 3361, 113th Cong. § 905 (2013).

[27] Relatedly, Congress should resist attempts to limit the decision of the Supreme Court in *Milner v. Dep't of the Navy*, 131 S. Ct. 1259 (2011), which eliminated the so-called "High 2" reading of exemption 2 that permitted agencies to withhold internal documents if release threatened to "circumvent" agency regulations or statutes and limited the scope of exemption 2 to internal personnel material, as it should be. *Id.* at [] ("Our construction of the statutory language simply makes clear that Low 2 is all of 2 (and that High 2 is not 2 at all) . . . .").

Chairman CHAFFETZ. Thank you.

Ms. Weismann, you are now recognized for 5 minutes.

STATEMENT OF ANNE WEISMANN

Ms. WEISMANN. Mr. Chairman and members of the committee, I have spent many, many years fighting for greater public access to records that show the public what our government is doing and why. And despite its flaws, I continue to believe the FOIA offers the best tool we have for this purpose.

Like Mr. Jones, I do not agree with some on the earlier panel that suggest that the FOIA is broken. That said, however, the statute as currently written definitely presents loopholes and limitations that opportunistic agencies abuse to circumvent its underlying disclosure purpose.

There are steps this committee and Congress as a whole can take to make the FOIA better, and I think they start most significantly with passing the FOIA Oversight and Implementation Act of 2015, which enjoys rare bipartisan support and now, Mr. Chairman, boasts another important champion in you.

The current situation cries out for the kind of meaningful and robust reforms in this legislation. We've heard a lot today about Exemption 5, and I echo those sentiments, that Exemption 5 is, I believe, the most abused exemption that is used to block public access to a wealth of information. In litigation that I brought when I was at CREW against the Department of Justice, DOJ went so far as to argue it had no legal obligation to produce a single OLC opinion, even those that provide the definitive position of the executive branch or a definitive statutory interpretation that all agencies must follow.

Exemption 5 has become the catchall to withhold virtually any records agencies fear may result in embarrassment or unwanted attention. And the FOIA Act addresses this problem by excluding records from Exemption 5 that embody the working law, effective policy, or final decision of the agency. I think this will avoid the very harm that Congress thought it was legislating against, the accretion or development of a body of secret law, something that has been widely criticized across the political spectrum.

I also agree with Mr. Rottman too, though, that the bill should go further, it should include a provision that was introduced last year that would add a balancing test, and here's why. While I would certainly support efforts to get rid of the deliberative process privilege altogether, I don't think that's a very realistic outcome. But in the discovery context, if you are a litigant and you want information that the government is claiming is deliberative process, you get to argue to a court that your need for that information outweighs the need of the government to keep it secret. And I believe by importing that test into the FOIA, it would provide the public and representatives of the public, such as those on this panel and the previous panel, to at least be able to make the argument that the public need for the information outweighs the government's reflexive invocation of the deliberative process privilege. So I would urge the committee to go back and consider adding in that provision.

I also agree that by codifying the presumption of openness will go a long way. Right now we have what I would call is just an aspirational goal and agencies are free ultimately to do what they want. I think if we want to have the kind of transparency that President Obama committed to, we need that codification.

At bottom, I think agencies need to understand that FOIA matters, not just as a statutory command, because it serves a critical role in preserving and advancing our democratic ideals. I have been privileged to meet with many visiting dignitaries and government officials from emerging democracies, and I am struck again and again by how they express the belief that by passing a similar law in their country, that is the only way that they will have a guaranteed right to have a democratic form of government.

Sadly, in our country, however, too many agencies have lost sight of the importance of this right in our own governance. Instead, they view their responsibilities under the FOIA as a burden and a distraction from their primary mission. I think this Congress through legislation like the FOIA Act needs to send a very clear and unmistakable message that FOIA still matters and FOIA remains at the core of every agency's central mission.

I would be happy to answer any questions that you have. Thank you.

[The statement of Ms. Weismann follows:]

STATEMENT OF ANNE L. WEISMANN
CAMPAIGN FOR ACCOUNTABILITY

BEFORE THE COMMITTEE ON OVERSIGHT
AND GOVERNMENT REFORM

"Ensuring Transparency Through the Freedom of Information Act (FOIA)"

JUNE 2, 2015

Mr. Chairman, Ranking Member Cummings, and Members of the Committee, thank you for providing me with the opportunity to testify today about barriers to accessing public documents under the Freedom of Information Act or FOIA. I am the executive director of a new non-profit, the Campaign for Accountability, which uses research, litigation, and communication to expose misconduct and malfeasance in public life. My testimony today draws from my 10 years of experience as the chief counsel of Citizens for Responsibility and Ethics in Washington and my more than 20 years of experience at the Department of Justice, which included supervision of government information litigation, most significantly under the FOIA. I have spent many years fighting for greater public access to records that show the public what our government is doing and why.

The FOIA offers the best tool we have for this purpose, but the statute as currently written presents challenges and limitations that opportunistic agencies have used to circumvent the FOIA's underlying disclosure purpose. Greater public disclosure is further hampered by the lack of any meaningful oversight within the Executive Branch, and the lack of comprehensive training for agency FOIA personnel. The government's failure to effectively manage its records, particularly electronic records such as emails, also has left agencies ill equipped to respond adequately to FOIA requests. I applaud this Committee for tackling the issue of how to improve government transparency through the FOIA under the strong leadership of Chairman Chaffetz and Ranking Member Cummings.

There are steps this Committee and Congress as a whole can take to restore the statute to its intended purpose of ensuring "an informed citizenry, vital to the functioning

of a democratic society, needed to check against corruption and to hold the governors accountable to the governed."[1] First, Congress should pass the FOIA Oversight and Implementation Act of 2015, also called the FOIA Act, introduced by Reps. Darrell E. Issa and Elijah Cummings earlier this year, which enjoys rare bipartisan support and now boasts another important champion in Chairman Chaffetz.

The current situation cries out for the meaningful and robust reforms found in this legislation. In particular, agencies have used Exemption 5 of the FOIA and its protection for deliberative process material to block public access to a wealth of information that would provide insight into, and a better understanding of, some of the most controversial government policies. For example, based on the Department of Justice's invocation of Exemption 5, the public has been denied access to opinions from the Office of Legal Counsel (OLC) on topics ranging from torture of detainees to authorized killing of Americans on foreign soil. DOJ has gone so far as to argue it has no legal obligation to make *any* of its OLC opinions public, even those that provide the Executive's Branch's definitive position on a matter or statutory interpretation. Exemption 5 has become the catchall on which agencies rely to withhold virtually any records they fear may result in embarrassment or unwanted attention.

