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FOIA AT FIFTY: HAS THE SUNSHINE LAW'S
PROMISE BEEN FULFILLED?

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TUESDAY, JULY 12, 2016

United States Senate,
Committee on the Judiciary,
Washington, D.C.

The Committee met, pursuant to notice, at 10:05 a.m.,
in room SD-226, Dirksen Senate Office Building, Hon. Chuck
Grassley, Chairman of the Committee, presiding.

Present: Senators Grassley, Leahy, Klobuchar, Franken,
and Blumenthal.

Chairman Grassley. Before I give my opening statement,
I am going to let Senator Leahy go ahead because he is a
major driver of everything we have done on reform. And also
because Senator Cornyn has worked so closely with him, I
have got a statement that I want to put in the record from
Senator Cornyn because of his hard work and commitment to
FOIA as well. And I look forward to continuing to work with
Senator Cornyn and Ranking Member Leahy as we work to still
improve government transparency.

[The prepared statement of Senator Cornyn follows:]

/ COMMITTEE INSERT

Chairman Grassley. Go ahead, Senator Leahy.

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

3 Senator Leahy. Well, thank you, Mr. Chairman. I
4 appreciate the courtesy. I once said FOIA ought to be part
5 of the Constitution, it is so important to our country. We
6 celebrated last week the 50th anniversary of the Freedom of
7 Information Act. It really is the premier transparency law.
8 So I think in this hearing we should talk about what we have
9 accomplished. We can talk about the work we have done
10 together since passage to make it even stronger.

11 For 50 years, FOIA has shed light on issues related to
12 public safety, public health, but also our national
13 security. FOIA has empowered the American people to
14 influence their government. This is one of the things you
15 have to remember. It is our government, and we should know
16 what our government does. It ensures that government of,
17 by, and for the people is not hidden from them.

18 But we also know that in those 50 years times have
19 changed, and technology has certainly changed remarkably.
20 So our transparency laws have to, too. I appreciate the
21 comments that Senator Grassley made about Senator Cornyn and
22 I working together on this. Senator Cornyn and I decided
23 sometime ago that this should not be a Republican or
24 Democratic issue. It is an issue for the American public.
25 And we have worked to try to modernize it.

1 Less than 2 weeks ago, President Obama signed into law
2 our bipartisan FOIA Improvement Act. Our bill brings in the
3 most significant reforms to FOIA since its enactment. The
4 presumption in our bill ensures that sunshine, not secrecy,
5 is our government's default setting.

6 But we can applaud ourselves for getting this bill
7 passed, and I certainly applaud the President signing our
8 bill. But the work is not finished. I think we have to
9 strengthen and support this important law for future
10 generations.

11 I also hope that we can work together to address the
12 frustration and grief felt by the American people who are
13 devastated by the loss of life in too many of our
14 communities. There continues to be distrust between law
15 enforcement and communities of color because of a long
16 history of unfair treatment towards minorities. The death
17 of two African American men, in Baton Rouge and St. Paul,
18 are just the latest examples. But we also must acknowledge
19 and be saddened by and aggrieved by the kind of hateful
20 violence that took the lives of five police officers in
21 Dallas last week. Violence is never the answer. Our police
22 are there to protect us. We can work with them. All people
23 have to be protected. All people. But violence, Dr. Martin
24 Luther King made that very clear when he moved us forward on
25 civil rights saying violence is not the answer.

1 We are charged with addressing the civil rights laws
2 and policies that affect law enforcement. It is our
3 responsibility to help to lead a national conversation. I
4 think we should have a call for a public hearing on these
5 issues. President Obama is going to Dallas today. He is
6 going to grieve with a community heartbroken by the loss of
7 five brave police officers. Those of us who have had the
8 privilege to serve in any level of law enforcement, as did
9 I, know how heartbroken that community has to be. So I
10 think we should have a hearing to shine a light. There are
11 a lot of things that can unify and heal us. We ought to
12 look at those things. We ought to work toward those things.

13 Congressman Elijah Cummings--I saw an interview with
14 him yesterday. He was asked, "Well, can we come together?"
15 He said, "It is not a question of can we come together, but
16 it is that we must come together." We must come together
17 for the sake of ourselves, our children, and our
18 grandchildren.

19 Thank you, Mr. Chairman.

20 OPENING STATEMENT OF HON. CHUCK GRASSLEY, A U.S.

21 SENATOR FROM THE STATE OF IOWA

22 Chairman Grassley. Good morning, everybody. As
23 Senator Leahy said, we have a 50-year history of this.
24 President Lyndon Johnson signed this into law. For the
25 first time in our Nation's history, individuals were given

1 the right--a right--to access the Federal Government's
2 documents. This marked a key step toward ensuring a more
3 open and accountable government.

4 The Supreme Court said it best: "The basic purpose of
5 FOIA is to ensure an informed citizenry, vital to the
6 functioning of a democratic society, needed to check against
7 corruption and to hold the governors accountable to the
8 governed."

9 Before FOIA, folks had to go through this process.
10 They had to justify to the government their need for
11 documents or for information. After FOIA now, the
12 government has to justify its refusal to release such
13 information to the public.

14 Before FOIA, government could largely rest assured that
15 mismanagement would remain hidden behind the curtains.
16 After FOIA, it is the right of the American people to know
17 what their government is up to.

18 Put simply, FOIA was created to ensure transparency.
19 And as you have heard me say many times, transparency brings
20 about greater accountability.

