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On behalf of

Sunshine in Government Initiative
American Society of News Editors

to

QUESTIONS FOR THE RECORD

Asked by Senator Amy Klobuchar

Senate Judiciary Committee
“We the People: Fulfilling the Promise of Open Government
Five Years After The OPEN Government Act”
March 13, 2013

1. In addition to the improvements that have been made since the OPEN Government Act's enactment, what two or three other reforms do you believe are most important to fully and effectively promoting open access to government?

Because there are so many reforms needed to both strengthen and promote open government, I am identifying only those reforms that offer the best opportunity for effectively and efficiently moving government toward greater openness while protecting important exemptions. This is not an exhaustive list.

These recommendations are: (1) strengthening dispute resolution when FOIA denials occur, (2) increasing leadership on FOIA issues at the agency level and (3) fully committing to technology – specifically the new FOIA Online system – as a means of improving FOIA processing.

(1) Strengthening dispute resolution when FOIA denials occur.

Several Members of the Committee expressed concern that the amount of litigation has risen since 2007 despite certain changes in the OPEN Government Act designed to reduce FOIA litigation. We continue to believe that increased litigation is positive in one respect. It is evidence that the 2007 amendments which made it easier for requesters to recover legal fees when an agency improperly denies a FOIA request have emboldened requesters to go to court to pursue their rights. But we agree that avoiding litigation is of prime importance. Litigation is expensive for both individual requesters and the government. It should be a last resort when FOIA disputes arise. It is no longer a last resort, but could be relegated to that status once again. The Office of Government Information Services (OGIS), created in the OPEN Government Act and housed within the National Archive and Records Administration, is the key. This office should be given more authority, a bigger mandate and sufficient resources to carry out both.

When it enacted the 2007 FOIA amendments, Congress told OGIS to offer mediation services to resolve disputes. Furthermore, Congress gave OGIS the power to issue advisory opinions if mediation does not resolve the dispute.¹ Increasing the frequency of each would make OGIS a more attractive option for FOIA requesters.

Our experience is that OGIS' success primarily lies on the procedural side. OGIS can get agencies to communicate with requesters when they otherwise would not do so; but it has not had much success in forcing agencies to adhere to the letter of the law when it comes to substantive FOIA compliance and record disclosure. This is due, in part, to the same lack of an enforcement power that exists in other areas of the law. Agencies have no real incentive to fully engage in mediation.

OGIS should be required to exercise its power to issue advisory opinions. Those advisory opinions should have some impact if the requester still needs to go to court to enforce the law.

One possibility would be to create a rebuttable presumption that the records must be disclosed if OGIS has issued an advisory opinion in the requester's favor. This would likely result in agencies taking mediation more seriously. They would have a real reason to disclose records: to avoid an advisory opinion which would effectively take negate the deference agencies receive from federal court judges regarding the applicability of an exemption. This would take away a key incentive agencies have for waiting on litigation. We realize this might require augmenting OGIS' annual budget but we believe the increased expense would more than be offset by a reduction in litigation.

¹ "The Office of Government Information Services shall offer mediation services to resolve disputes between persons making requests and, at the discretion of the Office, may issue advisory opinions if mediation has not resolved the dispute." 5 U.S.C. § 552 (h)(3).

(2) Increasing leadership on FOIA issues at the agency level.

There must also be a commitment to FOIA at the highest levels of government, including the highest levels of each agency. Members of this Committee have previously backed the idea of a FOIA Commission – such an exemption would have been created in the “Faster FOIA” act introduced by Senator Leahy in 2011 and passed by the Senate later that year.² While Faster FOIA itself may not be the perfect vehicle, there needs to be a thorough, independent and powerful review of FOIA to determine what works and what does not, and to offer persuasive recommendations for change.

The centralized commitment to, and leadership on, FOIA could also be achieved by giving greater authority to the Chief FOIA Officers that were also created by the OPEN Government Act. The potential of these Chief FOIA Officers simply hasn’t been realized. A change offered by the House Committee on Oversight and Government Reform would help: create a Chief FOIA Officers council which will regularly meet to discuss FOIA and implement best practices across government.³

(3) Fully committing to technology – specifically the new FOIA Online system -- as a means of improving FOIA processing.