The FOIA Act addresses this problem by excluding from Exemption 5 "records that embody the working law, effective policy, or the final decision of the agency." This is a long overdue amendment that restores the FOIA's intended purpose of preventing agencies from relying – as they do now – on a body of secret law, something that has been widely criticized across the political spectrum. I believe this provision is a game

[1] *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).

changer, transforming our government from one shrouded in secrecy to a more open and transparent body consistent with our underlying democratic values.

Similarly, the FOIA Act provides that Exemption 5 cannot be used to bar public access to records or information created more than 25 years preceding a request. The government's need to protect deliberative process material that is 25 or more years old is virtually non-existent, yet Exemption 5 has been invoked for this very purpose. Most egregiously, the CIA withheld under Exemption 5 as deliberative a volume of history pertaining to the Bay of Pigs, an event that happened more than 50 years ago and about which there is little that is not publicly known. The amendment will prevent this kind of abuse, again restoring the FOIA to its original intended purpose.

In the same vein, the FOIA Act codifies a presumption of openness that agencies currently apply only as a matter of discretionary policy. President Obama began his first term with a public commitment to be the most transparent administration in modern history. Sadly, this aspiration has not been realized, even with strong FOIA policies in place authored by the president himself and former Attorney General Eric Holder. This reality illustrates just how difficult it is to reverse the trend of greater and greater government secrecy. By codifying as a statutory mandate what is today only an aspirational goal, the legislation stands a much better change of achieving the kind of transparency President Obama first envisioned.

The FOIA Act also contains provisions that will strengthen oversight of agency compliance with the FOIA within the Executive Branch. The bill at long last gives the Office of Government Information Services (OGIS) an equal seat at the table with the Department of Justice, by establishing the Chief FOIA Officers Council co-chaired by the

director of OGIS and the director of DOJ's Office of Information Policy. As a requester, I have watched in frustration as OIP has attempted to subvert OGIS's efforts to maintain separate, independent authority. This is particularly troubling because OIP is not viewed by many in the open government community as a fair player seeking to protect the interests of both agencies and requesters. Rather, OIP has the reputation of an enabler, assisting agencies to whitewash their faults and emphasize only what the government is doing well under the FOIA. OGIS, on the other hand, has garnered a reputation as an entity committed to fairly and impartially ensuring the FOIA's implementation and has become an oasis for requesters seeking relief from arbitrary and unfair agency FOIA practices. The bill also contains much needed provisions that better ensure OGIS's independence from administration interference, particularly in OGIS's relationship with Congress.

But even with these provisions, there remains a lack of meaningful oversight of FOIA within the federal government. While OIP has assigned itself an oversight role, I have no expectation it will undertake that role robustly and impartially. OGIS has a limited staff and an already ambitious statutory charge, leaving it little to no room to undertake additional oversight responsibilities. This leaves inspectors general – a body that has demonstrated in the past an ability to effectively investigate allegations of misconduct under the FOIA. Congress should consider making explicit the FOIA oversight responsibilities of inspectors general and requiring them to report to Congress annually, or at least bi-annually, on how agencies have performed their statutory FOIA responsibilities.

Even the best FOIA policies and statutory provisions, however, cannot fully compensate for the widespread failure of agencies to properly train their FOIA personnel. With budget cuts and dwindling funds, agencies are offering fewer and fewer training opportunities to agency personnel responsible for handling FOIA requests. I spent many years on the board of the American Society of Access Professionals, including as its president, and watched agency enrollment in our FOIA training programs decrease each year, as agency training funds became virtually non-existent, to a level that suggested only a very small percentage of FOIA personnel were receiving adequate training. Some agencies have chosen to compensate by contracting out their FOIA processing functions. But far from offering a solution, this approach has caused more problems as it has resulted in non-agency personnel essentially making policy decisions on behalf of agencies as to which documents, if disclosed, would cause agency harm.

Federal agencies need to understand that FOIA matters, not just because it is a statutory command, but also because it serves a critical role in preserving and advancing our democratic ideals. I have been privileged to meet with many visiting dignitaries and government officials from emerging democracies who uniformly expressed their belief that democracy can be achieved only if the public is provided a statutorily guaranteed right and means of accessing government information. Sadly, some agencies appear to have lost sight of the importance of this right in our own governance, instead viewing their responsibilities under the FOIA as a burden and distraction from their primary missions. Their failure to allocate sufficient resources for FOIA training is, I believe, a direct result of this misguided view.

Finally, the government's failure to effectively manage its electronic records has greatly hampered agency responses to FOIA requests. Agencies simply have not moved from the paper-based environment of the 20th Century to the digital environment of the 21st Century. Although agencies are subject to an August 12, 2012 directive from the Office of Management and Budget and the National Archives and Records Administration, reinforced by the Presidential and Federal Records Act Amendments of 2014, to have in place by the end of 2016 an electronic records management system, they have not been provided any additional funds to achieve this goal, making the directive essentially an unfunded mandate.

Without effective electronic recordkeeping systems in place, agencies are unable to respond fully and adequately to FOIA requests seeking electronic records, such as emails. As a FOIA requester I have been told time and again by agencies they have no ability to search agency-wide for responsive emails and must instead rely on individual users to search whatever records they may have preserved, either electronically or in a paper format. As a result, all too often emails are simply beyond the reach of the FOIA. Yet for good government groups like mine, emails often provide the best source of information about what an agency is doing and why.

Despite the critical importance of emails to the public – and the scandals that erupt periodically when emails go missing – agencies have little to no incentive to preserve them, especially knowing it is emails that are likely to reveal an agency's most embarrassing secrets, or cast the agency in an unflattering light. Even without additional funds, Congress can mandate that agencies use the existing resources they have to ensure their full compliance with the OMB directive. Without a nudge from Congress, many

agencies are unlikely on their own to reprioritize dwindling agency funds toward implementing electronic recordkeeping systems.

The FOIA problems we in the access community are facing are nothing new. Some past administrations were overtly hostile to the FOIA, making it clear secrecy was their default. Insufficient resources and huge backlogs have plagued agencies for many years. This is not to suggest there have been no improvements. Many agencies now allow requesters to file electronically, and a growing number have adopted a more cooperative attitude toward requesters, working with them to ensure a response is made in a timely fashion. But the experience over the past few decades also has revealed the inherent limitations in the FOIA as currently written, exposing the need for the kind of FOIA reform embodied in the FOIA Act.

I thank and commend this Committee for recognizing its vital role in these efforts, demonstrated by its strong, bipartisan support for FOIA reform and its oversight of agency compliance with the FOIA. I look forward to working with the Committee in my new capacity with the Campaign for Accountability to secure passage of this bill and am happy to answer any questions you may have.

Chairman CHAFFETZ. Thank you. I thank you all for your comments. And I will recognize myself for 5 minutes.