21 So today's hearing is a celebration, but it is also an
22 opportunity to reflect on the good that has come from FOIA.
23 And it is a chance to reiterate why FOIA should matter to
24 all Americans.

25 Without FOIA, countless stories of government waste,

1 fraud, and abuse would have simply remained in the dark.
2 Today we will hear more about what FOIA has brought to
3 light. This Committee has a long and, more importantly,
4 bipartisan history of protecting the public's right to know
5 and ensuring the government's compliance with FOIA. Most
6 recently, this strong bipartisan work helped to accomplish
7 the enactment of the FOIA Improvement Act, a bill that makes
8 some of the most substantial improvements to FOIA in 50
9 years.

10 I was a cosponsor of this bill, and I had the
11 opportunity to work closely with Senator Cornyn and Ranking
12 Member Leahy who have been FOIA leaders in the Senate for
13 many years. It is a strong step toward greater
14 transparency. But legislative reforms are only part of that
15 story.

16 Over the years, the government has continued to find
17 ways to undermine citizens' right to know under FOIA--in
18 other words, not getting their FOIA rights the way Congress
19 intended. Where the default setting should be transparency,
20 we still find a culture of obstruction and reflexive
21 secrecy. This has been the case under both Democrat and
22 Republican administrations.

23 So before I talk about this administration, remember
24 what I just said. This has been a problem under both
25 Republicans and Democrats.

1 President Obama recently called his administration the
2 "most transparent in history." In fact, on Saturday at the
3 NATO summit press conference, the President said, "We are
4 processing more Freedom of Information Act requests and
5 doing so faster than ever before."

6 The facts do not measure up to what he said, and I want
7 to quote the Associated Press, not Chuck Grassley. The
8 Obama Administration set a new record in 2015 for failing to
9 fulfill FOIA requests. And under President Obama, the
10 number of FOIA lawsuits in Federal courts has reached record
11 highs. You should not have to go to court to get what the
12 law allows you to have pro forma.

13 Under President Obama, White House review of
14 politically sensitive FOIA requests is an official policy.
15 And this town is all about politics. And what a reason to
16 keep people from getting their information because it might
17 be politically sensitive? That is no justification.

18 More than one of his top officials used personal or
19 alias emails to conduct official business, and that also
20 undermined FOIA's reach and public accountability. I am
21 sure people are going to be able to tell me that in
22 Republican administrations people used personal email.
23 Either way, it is wrong not to have that public record that,
24 when you do public business, it ought to be public.

25 According to the State Department Inspector General,

1 two State Department employees independently raised concerns
2 in 2010 that former Secretary of State Clinton's private
3 email usage was interfering with Federal recordkeeping laws.
4 Between the Inspector General and the FBI's vague findings,
5 there is a clear pattern of avoidance of public
6 accountability.

7 In the previous Congress, Members worked tirelessly in
8 a bipartisan and bicameral manner to improve citizens'
9 access to government information. But it was the Obama
10 administration that lobbied aggressively behind the scenes
11 to derail some of these efforts.

12 And those who work to bring the news to the American
13 people have found themselves up against an administration
14 seemingly intent on a delay-and-deny strategy for FOIA.

15 Earlier this year, my own statewide newspaper, the Des
16 Moines Register, published an editorial describing how, "In
17 the Obama administration, Federal agencies that supposedly
18 work for the people have repeatedly shown themselves to be
19 flat-out unwilling to comply with the most basic
20 requirements of the Freedom of Information Act." But the
21 Register went on to say, "Obama's penchant for secrecy is
22 almost unparalleled in recent history."

23 But we are not here today just to look back. We are
24 here to look forward and to ask what can be done to best
25 ensure a government culture of openness for FOIA's next 50

1 years. In other words, the public's business ought to be
2 public. And when it is, you are going to have more
3 accountability.

4 Of course, we should bear in mind that a new
5 administration will soon be moving in. So it is important
6 to ask how we can work to secure a commitment to
7 transparency from day one.

8 Today we will hear about the benefits of more proactive
9 disclosure by agencies. By releasing information before it
10 is requested, agencies could go a long way towards reducing
11 delays and improving transparency.

12 And we will hear about the value of improved
13 communication between agencies and requesters and the
14 benefits of resolving FOIA disputes without going to court.

15 So I thank the witnesses for being here. Our first
16 witness is Rick Blum, director of Sunshine in Government
17 Initiative, SGI for short. Prior to joining this
18 organization, he was the founding director of
19 Openthegovernment.org. Mr. Blum holds a master's degree
20 from Indiana University and a bachelor's degree from the
21 University of California at Berkeley.

22 Miriam Nisbet served as the Founding Director of the
23 Office of Information Services at the National Archives and
24 Records Administration from 2009 until her retirement in
25 2014. Ms. Nisbet previously served in the United Nations

1 UNESCO as director of Information Society Division. Prior
2 to joining the National Archives, Ms. Nisbet served as
3 Deputy Director of the Office of Information and Privacy at
4 the Justice Department. She received a bachelor's degree
5 and J.D. degree from the University of North Carolina,
6 Chapel Hill.

7 David Cuillier is an associate professor and director
8 of the University of Arizona School of Journalism. He
9 previously served as the president of the Society of
10 Professional Journalists and currently serves on its Freedom
11 of Information Committee.