Finally, we continue to press for better and more efficient use of technology. My written and oral testimony discussed the FOIA Online system that is being used by six agencies (the Department of Commerce, the Environmental Protection Agency, the Federal Labor Relations

² Faster FOIA Act of 2011, S. 627, 112th Cong, 1st Session (2011).

³ FOIA Oversight and Implementation Act of 2013, H.B. 1211, 113th Cong., 1st Session (2011). The bill proposes a new section (k)(1) of FOIA which creates the Chief FOIA Officer Council and tells the Council to: “(A) Develop recommendations for increasing compliance and efficiency under this section. (B) Disseminate information about agency experiences, ideas, best practices, and innovative approaches related to this section. (C) Identify, develop, and coordinate initiatives to increase transparency and compliance with this section. (D) Promote the development and use of common performance measures for agency compliance with this section.”

Authority, the Merit Systems Protection Board, the National Archives and Records Administration and the Department of Treasury).

As I noted in my earlier testimony, this system could revolutionize FOIA processing by automating basic functions like logging and confirming requests, referring requests to other agencies, and even engaging in the proactive disclosure of frequently requested records (something which is already required under FOIA but rarely exercised by agencies). We calculated that FOIA Online could potentially save over 325,000 hours in processing time with regard to the first function (logging and confirming requests) alone.

Imagine if all records already requested were instantly searchable by other potential requesters. The increase in FOIA requests we have seen over the past several years – cited in the testimony of the Department of Justice’s Melanie Pustay with the implication that it is a major obstacle to reducing FOIA backlogs⁴ – would be significantly reduced. Requests do not have to be filed when the records are already publicly available.

2. Generally speaking, how successful have federal agencies been in adhering to statutory requirements for agency action on FOIA requests?

Agencies continue to routinely miss the twenty-day deadline for responding to a FOIA request. Sadly it takes significantly longer – an almost untenable amount of time for a reporter -- to actually receive records.

Yet, there are many requesters who would prefer the “untenable” delay to the “impossible” situation they face – not receiving the records at all despite the fact that they are fully entitled to those records. . As my fellow panelists Thomas Blanton and Sean Moulton

⁴ Pustay, Melanie. Statement to Senate Judiciary Committee. “We the People: Fulfilling the Promise of Open Government Five Years After The OPEN Government Act”, Hearing, March 13, 2013 at pages 3,5. <http://www.judiciary.senate.gov/pdf/3-13-13PustayTestimony.pdf>

explained, a significant number of FOIA requests are denied in whole or in part despite the fact that the law requires that an agency specifically demonstrate the need for an exemption. This despite the Attorney General's admonition to heads of Executive Branch agencies and departments that records should be disclosed unless foreseeable harm would result from their disclosure, and despite the testimony of Melanie Pustay indicating a high release of records (she stated that the Department of Justice releases records pursuant to 94% of requests made with that agency).⁵

I urge you to closely review Mr. Blanton's oral testimony refuting Ms. Pustay's claim to a high rate of disclosure. His testimony, which notes that the Office of Information Policy includes any record disclosure – no matter how insignificant with regard to number of pages or percentage of records requested – as a “release”, clearly itemizes the regularity with which the government does not completely fulfill a requester's needs, but also does not consider that failure to be a “denial” of the request.

Two suggestions may be helpful here: (1) as I stated in response to the question posed by Senator Franken to our panel, this Committee should closely review Ms. Pustay's testimony, identify the successes claimed by the Office of Information Policy and the further reforms promised out of that office, and engage in the oversight required to confirm that the proffered claims of success are accurate and the promised reforms come to fruition; (2) Congress should codify the “foreseeable harm” standard enunciated by Attorney General Holder that rightfully tips the scales in favor of the requester, making disclosure, not secrecy, the norm under FOIA.

March 29, 2013

⁵Id. at page 5.