There are two issues that I want to deal with, even though we have passed the bill out of committee, that I think we need to address before we encourage and bring it up to the floor. One of those is limiting back the exemptions. What I would like you to do as something we would appreciate if you would really put some thought and brainpower behind is to get back to this committee in about a week's time. You've been looking at FOIA. You've spent time with FOIA. You've spent years looking at it. How would we reconstitute those nine? Should they be three? Should they be two? Maybe it's 18 and they just have to be much more specific.

How would you take that section of FOIA and redo it in such a way that there are certain things, there are certain privacy things with individuals that have to be, I think we would all agree about that. But I do hear this resounding drumbeat that says it's being far too used, it's so liberal in its approach that you can put everything under there, and then you get what Ms. Mitchell here is binders full of redactions. And we deal with the same thing in Congress. I mean, even when we issue subpoenas, we get information that's so heavily redacted it's ridiculous.

So we would appreciate your thoughts and comments in writing back on that as we at the staff level in a bipartisan way try to redo that.

Chairman CHAFFETZ. The other one that I'm struggling with a little bit that I need your help and insight, and I appreciate some verbal comments, but again give it a little bit of thought, is what is the consequence? Because if there are no consequences—now part of that can be who pays—but ultimately it's the taxpayers that end up paying. Right? No skin off somebody's back if you got to pay. But there has got to be some degree of consequence for noncompliance and for just running out the 20-day clock. They just blow right through that, and we're talking about years often for these materials.

So, Ms. Garcia, I'm going to start with you because I can tell you're anxious to talk about that.

And then, Mr. Fitton, too, if you could jump in here.

Ms. GARCIA. Thanks so much, Mr. Chairman.

Actually, because I don't take these requests to court, I'm probably the most experienced in terms of securing compliance without that stick.

The statute actually does provide for consequences to a FOIA officer. That's why every single decision has to be signed by an individual. It's often the case that, for instance, State Department is getting away with little initials so that you can't track down who the person was who made that decision. And then, once it goes to court, which I never go to court, and they know I don't go to court, but if you went to court, you couldn't really pin that back on one person, the statute does provide.

The problem is it gets triggered by the judge. The judge has to find that there was arbitrary, capricious, or, like, just so outlandish. Guess how many times they've ever referred something to special counsel? Zero, big goose egg.

In addition to that, because FOIA cases are decided at the litigation level—I know a lot about litigation only because that's the way I'm able to avoid it—but the fact is that it's a closed set, the FOIA request. So when it comes to a court it's not like an unbounded discovery situation typically. You could go there, but typically it's just the closed record that was before the agency at the time they made their decision and their appeal.

Chairman CHAFFETZ. Okay. Let me go to Mr. Rottman and then Ms. Mitchell and Mr. Fitton. We have to keep going here.

So, yes, Mr. Rottman.

Mr. ROTTMAN. So fundamentally one of the primary issues that's happening with FOIA today is this question of secret law, and it covers a lot of ground. Part of it is this deliberative process privilege, which is being used to keep what agencies are calling predecisional documents from the public, but those documents, for instance, will show internal dissent on questions that are of the utmost importance for public policy, and they'll actually contain documents that are binding on agencies.

Chairman CHAFFETZ. Okay. So let me just, because my time is expiring and we're going to have votes and we're going to get cut short.

Ms. Mitchell, here consequence. How do you institute consequence for noncompliance?

Ms. MITCHELL. Well, Mr. Chairman, I think that we should look at some of the States. The State of Florida has imposed criminal consequences for failure to abide by the State equivalent in Florida of their Freedom of Information Act. And there have been people prosecuted, and it has actually had the deterrent effect of making agency people realize that if there are consequences, they better follow the law.

Chairman CHAFFETZ. Okay.

Mr. Fitton.

Mr. FITTON. Well, it's difficult to impose consequences on decisions that are discretionary. And if a court disagrees, two people disagree. But if you eliminate the discretion, it's easier.

But where you have this willful withholding of documents there already is a law that could put you in jail for 3 years for unlawfully and willfully concealing records, and there's no limit as to how that could be applied. And of course a change in procedure and a change in attitude and approach by the agency heads, by the political appointees, that reward disclosure and punish the arbitrary or broad exemptions that are used where everything is withheld because it's deliberative process as opposed to a more careful analysis.

Chairman CHAFFETZ. Thank you.

I would like, all of you, to give you a chance to respond, but I'm a minute past my time here. So we have got other members who would like to ask questions.

I now recognize Mr. Cummings for 5 minutes.

Mr. CUMMINGS. I want to be effective and efficient. I mean, we can go on this merry-go-round forever. And there are clearly problems. And we have got a FOIA bill. And I know this may have been answered before but I was tied up in a Benghazi meeting, so I'm going to ask you what has probably already been asked.

We're going to sit down and try to improve the bill that we have so that we can accomplish something. And in other words, to do what the law was intended to do, and that is the FOIA law. Give me the elements of what needs to be in that legislation. You all are the folks who are the experts.

And, you know, I keep hearing about the criminal consequences. You know, I got to tell you, I lived in a neighborhood where people go to prison for stealing a bike. You know, then we got people on Wall Street that in some instances have been responsible—and banks—for causing millions of people to lose money. So, you know, people on my block say: What's that about?

I'm not saying that criminal consequences are not appropriate in certain instances. I just wonder when you have that, do you really get to the people who are truly responsible for what Mr. McCraw called a little earlier the culture.

So I just want to know from a very practical—sometimes I think we in trying to resolve problems, we go all the way around the mulberry bush, and we needed to just go straight ahead and say: Okay, bip, bip, bip, and this is what we're going to do so that we can have transparency, accountability, effectiveness, and efficiency. What would we have to have in the legislation to accomplish those things?

Ms. GARCIA. I would agree with you, Mr. Cummings, over-criminalization is not really the answer. I mean, at some point, like if you completely destroy a computer, like a server getting wiped, then that reach spoliation to the level of criminal acts. But below that, I think that there's a much lower threshold. And one of the ideas I would have is to cap the funding to the agencies. We talked a lot about raising funds. In fact, they should be reduced. There's a lot of slush fund money that's going into FOIA. Twenty-five percent of the budgets are being directed to defending against FOIAs, and that doesn't even include contractors.

So the same way a prosecutor, you were saying about a criminal, a kid who steals a bike, the same way we cap U.S. attorney's offices, the amount of money, and they have to exercise prosecutorial discretion, who are they going to charge, who are they not, we should do that with FOIA. Right now it's a limitless fund. DOJ will fight to the death every single little ounce.

Mr. JONES. Mr. Cummings, thank you very much.