12 And Margaret Kwoka is an assistant professor,
13 University of Denver, Sturm College of Law, where she
14 focuses on government transportation and executive branch
15 accountability. Prior to that, she was an attorney at
16 Public Citizen's litigation group where she focused on FOIA
17 litigation. The professor holds an A.B. from Brown
18 University and J.D. from Northeastern University School of
19 Law.

20 Welcome. I thank all of you for the hard work you have
21 to go through to make sure that we get the information that
22 you can give us. So here we go. Thank you very much, and I
23 will start with Mr. Blum, and then we will just go across
24 the table that way.

1 STATEMENT OF RICK BLUM, DIRECTOR, SUNSHINE IN
2 GOVERNMENT INITIATIVE, WASHINGTON, D.C.

3 Mr. Blum. Mr. Chairman, Ranking Member Leahy, and
4 members of the Judiciary Committee, my name is Rick Blum,
5 and I direct the Sunshine in Government Initiative, a
6 coalition of nine media associations promoting open
7 government.

8 Thank you for the chance to celebrate with you a half
9 century, and counting, era of law meant to guarantee that
10 the public's business is conducted publicly. Transparency
11 is a core democratic value. It is also a powerful tool for
12 democratic self-correction.

13 FOIA has had an impact. I want to congratulate and
14 thank the members of this Committee, and especially you, Mr.
15 Chairman, Senator Leahy, and Senator Cornyn, for your
16 bipartisan work winning enactment of the FOIA Improvement
17 Act. A presumption of openness, a more independent FOIA
18 Ombudsman, and a time limit on withholding policy
19 deliberations that do not otherwise fall within an exemption
20 are all going to help limit abuses of FOIA.

21 In fact, congressional action has been essential to
22 strengthening transparency in government throughout FOIA's
23 history.

24 Let me celebrate FOIA's 50 years by highlighting a
25 couple recent stories showing FOIA's impact--or one showing

1 FOIA's impact and another worthy of a Hall of Fame
2 somewhere.

3 First, when a Minnesota TV news station used FOIA,
4 reporters found the Veterans Administration had relied on
5 medical professionals unqualified by VA's own standards to
6 properly administer over 24,000 tests for brain injuries,
7 leading to wrong diagnoses or denied benefits. Because of
8 the stories, the VA announced 6 weeks ago it is redoing
9 those tests.

10 The FOIA story that perhaps best reminds me of
11 transparency's importance is one from a decade ago. The
12 military was sending armored vests to troops knowing the
13 vests failed ballistics tests. Holding the test results
14 obtained through FOIA, the reporter called the official
15 responsible for comment just before going to publish. The
16 next day, thousands of vests were recalled.

17 I mention other examples in my written testimony.
18 These are just some examples of FOIA's five-decade-long
19 track record of important contributions to the public good.

20 This Committee can continue its bipartisan, bicameral
21 work to strengthen FOIA by tackling some of the big issues
22 in FOIA, and let me explain briefly.

23 First, agencies should be more responsive to correcting
24 problems with FOIA and held accountable. Currently, as long
25 as an agency shows progress toward reducing backlogs or can

1 show an unexpected uptick in requests, long wait times are
2 tolerated. Probably the single biggest factor deterring
3 journalists from using FOIA is the long waits. The new
4 amendments take away fees for delays, and that is a very
5 good step.

6 Second, FOIA suffers from insufficient investment in
7 technology. The portal required under the new law is good
8 to have in law. A useful portal is a request-to-response
9 processing and tracking tool serving the needs of agencies
10 and requesters. FOIA Online is an example. This is the
11 kind of solution that should be built and address this
12 persistent problem, and we need more like it.

13 Third, we must do more to defend FOIA from statutory
14 exemptions proposed by agencies and special interests. We
15 need better gatekeeping to supplement this Committee's
16 efforts to ensure any new proposed statutory exemption,
17 which is under subsection b(3) of FOIA, meets strict, clear
18 criteria to ensure any new secrecy is absolutely necessary,
19 justified, narrowly tailored to the need, clearly defined,
20 and time-limited.

21 Again, we thank you for speaking out publicly against
22 the confidentiality proposed for commodity promotion boards
23 like the Egg Board and the Committee's continued bipartisan
24 work to defend FOIA from other overbroad proposed
25 exemptions.

1 I also want to mention that Congress should improve the
2 way that government captures, organizes, and stores
3 electronic information so disclosure is built in at the
4 front end, not the back end. Amazon does not pile up boxes
5 in huge mounds in its warehouses. It catalogues the row and
6 shelf location for easy retrieval for each package to
7 deliver my package in 2 days. Digital storage and retrieval
8 should speed government responses, not slow it down.

9 There are a number of other specific actions that
10 Congress and the President might focus on that are mentioned
11 in my and others' testimony. We look forward to working
12 with you to identify problems and their solutions, to
13 strengthen leadership within and across Federal agencies,
14 and to give agencies and requesters the tools and resources
15 they need to continue to improve FOIA.

16 Thank you for the opportunity to testify today, Mr.
17 Chairman, and I look forward to your questions.

18 [The prepared statement of Mr. Blum follows:]

1 Chairman Grassley. Thank you, Mr. Blum.

2 Now, Ms. Nisbet.

1 STATEMENT OF MIRIAM NISBET, FOUNDDING DIRECTOR,
2 OFFICE OF GOVERNMENT INFORMATION SERVICES,
3 NATIONAL ARCHIVES AND RECORDS ADMINISTRATION,
4 WASHINGTON, D.C.