I think, speaking practically, as you said, we have two very good FOIA bills that have passed the Senate and passed the House last session without becoming law. So I don't think we should throw the baby out with the bathwater.

Mr. CUMMINGS. I didn't say throw the baby out. No, no, no, no, no, no, no. You didn't hear me. I said it two or three times. I said what do we do to improve it or make it even better. One of the things that the chairman has said to me, that we would sit down and try to take a look at 653 and try to make it even stronger or make it more practical or whatever. But I just wanted to know from you all what. I want to start with that.

Mr. JONES. What to improve is to continue to make the Office of Government Information Services strong enough so that agencies fear it and that it can compel agencies to release more information to more people more quickly.

Ms. WEISMANN. Mr. Cummings, I have three suggestions that I would make. One we have already discussed but you were not here, and that is I would revisit the idea of adding a balancing test for Exemption 5 deliberative process material because I think that is really the only way to level the playing field and avoid the kind of abuses we're seeing.

Two, I would look for more oversight within the executive branch, and I would consider using inspectors general. They have done some of this work. I think that their obligations under the FOIA should be made explicit. And I think this committee should consider legislation that would require them to report maybe every 2 years back to Congress on how their agencies are doing with implementing the FOIA, because I don't think either the Department of Justice, which I don't think is a fair dealer in this fight, nor the Office of Government Information Services, which is really overworked, it can barely meet the obligations it currently has, is best situated.

And I have, three, a very modest but I think practical suggestion, which is to require explicitly that every requester be given the name, contact information of someone at the agency who knows something about their request that they can contact and talk to.

Thank you.

Mr. CUMMINGS. Ms. Mitchell. And I thank the chairman's indulgence.

Ms. MITCHELL. Well, Mr. Cummings, I actually think that, after looking at the jurisprudence, the case law on the deliberative process, it is unintelligible. It is mind numbing to read those cases. And I think that Congress needs to eliminate the deliberative process privilege altogether.

There are two other sections, two other types of privileges under the Exemption 5, the attorney work product in anticipation of litigation and the attorney-client privilege where the counsel to an agency is giving legal advice to the agency personnel making decisions. And I really think that that is as broad as it should be. I do not believe that Congress should give Federal judges who have completely mucked up, including the Supreme Court, the whole deliberative process privilege. I think it has to be very clear, and you should not give them the authority to decide the balancing.

The presumption is openness. The presumption is deliver the documents. And if you read some of these cases where the judges have decided, well, is it predecisional, is it deliberative—I mean, what does that mean, for Pete's sake? I mean, normal people can't understand all that. I don't understand all of that.

It used to be in the common law definition the agency head had to sign off before it could be invoked, the deliberative process privilege could be invoked. My favorite of the deliberative process privilege invoked in the production that I brought here today is the withholding of documents written by a summer intern as deliberative process, who had gathered research and wrote memos, and that's all been redacted and withheld, either redacted or withheld, but they won't tell us the name because they say this person was not a decisionmaker.

So these are the kinds of things that the agencies are just unilaterally deciding, and I think the only way to deal with it is to just get rid of that deliberative process altogether.

Mr. CUMMINGS. Thank you, Mr. Chairman.

Mr. PALMER. [Presiding.] The chair now recognizes Mr. Jordan from Ohio for 5 minutes.

Mr. JORDAN. I thank the chairman.

Mr. Fitton, let me go back to where I was with the first panel. We had a group of journalists who had never testified here before but felt it was important to come talk about this issue in front of Congress. I just want to make sure we're all clear, and I'll run the same questions by you. In your judgment, has the process of trying to get information from Federal agencies, has it gotten worse and more difficult to get that information?

Mr. FITTON. Yes.

Mr. JORDAN. Deliberative process exemption has increased dramatically?

Mr. FITTON. Yes.

Mr. JORDAN. And the number of redactions when do you get the stuff after taking forever, you got a whole bunch more redactions on the material?

Mr. FITTON. Yes.

Mr. JORDAN. And other exemptions that you may see as well?

Mr. FITTON. Yes.

Mr. JORDAN. Okay. So much so that the first panel—I mean, I still think this is amazing, that none of them had ever testified on this issue before, but yet the press has to come testify about restrictions the press is receiving even though we have this thing called the First Amendment. Pretty amazing.

And I think it's also important to remember the entire context. Not only are agencies unwilling to give citizens information, but the very same agencies that may not give information under a legitimate FOIA request were also targeting citizens for exercising their First Amendment rights, right?

Mr. FITTON. Right.

Mr. JORDAN. Ms. Mitchell, I know you can talk about that, right? I mean, take the IRS, for example. They may not comply with certain FOIA requests that you want, but they were also not just not complying with giving citizens information they had a right to get, they were also targeting potentially those same citizens.

Mr. FITTON. We represented, worked with Wayne Allyn Root, who was a vice presidential candidate for the Libertarian Party, but he had been audited under suspicious circumstances. It took us a year to get this man's one IRS file. And we didn't go to court over it. But to just get your own file shouldn't take a year from an agency such as the IRS.

Mr. JORDAN. All I'm trying to do is sometimes we get focused, okay, agencies are dragging their feet, they're doing more redactions, more exemptions. We got to remember the big picture. These same agencies have targeted citizens.

Mr. FITTON. Right.

Mr. JORDAN. So these same agencies have behaved so poorly that the press for the first time ever has to come testify about restric-

tions the press is getting. I mean, it's unprecedented where we're at.

So I would to the chairman say we have got to understand the entire context here of what's going on.

Mr. FITTON. It's catch me if you can government. And the agencies don't like to turn over documents, and unless you're represented in court, it is unlikely you're going to get a substantive response from the government unless you're willing to wait years and months, which is outside what the law requires.

Mr. JORDAN. No. Judicial Watch has proven that. The only way you're going to get stuff, almost the only way, is to go to court. We get that.

I want to ask all of you, have you seen a marked increase in all the things we're talking about since this administration took office?

Mr. Fitton.

Mr. FITTON. Yes, we have had a dramatic increase in government spending and activity and less transparency.

Mr. JORDAN. Ms. Mitchell.

Ms. MITCHELL. Well, Mr. Jordan, actually I hadn't been involved in FOIA until I started dealing with clients who had been targeted. So we began to try to get information from Federal agencies, not the IRS but others, and submitted FOIA requests to find out, to try to get to the bottom of the targeting. And I include some documentation in my testimony about some of my clients and our efforts to try to get information.

Mr. JORDAN. Ms. Mitchell, let me ask you a question. I just thought of this. It wasn't in my planned questions. You had clients who were targeted, and then you requested, did FOIA requests to get information,

Ms. MITCHELL. Correct.