5 Ms. Nisbet. Good morning, Mr. Chairman and members of
6 the Committee. I am Miriam Nisbet, Founding Director of the
7 Office of Government Information Services at the National
8 Archives and Records Administration. It was my privilege to
9 stand up that office that is usually referred to as "OGIS"
10 or as the "FOIA Ombudsman." I retired at the end of 2014.

11 I want to add my congratulations and thank you for the
12 FOIA Improvement Act of 2016. Without this Committee's
13 leadership, we would not be celebrating the 50th anniversary
14 of FOIA. with these new, significant amendments. Many
15 stakeholders worked with you to bring this to fruition--
16 people who are true believers in the power to FOIA as an
17 essential tool to ensure accountability and transparency in
18 government. That is very true.

19 Yet this Committee has observed many times that the
20 process should work much better. Agency FOIA professionals
21 and FOIA requesters alike are frustrated by backlogs. They
22 are stymied by underutilization of technology, and they are
23 disappointed by adversarial encounters. New amendments that
24 will surely help include: codifying the "foreseeable harm"
25 standard to promote disclosure and placing a 25-year sunset

1 on the deliberative process privilege under Exemption 5;
2 requiring publication of records requested under FOIA three
3 or more times; and establishing a singular online portal for
4 the public to make requests.

5 The changes I would like to focus on today flow
6 directly from goals stated eloquently by this Committee over
7 the past few years, and that would be bolstering the use of
8 dispute resolution in the FOIA process and strengthening the
9 FOIA Ombudsman's Office and increase its institutional
10 independence.

11 First, the new law ensures in a number of ways that
12 dispute resolution is an integral part of the FOIA process.
13 For example, requesters will be notified at several stages
14 now that they have the right to assistance from the FOIA
15 Public Liaison and the Office of Government Information
16 Services. These will increase the opportunities for dispute
17 resolution to conserve administrative resources and head off
18 costly and time-consuming lawsuits. The availability of
19 dispute resolution at all stages of the FOIA request is just
20 good customer service.

21 Second, the law affirms the responsibility of OGIS to
22 review agency compliance and solidifies the role of OGIS in
23 the FOIA ecosystem. In existence nearly 7 years, OGIS has
24 worked with and assisted many agencies and thousands of
25 requesters. Still, there has been confusion and pushback

1 about what the new FOIA Ombudsman could do and would not do.

2 The new law makes clear that OGIS has the authority to
3 make its compliance reviews broadly available, identify
4 procedures and methods for improving FOIA compliance, and
5 recommend legislative and regulatory changes to improve
6 FOIA.

7 Finally, from previous visits to this Committee, I know
8 that you and your colleagues in the Senate and the House had
9 expected to receive unvarnished recommendations from an
10 independent ombudsman. That could not happen during my
11 tenure.

12 As a component of an executive branch agency, the OGIS
13 Director's draft recommendations, reports, and testimony
14 were reviewed and had to be approved, sometimes after
15 lengthy debate and negotiation, by the very agencies that
16 could be affected. You have fixed that. The OGIS Director
17 is not required now to get the prior approval or comment of
18 any government officer or agency before submitting reports,
19 recommendations, and testimony to Congress, so long as the
20 submissions state that they do not necessarily represent the
21 views of the President.

22 The authority to report and communicate directly to
23 Congress, as the new law provides, is an important reform
24 for an office that hears complaints, resolves disputes,
25 reviews compliance--and is expected to speak truth to power.

1 Thank you for the opportunity to testify. I look
2 forward to your questions.

3 [The prepared statement of Ms. Nisbet follows:]

1 Chairman Grassley. Thank you very much.

2 Now, Dr. Cuillier, if I have pronounced your name
3 right.

4 Mr. Cuillier. You did. Excellent. Thank you.

1 STATEMENT OF DAVID CUILLIER, PH.D., DIRECTOR AND
2 ASSOCIATE PROFESSOR, THE UNIVERSITY OF ARIZONA
3 SCHOOL OF JOURNALISM, AND FORMER PRESIDENT,
4 SOCIETY OF PROFESSIONAL JOURNALISTS, TUCSON,
5 ARIZONA

6 Mr. Cuillier. Thank you, Chairman Grassley and members
7 of the Committee on the Judiciary. Thank you for the
8 opportunity to testify today on behalf of the Society of
9 Professional Journalists, the largest and most broad-based
10 journalism organization in the Nation, about 7,000 members,
11 and as a professor, researcher, and teacher of freedom of
12 information at the University of Arizona. And thanks to all
13 of you for your continued work to improve the public's right
14 to get information about its government. This is so
15 critical, as you pointed out, and the FOIA Improvement Act
16 has done a lot. I mean, we have significant changes,
17 changes that we have talked about in these hearings in the
18 past that are now a reality. It is not often that
19 journalists say thank you to the government, but thank you.
20 We appreciate it. We truly do.

21 And I hope I can build on this momentum a little bit
22 and so that we could really fix FOIA. And I hate to be a
23 bummer, but we still have a lot of problems with FOIA, and
24 that is our role. Journalists, we are bummer. And so I
25 have got to talk about that a little bit because I hope that

1 we can make things better in the next 50 years for the
2 future of FOIA, which is what we are all about, aren't we?
3 We are all about coming together. It does not matter what
4 party you are, what job you have. We want to make America
5 better.