Mr. JORDAN. Did it ever work in reverse? Do you have any clients who requested information and because they requested information were then in some way harassed by a Federal agency?

Ms. MITCHELL. Well, they had already been harassed.

Mr. JORDAN. I understand the situation. I'm just curious, maybe we don't know, but this is something I'm kind of interested in finding out, if it's ever worked the other way around. Someone is asking for information, and because of that request they suddenly become a target of harassment from an agency.

Mr. FITTON. Well, the IRS told us when they audited us during the Clinton years: What do you expect when you sue the President? You're going to scrutinize the government, the government is going to scrutinize you.

Mr. JORDAN. I got 30 seconds left, so I want to go to the memo. I mean, I read this memo that the White House Counsel sent to all the general counsels of the various Federal agencies, if this, as I said to the first panel, if this isn't a chilling impact on what we're talking about, I don't know what is. When they should, every agency should consult with the White House Counsel's Office on all documents, all documents, that may involve documents with White House equities.

Any interest the White House may have, that's as broad as you can get. And then they further go down here. They list GAO re-

quests, judicial subpoenas, FOIA requests. They list everything you can imagine. I've never seen anything like that.

Ms. GARCIA. Mr. Jordan, more dramatic than that, weeks after the President issued that directive saying that agencies should err on the side of transparency and openness, he was awarded an award by the transparency community, not including me, on the promise of his future transparency, sort of like the Nobel Prize. And in point of fact, he closed it to the press. So the actual receipt of the award was not open to the media. If that doesn't send a chilling statement, I don't know what does.

Mr. JORDAN. I thank you all.

Thank you, Mr. Chairman.

Mr. PALMER. The chair now recognizes Mr. Lynch from Massachusetts for 5 minutes.

Mr. LYNCH. Thank you, Mr. Chairman.

Thank you all for your help.

I just want to point out one contrast here. Up until about an hour ago when the USA Freedom Act passed, the government in getting information about the general public was unfettered, warrantless gathering of information of the public. And even when they had to go to the FISA court we could find no examples of the FISA court ever denying a warrant for the government to gather metadata regarding its citizens.

So here you have the government with absolute discretion on gathering information about private citizens, and yet when private citizens try to understand a little bit about what the government is doing, it's a roadblock, complete roadblock.

I would like to talk about something that a couple of the panelists have brought up about the inspector general, the way we have inspector generals in each department. And they do a pretty good job. I have to say I'm pretty pleased with the way they do their job. But they are also sometimes denied access to information or given the runaround like you all are on a regular basis.

So the problem is this weighing, this balancing and determining whether some information lies within one of the exemptions or should be protected. And you all have to go to court to have that figured out, and it's a very long process, for most of you, most of you.

Would it be helpful if we had an advocate general for freedom of information within the IG's office where they could in the first instance determine whether or not these people are stonewalling and looking at the information and saying: Hey, wait a minute, this does not pass muster, this is not part of the deliberative process.

From the previous panel, they were saying how stuff that was just—there was no contest that this should have been information that was—and even the judges, when it finally went to court, the judges said this should have never been denied, it should have been responded to, the public should have had this information.

There has got to be some way to short-circuit this and to incentivize these agencies to cooperate as FOIA would intend. And that could be civil penalties, it could be awarding costs or damages to a party that hasn't been dealt with fairly or there's been unreasonable obstruction of justice and flow of information because of the positions that these departments have taken. There's got to be

some consequences here. We have to induce good behavior, and we're not seeing that right now.

So would an advocate general or would any of those measures help? And, look, I voted for the FOIA bill that we passed here, fully supported, but I don't think it addresses every single aspect of what you're bringing up here today.

Mr. Fitton.

Mr. FITTON. The concern is about these administrative agencies. They'll have opinions and it's another layer of bureaucracy that may or may not be helpful, and the courts may give undue deference to them, and they are still working for the agency at issue.

IGs are interesting creatures. Many IG reports are both exposes and coverups at the same time. And I think it's notable, I think it's in the new FOIA legislation, that there's a mandate that material behind IG investigations be publicized as well, or made public, that it currently isn't happening.

So getting access to the courts and taking away the deference, taking away the excuse courts have to give deference to the agency discretion on these withholdings, that's what we have to work around, because as long as they have that discretion it's going to be very difficult to overcome that because the courts are going to say: Who am I going to listen to, the agencies who know what they're doing? What do you know, Judicial Watch, about the damage to the agency's deliberative process if I don't release this information? Or they're weighing privacy interests.

During the Bush administration, one of my favorite worst examples, was that after 9/11 one of the agencies redacted the name of Osama bin Laden to protect his personal privacy. Now, we can laugh about it, but it took a lot of time for us to undo it.

Mr. LYNCH. Not to cut you off, and I appreciate the example, but the inspector generals are swimming in that world. They are constantly dealing with that world. So they too have a discretion and a certain balance of interest there where they're trying to get information for us, and they work with this committee especially.

Mr. FITTON. And they already have an obligation to enforce the law, and in theory there is nothing preventing them from doing FOIA investigations and oversight——

Mr. LYNCH. I guess I'm trying to short-circuit this process that you're all going through very painfully.

Thank you. I yield back.

Mr. PALMER. Thank you, Mr. Lynch.

The chair now recognizes Mr. Carter from Georgia for 5 minutes.

Mr. CARTER. Thank you, Mr. Chairman.

And thank each of you for being here. We appreciate—as if you had any other choice—you being here. But we do appreciate it very much.

Ms. Garcia, I'm interested particularly in your role with the Resource Center and in your dealings with DHS. I have a bill that is before DHS right now, H.R. 1615, dealing with FOIA. As you know, DHS has got the largest backlog of any other agency in the way of FOIA requests, and I'm very concerned about that, and that's what this bill addresses, is that backlog, to try to catch us up and try to help us to address it.

But what I want to ask you about is particularly the fees that are involved in this. What do you find most problematic, is it the high price of the fees or the estimation of what the fees are going to be? What's the biggest problem when it comes to fees for a FOIA request?

Ms. GARCIA. Well, one of the largest problems, Mr. Carter—thank you so much for your question—one of the largest problems is that the agencies know that most requesters don't know the law, so they actually make things up as they go along.

A lot of contractors are working at DHS, and so what's being not shown in the full-time employee numbers that were given by Mr. Cummings, the ranking member, is that, in fact, there's this whole crew of shadow workers at DHS. They're there to kill the FOIAs, not to fulfill them. They will give you a phone call and tell you, just as they said in the earlier panel, that your FOIA doesn't make sense or that it doesn't somehow comply. All of that time is added to the fee that it took to process your request.

On top of this, because the contract regulations don't allow contractors to make decisions, then you need a second layer where an actual employee rubber stamps the work of the other person. Now you've gotten a bill for double the price.

Mr. CARTER. Right. Well, let me ask you, you gave us an example where you had requested a $60 fee waiver, and you got an eight-page response. Now, I'm not a lawyer, but I read through this, and this looks like legal jargon to me. I can only imagine how much this cost to assimilate, as opposed to just waiving the $60 fee.

Ms. GARCIA. That's exactly right, Mr. Carter. In point of fact, the request only amounted to $3, but after they added the contractor and the rubber stamper, then it actually resulted in a $60 fee, so it was something like a 1,900 percent increase. And then someone who gets paid roughly in the neighborhood of $225,000 a year took the time to write out, not including benefits and perquisites, took the time to write out an eight-page legal memo like to the nines, like we were going to court.

So, yes, in fact they add their own. Twenty-five percent of these budgets are going to FOIA defense, and that was as much as I could adequately honestly compute. It may be more. I would say that your bill trying to curb DHS expense in FOIA is very welcome, precisely the provision that talks about auditing, as long as we don't hire another contractor to perform the audit.

Mr. CARTER. Okay. Let me ask you this. Did they give you an estimate of how much it's going to be?

Ms. GARCIA. They do. And there is an interesting procedure that's starting to get widespread, like catching like wildfire all over the Federal Government, which is they do give you an estimate. They say: If you don't give us this money or promise to pay this money within 10 days, we will close your request.

Of course you can appeal this decision, no problem, you have 45, 60 days, whatever it is. The problem is once they've already killed your request, what incentive does the agency have to reverse its original position and then suddenly grant you the fee waiver and revive your FOIA request? It doesn't happen.

Mr. CARTER. Right. Right. Okay.

Again, in dealing with the fees and when they're coming up with these estimates, one thing that bothers me is—obviously my bill deals with DHS—but we need a consistent policy throughout all the agencies. Is that something that you feel like, Ms. Mitchell, is that something that you think would be possible? Because it appears to me from what I've heard today, not only with this panel but the first panel as well, is that it's haphazard among the agencies.

Ms. MITCHELL. It is completely haphazard. And it's interesting, but if you submit a FOIA request, the exact same FOIA request to multiple agencies, you will get radically different levels of response, and some agencies are more responsive than others. And the IRS just happens to be one that takes the position that they're not going to answer any FOIA requests unless you sue them. That's their default position. So there is no standard of responsiveness, level of responsiveness, how they price things, nothing.

Mr. CARTER. Okay. Well, guys hang in there. We're doing the best we can.

Mr. Chairman, I yield back.

Mr. PALMER. Thank you, Mr. Carter.

The chair now recognizes Mr. Hice from Georgia for 5 minutes.

Mr. HICE. Thank you, Mr. Chairman.

And thank each of you for being here today. Very disturbing information.

Just as a general rule, what would you say is the average time it takes to receive a FOIA response? Is there any average or any way of determining that.

Mr. FITTON. If they could, it would be years.

Mr. HICE. So you're saying average would be years?

Mr. FITTON. A lawsuit may get you documents in less than a year.

Mr. HICE. Okay.

Ms. Mitchell.

Ms. MITCHELL. I have so many clients who could paper a room with letters from Ms. Higley from the IRS. She generates those letters. She's a very nice person. She'll generate these fake dates. Every 90 days you get another letter, you get another letter.

Mr. HICE. Would you say years?

Ms. MITCHELL. Years. This has been going on years.

Mr. HICE. Okay.

Mr. Jones.

Mr. JONES. Varies agency by agency. The longest National Security Archive has is over two decades.

Mr. HICE. Mercy.

Ms. Garcia.

Ms. GARCIA. Usually clients before they come to me, it's 2 to 3 years and a lawsuit.

Mr. HICE. Okay.

Mr. Rottman.

Mr. ROTTMAN. Part of the problem is there's two separate averages. So for cases where the documents are politicized it's far more than the 20 days. And then for run-of-the-mill cases it's less.

Mr. HICE. Okay.

Ms. Weismann.

Ms. WEISMANN. Months to years.

Mr. HICE. Okay. So far, far beyond the 20 days. I mean, in fact, it is an extreme situation that the law is actually followed.

Mr. Fitton, let me go back to you. Do you believe that there is an attempt by agencies to actually obstruct? Is the word obstruction too strong?

Mr. FITTON. No, it's not too strong, particularly with the IRS and the State Department. That's knowing and willful conduct that rises to a criminal level in my view. The general counsel of the IRS was there during the IRS attacks on the Tea Party, and he's there guiding the document response into that very scandal.

Mr. HICE. All right. So you absolutely used the word obstruction is taking place?

Mr. FITTON. Criminal obstruction.

Mr. HICE. Criminal obstruction. All right. So would you go so far as to say that we are potentially facing a constitutional crisis if just, say, FOIA requests are regularly denied, we have got some constitutional issues potentially in the making?

Mr. FITTON. Well, not only do you have that vis—vis the executive branch and the citizenry, but you have it with the interbranch relations as well. So, yes.

Mr. HICE. Okay. Mr. Fitton, let me go to you. You stated a moment ago that were told by an agency official that if you scrutinized the government, that the government will scrutinize you. I believe that was you.

Mr. FITTON. Yeah, that was during a discussion about an IRS audit. It was an IRS official who told us that.

Mr. HICE. Okay. Unbelievable. All right. So does that mean the IRS considers a FOIA request government scrutiny?

Mr. FITTON. Oh, for sure, for sure.

Mr. HICE. All right. So the IRS would look at a FOIA request as an attempt by an individual or a group to scrutinize the government and therefore they are worthy of retaliation?

Mr. FITTON. I believe there have been retaliatory audits for activities of groups that are opposed to either this administration or prior administrations, yes.

Mr. HICE. All right.

Well, Ms. Mitchell, let me go to you. I believe then you said that you personally got involved in this whole thing because of people you are now representing who were scrutinized by the government. All right. Specifically or is that IRS? Or are there other agencies?

Ms. MITCHELL. It's both.

Mr. HICE. Both what?

Ms. MITCHELL. I have one client who actually testified before a subcommittee of this committee in the last Congress, and when she filed applications for exempt status for two Tea Party groups, within a very short period of time she was visited personally by the IRS. Her business was visited twice by the Bureau of Alcohol, Tobacco, and Firearms. Her business was suddenly audited by OSHA. The FBI came seven times. I mean, this is a woman who had been living her life for quite a long time with none of that government interest in her or her family.

Mr. HICE. So connecting the dots is undeniable in your opinion.

Ms. MITCHELL. Certainly seems more of a coincidence.

Mr. HICE. Okay. If it's not already been stated, could you provide that evidence to this committee or has that already been submitted?