6 But, unfortunately, FOIA has become a tool of secrecy,
7 not transparency. Agencies are gaming the system. Critical
8 information is hidden from the public, and journalists are
9 frustrated because they see that firsthand. They see
10 information not getting to their communities, and it is
11 something that just really bugs us--information that could
12 shed light on unsafe drinking water, on corruption, on
13 wasteful spending. And I think we are at a tipping point,
14 and we have to deal with this.

15 Research, lots of research on this I have cited in my
16 written testimony. It is clear the Obama administration has
17 set new records in secrecy. Yes, they are processing more
18 requests, and they are processing faster. What they are
19 doing is they are stamping "No" faster is what they are
20 doing. Higher denials, more use of exemptions. So, sure,
21 we are processing FOIA requests, more of them and faster,
22 but we are not making transparency better.

23 On average, people are told they cannot have
24 information 77 percent of the time. Three-quarters of the
25 time you go ask for information, you are told no, or they

1 cannot find it.

2 Government Public Information Office, the offices
3 manage the message. They control information that is
4 getting to the public. And journalists, who serve as
5 proxies for citizens, have become increasingly frustrated at
6 what is happening.

7 Last year, the Society of Professional Journalists and
8 50 other open government groups, journalism organizations,
9 urged the White House to stop this, to stop this increased
10 information control. And we have yet to really hear or see
11 results to live up to the promises of the transparency that
12 we were told 8 years ago.

13 Congress can turn the tide. They can set us back on
14 track, create a culture of openness and accountability. So
15 let us take these steps together, shall we? Let us make
16 FOIA great again. Let us make it stronger together. I
17 think we can do that. And how do we do that? Five
18 suggestions.

19 One, we should require FOIA training of all employees.
20 I hear often complaints that a lot of government employees
21 do not understand the law or do not see the point of it.
22 Maybe they see it as a hindrance to their day-to-day work.
23 I get that. I am a public employee. But this is a
24 necessary function of government. The Office of Government
25 Information Services provides training for FOIA officers. I

1 think they should have funding to provide for all Federal
2 employees.

3 Second, we need enforcement mechanisms. The law has no
4 teeth. There are no repercussions for violating FOIA--
5 except maybe hiring a lawyer and suing, and that is hard for
6 citizens. The system is stacked against them. Some State
7 public record laws provide penalties and fees and fines for
8 noncompliance. I think that should be instituted at the
9 Federal level as well.

10 Third, streamline the system. Reduce delays.
11 Professor Kwoka will talk about this, about how commercial
12 requesters suck up the bulk of FOIA requests, creating
13 backlogs and subsidized by taxpayers in the millions and
14 making it harder for people who are trying to get
15 information for the public good.

16 Fourth, rein in exemptions. Congress should restrain
17 the abuse of Exemption b(3), Examination 5 of the privacy
18 exemption that has been twisted out of recognition since its
19 original intent. Overclassification is out of control, and
20 we need to curtail these secrecy tactics.

21 Fifth, invest in electronic proactive disclosure. As
22 Mr. Blum talked about, when we have to do a request, we have
23 failed.

24 So I hope that we can make this better. Thank you for
25 all your work, and I look forward to your questions.

1 [The prepared statement of Mr. Cuillier follows:]

1 Chairman Grassley. Thank you, Dr. Cuillier.

2 Now, Professor Kwoka.

1 STATEMENT OF MARGARET B. KWOKA, ASSISTANT
2 PROFESSOR, STURM COLLEGE OF LAW, UNIVERSITY OF
3 DENVER, DENVER, COLORADO

4 Ms. Kwoka. Chairman Grassley, Ranking Member Leahy,
5 and members of the Committee, thank you for the opportunity
6 to testify today about the state of the Freedom of
7 Information Act at this 50th anniversary of its enactment.
8 My name is Margaret Kwoka, and I am on the faculty at the
9 University of Denver Sturm College of Law.

10 I want to begin by commending the members of this
11 Committee for their longstanding leadership with respect to
12 FOIA and, in particular, on the recent FOIA Improvement Act
13 of 2016, which promises to make meaningful strides in
14 improving the transparency and accountability of our
15 government.

16 In FOIA's first 50 years, we have seen many remarkable
17 victories for openness and government accountability,
18 particularly stemming from requests made by the press, who
19 are, of course, the prime intended users of the law.

20 While we should celebrate the countless instances in
21 which FOIA has worked exactly as envisioned, it remains true
22 that the news media make up a tiny percentage of requesters-
23 -in the single digits at most agencies. Yet, on the other
24 side of the ledger, the executive branch rightfully notes
25 the increasing workload of FOIA offices. Governmentwide,

1 agencies are now receiving in excess of 700,000 requests per
2 year.

3 As we move into FOIA's next 50 years, I believe we
4 should be asking who makes up the bulk of these requesters
5 if it is not the news media and whether FOIA is the best way
6 of meeting those other requesters' information needs.
7 Accordingly, today I will focus my testimony on the findings
8 of my recent research on one large subset of FOIA requesters
9 whose use of the law was largely unanticipated: commercial
10 requesters.

11 My research documents that at many agencies,
12 particularly large regulatory agencies such as the SEC, EPA,
13 or FDA, commercial requesters make up the majority,
14 sometimes the vast majority, of FOIA requests.

15 My study also shows that these commercial requests
16 advance primarily private interests rather than promoting
17 the public's knowledge about governance.

18 For example, businesses use FOIA to get information
19 about their competitors, lawyers use FOIA to get information
20 to recruit clients, and companies use FOIA to provide due
21 diligence services to clients.