Ms. MITCHELL. Yes. It has been in the last Congress. I'm more than happy to provide it again.

Mr. HICE. Okay. All right. Thank you for that.

Ms. Garcia, let me end my time with you. You stated just a moment ago that the DHS, I believe you mentioned specifically, has the attitude that absolutely their attempt is to avoid fulfilling FOIA requests rather than meet those requests. Is that right?

Ms. GARCIA. Absolutely. In fact, the DHS FOIA chief said I was the Kerry Washington of FOIA, that if somebody needed a request, they knew where to get it handled. Who would say that? I mean, that's like a scandal. That's like a TV show.

Mr. HICE. Would you submit that evidence to this committee?

Ms. GARCIA. Absolutely.

Mr. HICE. Thank you very much.

And I yield back.

Mr. PALMER. Thank you, Mr. Hice.

The chair now recognizes myself for 5 minutes.

Mr. Fitton, in regard to the memo from the White House that Mr. Jordan read in which they directed every executive agency to notify them of any requests for information, and in the context of your answer to a question Mr. Hice just asked about and which you responded that there is criminal obstruction, that's pretty strong, I want to know what you would think about an agency possibly engaging in an effort to instruct their employees on how to work with outside groups to avoid the requirements of a FOIA request.

Mr. FITTON. It certainly would be inappropriate. The Justice Department is the locus of evil when it comes to FOIA noncompliance. All the agencies get represented by the Justice Department, and everything they say and everything they do in terms of withholding is almost always supported by the Justice Department. I would bring the Attorney General or a representative up from Justice and say: Tell us those cases that you've turned away.

Mr. PALMER. Let me share with you some information that I shared with the panel earlier from the press. This is the written testimony submitted by Mr. David Schnare, former employee of the EPA, who testified that the EPA had prepared an 83-page PowerPoint presentation on how to use electronic tools to collaborate with external partners. I'm not going to read all of this. But he talked about the use of instant messaging, other real-time correspondence tools, even encouraging using AOL and Yahoo and asking third parties to set up chat rooms.

And then here's the part I find particularly troublesome. He said this presentation also documents a culture of disregard for agency duties under public records and FOIA requirements. It characterizes FOIA and the NARA rules as Federal laws that constrain Federal administration of public-facing Web collaboration tools. Actually here's the PowerPoint from that. And listed among those is the NARA, the Federal Advisory Committee Act, the Paperwork Reduction Act.

And then he goes on and says the next section of the presentation describes creative solutions to dealing with Federal con-

straints—now, they've already considered these requests for documents to be constraints—and openly suggests ways to circumvent public records acts. Specifically, EPA encourages its employees to help outside parties to sponsor the Web-based collaboration tools, noting that as long as we're only participants, not administrators of a Web collaboration site, the site is not limited by those same FOIA and Public Records Act constraints.

How would you respond to that? How would you characterize that, let me say that, put it that way?

Mr. FITTON. That's a willful avoidance of the law, and the criminal law already prevents—there's a criminal sanction for willful concealment of documents. And the classification issues with a process like that are significant. You could have classified records, depending on the agency. And to be creating Federal records and not maintaining them in a willful way is a criminal violation of law. And this is a dramatic illustration of a coordinated effort to avoid transparency laws and disclosure.

Mr. PALMER. So that would perhaps go beyond obstruction.

Mr. FITTON. Well, I say obstruction when there is a willful concealment of records, you're violating the Freedom of Information Act, but there are criminal sanctions associated with concealing records. And that has got to be a tool that prosecutors, you know, they can do a case against the former Speaker of the House by interpreting the structuring laws, antistructuring laws, maybe they can figure out how to do the criminal laws and impose them on the Federal bureaucracy that willfully violate FOIA in ways that take away our freedom to know what our government's up to.

Mr. PALMER. Would any of the other panel like to respond to that?

Mr. JONES. I'd add it's very widespread.

Ms. GARCIA. I would also add that LinkedIn is something to be looked into. It's probably because the FOIAs are so slow that it didn't make it to them. And you talked about Yahoo Messenger, something ridiculous like that. But, indeed, LinkedIn sold half a million dollars of contracts, and I went to a training for government officers, and they were specifically told to use their private email accounts to be able to communicate with people.

Mr. PALMER. I would like to thank all of our witnesses for taking the time to appear today. If there is no further business, without objection, the committee stands adjourned.

[Whereupon, at 6:02 p.m., the committee was adjourned.]

APPENDIX

MATERIAL SUBMITTED FOR THE HEARING RECORD

Nothing holds government more accountable than making its actions open and transparent to the American taxpayer.

The Freedom of Information Act - FOIA - gives the public a tool to gain insight into how their government functions.

It isn't hard to make a FOIA request.

A request must simply be in writing and reasonably describe the records being requested.

That's it.

Or so it should be.

But navigating the FOIA process is complicated and varies across government agencies.

In responding to a FOIA request, each agency has its own set of standards, which may or may not be updated to reflect current law.

- What one agency deems as a reasonable description of documents requested may not be adequate for another agency.

- For example, the State Department rejected a request because it didn't include the contract number when FCC doesn't require that information at all.

Congress must ensure that when it comes to FOIA, agencies are following the law.

The FOIA statute requires agencies to give a preliminary response within 20 business days of the request.

- In practice, agencies take the 20 day time limit merely as a suggestion, rather than as a rule.
- Some agencies don't even bother to respond.
- Syracuse University recently learned this the hard way when only 7 of 21 agencies provided a satisfactory response to the exact same request for records kept by every FOIA office.
- Three agencies didn't even bother to respond at all.
    - The unresponsive agencies were the Bureau of Alcohol, Tobacco, and Firearms; the DOJ Executive Office of the United States Attorneys; and the DOJ National Security Division.

The FOIA law requires documents to be released unless those documents fall into the exemptions outlined in the statute.

- And exemptions are far narrower than many agencies claim.
- The Committee reviewed redacted and unredacted versions of documents from the FCC and found numerous redacted emails with no statutory justification.
- Of note, the FCC redacted the Chairman's initials from all documents under a privacy exemption, while failing to redact email addresses and other contact information for third parties.

We also found some agencies redacted basic information already available to the public.

- Redacting information that can easily be found on an agency's website does not suggest a government interested in ensuring transparency.

- For example, in 2011, Immigration and Customs Enforcement at the Department of Homeland Security provided the National Security Archive with 111 pages of documents already available to the public, including news clippings, media alerts, even congressional testimony.

- Yet in those public documents, ICE chose to redact information like the name of the board agent that sang the national anthem at a conference.

- These types of redactions not only have no legal basis, they defy common sense.

- So requesters who actually receive a response must literally read between the blacked-out lines.