22 Interestingly, there is also a group of frequent
23 commercial requesters that I classify as "information
24 resellers." These are businesses that request large volumes
25 of Federal records and resell them--at a considerable

1 profit--to private parties. In fact, resellers are present
2 amongst top requesters at five of the six agencies I
3 studied, and at two agencies, multiple resellers compete
4 against one another.

5 One problem that is posed by this volume of commercial
6 requesting is that, by my estimates, agencies are often
7 recouping only between about 1 and 5 percent of the cost of
8 processing commercial requests by charging fees, thereby
9 essentially providing a private subsidy to these businesses.

10 Another is that news media and other requesters may be
11 crowded out due to resource constraints, given that some
12 commercial requesters are filing hundreds and sometimes even
13 thousands of requests per year.

14 I do not want my conclusions about these problems to
15 suggest that I think businesses do not have legitimate
16 information needs or that they should not be entitled to
17 access government information. Rather, I simply think FOIA
18 was not designed for this purpose, and perhaps more
19 importantly, FOIA is poorly suited to meet these commercial
20 information needs because commercial requesters tend to
21 request the same types of records over and over again.

22 For example, at FDA many commercial requesters file
23 hundreds of FOIA requests for facilities inspection reports.
24 Though each record concerns a different facility or
25 inspection event that took place, the type of record that is

1 requested is routine. Given that fact, filing FOIA requests
2 one by one for each inspection record is an inefficient way
3 of gathering the whole category of these records.

4 In contrast to commercial requesters, news media
5 requests tend to vary widely in subject matter, making
6 individual requesting a far more sensible approach to
7 information access in this context.

8 Instead of forcing companies to rely on FOIA to the
9 potential detriment of overall transparency, agencies should
10 be incentivized or even required to identify routinely
11 requested categories of records in their FOIA logs and to
12 affirmatively disclose them without waiting for individual
13 requests.

14 For agencies, affirmative disclosure would save them
15 from having to respond to thousands of requests at the cost
16 of potentially millions of dollars. It might also free up
17 their FOIA office's resources to service those requests that
18 go more to the heart of FOIA, making FOIA faster and more
19 useful for journalists and watchdog groups. It would
20 certainly eliminate the private subsidy and create databases
21 that are truly transparent and useful for all.

22 There is nothing stopping agencies from taking this
23 approach on their own. For example, my understanding is
24 that EPA is currently working to release My Property 2.0, an
25 online tool designed to eliminate the need for the public to

1 submit FOIA requests for site-specific records, most of
2 which are currently requests that come from due-diligence
3 companies. But these kinds of voluntary efforts are rare.

4 I urge this Committee to consider Congress' role in
5 encouraging or requiring agencies to take these steps.
6 Congress could legislate requirements that agencies publish
7 their logs, evaluate those logs for opportunity to preempt
8 the need for FOIA requests, and to report on their efforts
9 to the Department of Justice.

10 I thank this Committee once again for your commitment
11 to transparency and the opportunity to testify today, and I
12 look forward to your questions.

13 [The prepared statement of Ms. Kwoka follows:]

1 Chairman Grassley. Thanks to all of you for staying
2 within the time limit. Of course, your whole statement will
3 be put in the record if you have a longer statement.

4 I am going to start with Ms. Nisbet. You heard me
5 express my concern about the increasing number of lawsuits
6 that are being filed in Federal court. A draft GAO study
7 says that there has been a 57-percent increase since 2006.
8 Such a huge increase proves that maximum transparency under
9 this administration does not exist. We need to work toward
10 resolving FOIA disputes before they go to litigation. It
11 seems to me that encouraging communication at the outset
12 between agencies and requesters would go a long way.

13 So I would like to have you speak to the benefits of
14 improved communication between requesters and agencies,
15 particularly your experience as Director of OGIS. And how
16 can we best ensure communication early on to resolve FOIA
17 disputes before they go to litigation?

18 Ms. Nisbet. Thank you, Mr. Chairman. I think there
19 are changes in this new FOIA Improvement Act that will go a
20 long way to help this culture of openness to dispel the
21 adversarial nature a lot with the FOIA process, and that is
22 having communication early and often between requesters and
23 agencies.

24 I do not have the figures in front of me, but I am
25 aware that--I have heard many times people express concern

1 that a number of the lawsuits that are brought under FOIA
2 are because the requester did not get a response at all from
3 the agency. Bringing a lawsuit when you have not gotten a
4 response is understandable. That is huge frustration. But
5 that is precisely where the FOIA Public Liaison and the
6 Office of Government Information Services, acting early on,
7 can open up those lines of communication and talk about what
8 is going on, the scope of the request, what the records may
9 be that the agency could give quickly, if not immediately.
10 And it just sets, I believe, a really good tone for the
11 culture of openness that I know I have heard you talk about.

12 Chairman Grassley. Dr. Cuillier, I would like to hear
13 what you have to say about ensuring compliance. Do you
14 think that FOIA's current enforcement mechanisms are
15 adequate? Or should there be stronger sanctions for agency
16 personnel who violate their obligations under FOIA? And do
17 you think stronger sanctions actually will work?

18 Mr. Cuillier. Well, I know they work. When we see
19 States that have strong enforcement provisions, we see
20 compliance. Washington State, Florida, Texas, States where
21 if you do not comply as an agency, not only could you get
22 attorney fees that you have to pay for plaintiffs who
23 prevail, but punitive damages. There are some States that
24 have criminal penalties for individuals who violate their
25 public records law. Rarely are they enforced, but they are

1 on the books. Louisiana used to have a law that made you do
2 hard time in a penitentiary if you violated the public
3 records law.

4 I do not anticipate that will happen in FOIA, but we at
5 least have to have some teeth in the law, because if we do
6 not, people will just ignore a request because they know
7 most people are not going to sue; they are not going to hire
8 an attorney or they will be intimidated.

9 So I think it is absolutely necessary. If we are going
10 to have a law, we should have enforcement. It works for you
11 and me if we go speeding down the interstate. There are
12 penalties to breaking the law. The same should apply to
13 FOIA, I think.

14 Chairman Grassley. Mr. Blum, talk about what
15 challenges journalists are facing in the FOIA process,
16 particularly recently. What are some of the biggest
17 frustrations that journalists have faced and continue to
18 face in trying to gain access to information? And what
19 specifically would you have this Committee focus on to best
20 ensure openness and transparency as we move into FOIA's next
21 50 years? And, Dr. Cuillier, listen to him, and if you have
22 got anything to add, add.

23 Mr. Blum. I have a feeling they will have--that is a
24 very large question, and I appreciate the question. You
25 know, I think that the big problem is just how long it

1 takes. I talk to journalists, and they are not going to
2 file a FOIA request. The first piece of advice I give is,
3 "Do not use FOIA if you do not have to because it is going
4 to take a long time."

5 So what reporters do is they will file, planning to do
6 something months or even years down the line. So that is a
7 big problem.

8 Others say that our big problem is we have to sue to
9 even get the agency's attention. They will not take us
10 seriously until we file a lawsuit. And, obviously, we have
11 to pick and choose which cases that we do that for, but that
12 is also a big problem.

13 It is also hard to know, once you get a response back,
14 if you are getting everything that you need and everything
15 that you should get. Oftentimes, the person who--if it is
16 an adversarial request, the person who is looking at the
17 request, trying to decide what to redact or what to not
18 include in the response is the person who might be
19 embarrassed or who would be affected by the disclosures.

20 So I think that, going forward, having certain
21 technologies in place--Ms. Nisbet was responsible in leading
22 the government's efforts to build something called FOIA
23 Online. We think that was a very, very good step because it
24 allowed both agencies and requesters to see where their
25 request was in the process of getting a response. It is

1 just an online tool. All agencies should be using something
2 like that--you know, it goes to this Amazon model--so that
3 we can also have just greater guarantees that when we make a
4 request and get a response, we are getting everything that
5 we need, and it is done in a more timely way.

6 Chairman Grassley. Do you have anything to add to
7 that?

8 Mr. Cuillier. Well, I would just add that there is a
9 reason three-quarters of journalists do not use FOIA, and
10 they are the reasons Mr. Blum pointed out. And that is too
11 bad. But, more important, this is not really about
12 journalists versus the government. This is about citizens.
13 Journalists are just proxies. And citizens are even more of
14 disadvantaged at getting information about their government,
15 and I think that is the real problem here today. I think we
16 need to speak out on behalf of those folks.

17 Chairman Grassley. Senator Leahy.

18 Senator Leahy. Let me ask you, Mr. Blum, you spoke
19 about some of the rise of statutory FOIA exemptions, and I
20 share your concern. The Senate recently passed the national
21 defense authorization bill. It contained a broadly worded
22 FOIA exemption that would cause a wholesale carveout of the
23 Department of Defense in FOIA. Obviously, I did not support
24 that amendment. But what would that do if that was passed
25 into law? Would that have any effect on journalists?

1 Mr. Blum. I believe it would. Our organization, as
2 part of our efforts to educate both journalists and others
3 about the importance of FOIA, we have something called the
4 "FOIA files." You can go online, and we have collected over
5 the last 10 years over 700 stories that used in some way the
6 Freedom of Information Act, by journalists, by others, and
7 we have catalogued them. I looked yesterday, and about 25
8 percent of the stories come from the Department of Defense.
9 These are Department of Defense-related FOIA requests. And
10 those stories cover everything from concussion rates in
11 trainings, sexual assaults, high suicide rates in the
12 military, the challenges that the U.S. faces with growing
13 cyber attacks, Pentagon workers who were tied in some way to
14 child pornography.

15 I think the other issue, the other story that really
16 struck me was what was called "suicide showers," and these
17 are soldiers at U.S. bases who are electrocuted from
18 miswired showers.

19 These are some of the things that I think if you look
20 at the very broad language in the proposal that you are
21 talking about, it is everything concerning military tactics,
22 operations, or techniques. I am not sure that there is
23 anything that the Defense Department does that is not
24 concerning in some way military tactics, techniques, or
25 operations.

1 Senator Leahy. In fact, the things that you have
2 talked about--suicide rates, health care, cost overruns,
3 which should concern all of us--these things should be
4 disclosed, should they not?

5 Mr. Blum. They should, and there is a way to do those
6 stories without, you know, running up against national
7 security concerns. Those really are not--that is really not
8 the issue.

9 Senator Leahy. You cannot get a FOIA request to say,
10 "Where are you planning an attack in Iraq next month?"
11 Right?

12 Mr. Blum. That is absolutely correct.

13 Senator Leahy. I mean, those kind of things are
14 protected, but mistakes, miswired showers where people die,
15 that is not a national security issue. We ought to be able
16 to find out about those things, should we not?

17 Mr. Blum. We absolutely should, and oftentimes,
18 telling those stories, as I mentioned about the armored
19 vests, that is what leads to changes, and the FOIA has been
20 an integral tool for telling those stories.