- And every time we see such questionable redactions, we have to wonder "if they are going to hide this, what else are they hiding?"

Congress intended for FOIA to increase accountability by giving taxpayers a view into the inner-workings of their government.

That no longer appears to be the case.

We have two full panels of witnesses here today with extensive professional experience with the Freedom of Information Act.

And all have at one time or another struggled with the FOIA process.

I look forward to hearing from all of our witnesses about their experiences with FOIA and any suggestions they might have to ensure disclosure of information is timely, accurate, and routine.

Federal Register
Vol. 74, No. 15
Monday, January 26, 2009

Presidential Documents

Title 3—

The President

Memorandum of January 21, 2009

Freedom of Information Act

Memorandum for the Heads of Executive Departments and Agencies

A democracy requires accountability, and accountability requires transparency. As Justice Louis Brandeis wrote, "sunlight is said to be the best of disinfectants." In our democracy, the Freedom of Information Act (FOIA), which encourages accountability through transparency, is the most prominent expression of a profound national commitment to ensuring an open Government. At the heart of that commitment is the idea that accountability is in the interest of the Government and the citizenry alike.

The Freedom of Information Act should be administered with a clear presumption: In the face of doubt, openness prevails. The Government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears. Nondisclosure should never be based on an effort to protect the personal interests of Government officials at the expense of those they are supposed to serve. In responding to requests under the FOIA, executive branch agencies (agencies) should act promptly and in a spirit of cooperation, recognizing that such agencies are servants of the public.

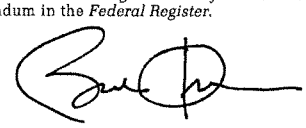
All agencies should adopt a presumption in favor of disclosure, in order to renew their commitment to the principles embodied in FOIA, and to usher in a new era of open Government. The presumption of disclosure should be applied to all decisions involving FOIA.

The presumption of disclosure also means that agencies should take affirmative steps to make information public. They should not wait for specific requests from the public. All agencies should use modern technology to inform citizens about what is known and done by their Government. Disclosure should be timely.

I direct the Attorney General to issue new guidelines governing the FOIA to the heads of executive departments and agencies, reaffirming the commitment to accountability and transparency, and to publish such guidelines in the *Federal Register*. In doing so, the Attorney General should review FOIA reports produced by the agencies under Executive Order 13392 of December 14, 2005. I also direct the Director of the Office of Management and Budget to update guidance to the agencies to increase and improve information dissemination to the public, including through the use of new technologies, and to publish such guidance in the *Federal Register*.

This memorandum does not create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

The Director of the Office of Management and Budget is hereby authorized and directed to publish this memorandum in the *Federal Register*.



THE WHITE HOUSE,
Washington, January 21, 2009

[FR Doc. E9-1773
Filed 1-23-09; 11:15 am]
Billing code 3110-01-P

THE WHITE HOUSE

April 15, 2009

MEMORANDUM FOR ALL EXECUTIVE DEPARTMENT AND AGENCY GENERAL COUNSELS

FROM: GREGORY CRAIG, COUNSEL TO THE PRESIDENT

SUBJECT: Reminder Regarding Document Requests

This is a reminder that executive agencies should consult with the White House Counsel's Office on all document requests that may involve documents with White House equities. We ask that such consultation take place well in advance of the deadline for responding.

This need to consult with the White House arises with respect to all types of document requests, including Congressional committee requests, GAO requests, judicial subpoenas, and FOIA requests. And it applies to all documents and records, whether in oral, paper, or electronic form, that relate to communications to and from the White House, including preparations for such communications.

Please be in touch with your points of contact in the White House Counsel's Office or, if you are uncertain whom to contact, please call Chris Weideman (202-456-3096) or Blake Roberts (202-456-2948). We will respond to your requests promptly.

U.S. Department of Justice
Office of Legal Policy

Assistant Attorney General

Washington, D.C. 20530

September 1, 1988

MEMORANDUM

TO: Freedom of Information Act/Privacy Act
Legal and Administrative Contacts

FROM: Stephen J. Markman STM
Assistant Attorney General
Office of Legal Policy

SUBJECT: White House Records in Agency Files:
Referrals and Consultations

In processing requests under the Freedom of Information Act or the Privacy Act of 1974, the search for responsive records occasionally turns up White House records located in agency files which are responsive to the requests. Such White House records raise special issues because of the unique status of the White House under the FOIA. After consultation with the Office of the Counsel to the President with regard to such records, we have agreed that agencies should implement the following procedures:

1. Records originating with or involving the "White House Office"[1] should be forwarded to the Office of the Counsel to the President for any recommendations or comments it may wish to make prior to your final response to the requester. Please be certain to advise the Counsel's Office of any sensitivity that these records have for your agency and whether any FOIA exemptions apply. It is not necessary to follow this consultation procedure, however, if the record is going to be withheld on other grounds relating to the interests of your agency, for example, under Exemption 7(A).

---

[1] The "White House Office" consists of all offices over which the Office of Chief of Staff directly presides, including the Offices of Deputy Chief of Staff, Communications, Speechwriting, Research, Public Affairs, Media and Broadcast Relations, Press Secretary, Political and Intergovernmental Affairs, Counsel to the President, Presidential Advance Office, Domestic Affairs, Policy Development, Cabinet Secretary, Legislative Affairs, First Lady, Appointments and Scheduling, Private Sector Initiatives, Presidential Personnel, and Operations.

All inquiries to the White House on records whose origins cannot be discerned should be referred to the White House Counsel's Office at the following address:

Mr. Arthur B. Culvahouse, Jr.
Counsel to the President
The White House
1600 Pennsylvania Avenue, N.W.
Washington, D.C. 20500

Please note that many documents originating with the White House Press Office, such as "Press Briefings" and "White House Talking Points" (unless they are marked as drafts), are in the public domain and thus may be disclosed without consultation. Questions concerning documents likely in the public domain should also be referred to the White House Counsel's Office.

2. All records originating with other offices within the Executive Office of the President (EOP) must be referred to the proper EOP officer for consultation purposes only. Individual agencies should respond directly to the requester when these consultations have been completed. For your convenience, I am attaching a list of names and addresses of all other EOP components.

3. Classified White House records, or "sensitive" ones involving foreign relations matters, should be coordinated with Ms. Nancy V. Menan of the National Security Council at the following address:

Ms. Nancy V. Menan
Acting Director, FOIA Unit
National Security Council
Old Executive Office Building
Room 395
Washington, D.C. 20506

If you have any questions with regard to these procedures, please do not hesitate to contact Miriam Nisbet, Deputy Director of the Office of Information and Privacy, Department of Justice, at 633-4233.

Attachment

○