21 Senator Leahy. Professor Kwoka, you said that
22 companies try to profit by requesting and then reselling
23 government records and that they are overwhelming agencies
24 with their requests, and reporters and government watchdogs'
25 requests take longer as a result.

1 Is our FOIA system going to break down if we have this
2 expansion--actually, a two-part question. Is our FOIA
3 system going to break down if we have an expansion of
4 profit-seeking companies on FOIA? And do we set a bad
5 precedent, conversely, if we give a priority to media over
6 commercial requests? How is that for tossing it all on your
7 lap?

8 [Laughter.]

9 Ms. Kwoka. Those are important issues both. I think
10 as to the first portion of your question, I do think that
11 maybe these private companies who warehouse Federal records
12 and resell them at a profit are clogging the system,
13 potentially to the detriment of other requesters who, you
14 know, are waiting, as we have heard, very long times for
15 responses from agencies. Even more so, they may be a
16 symptom of the problem because what they are doing is kind
17 of demonstrating that they can add value simply by
18 warehousing records and being faster at responding to
19 private businesses' needs for information than the Federal
20 Government is itself. And so that is one reason why I think
21 affirmative disclosure would preempt the need for this sort
22 of private profit-seeking industry.

23 And, second, as to the bad precedent that we might set
24 if we kind of track requests differently, I do think, you
25 know, it may be important to explore options like

1 prioritizing press requests. We do have expedited
2 processing for some sorts of requests. But it may also
3 encourage, you know, industry to try to game the system or
4 fit themselves into some new priority category. Affirmative
5 disclosure will, in fact, prevent all of that. It will
6 prevent the need for requesting in the first place for all
7 requesters and I think offers a more promising solution for
8 that exact reason that you have highlighted.

9 Senator Leahy. Thank you, because I think we are going
10 to be facing that question more and more as we go ahead. We
11 want FOIA to work, but we also do not want to be
12 overwhelmed. In fact, I would ask you, Ms. Nisbet, you were
13 the first Director of OGIS. Senator Cornyn and I created
14 that office back in 2007 in the Open Government Act. Has
15 that office realized its full potential? Or does it need
16 some of the things we have put in the FOIA Improvement Act?

17 Ms. Nisbet. First, thank you for your work in creating
18 the office, and I would say it is an office that is really
19 beginning to be a recognized part of the solution in FOIA, I
20 believe as you intended.

21 The changes in the FOIA Improvement Act of 2016 are
22 certainly going to help that, and not just OGIS. Because of
23 the provisions that really ensure that the FOIA Public
24 Liaisons in the agencies--who, by the way, work closely with
25 OGIS--that they will be involved early on and that

1 requesters are going to be told that they have the right to
2 seek the services of the FOIA Public Liaison and OGIS, and
3 that will definitely help to spread the word and let more
4 people know.

5 I think there are still many requesters who do not
6 understand that OGIS is available to help them figure out
7 things that, before there was an OGIS, the only recourse was
8 to bring a lawsuit.

9 Senator Leahy. Well, thank you. I will give you an
10 open invitation to keep me and my office posted on what is
11 going well with OGIS but also be candid and tell us where
12 you have problems.

13 Ms. Nisbet. Thank you.

14 Senator Leahy. Thank you.

15 Thank you, Mr. Chairman.

16 Chairman Grassley. Senator Franken.

17 Senator Franken. Thank you, Mr. Chairman, for this
18 important hearing.

19 In your testimonies, a couple of you, especially Mr.
20 Blum and Ms. Kwoka, Professor Kwoka, talked about
21 technology, and with 700,000 requests a year, it just seems
22 like--I have quotes from you. Mr. Blum, you said, "FOIA
23 suffers from insufficient investment in technology." Ms.
24 Nisbet, you talked about agencies being flooded with
25 requests, and that they are often struggling with outdated

1 technology.

2 Just for all the witnesses, what additional tools and
3 resources do Federal agencies need to help fulfill this?
4 Because what I heard from the Chairman's opening statement
5 was that President Obama said they are processing more,
6 answering more, and then he quoted that there are more
7 unanswered. And I think both are true. Right? So, I mean,
8 though you quoted that, Mr. Chairman, with all respect, the
9 second thing did not negate the first. I think the
10 President was saying something that was true. And I think
11 what we have is this explosion, and we are seeing that a lot
12 of commercial interests--Professor Kwoka testifies to the
13 overwhelming number of commercial interests that are really
14 gaming this, or some are gaming it. What kind of technology
15 can we use to handle this?

16 And one last thing. Mr. Cuillier, I do not think you
17 can--I think it would be a little waste of effort to train
18 every Federal employee in FOIA. I think I can envision a
19 few Federal employees that really would not need that
20 training. But go ahead. Open it up on technology, and, Mr.
21 Cuillier, feel free to say anything you want to me. Well,
22 not anything, but you know--

23 Mr. Cuillier. Okay.

24 [Laughter.]

25 Mr. Cuillier. Well, let me start with--

1 Senator Klobuchar. Can I do that, too?

2 Mr. Cuillier. I will just say there are States that
3 require all government employees to go through public
4 records training, so I think there are models for this. I
5 agree with you, there are a lot of Federal employees, and
6 that is a big job. And, you know, there are different ways
7 of doing that, but I do not think it is an insurmountable
8 task. But it is a good point. It sounds insurmountable.

9 Senator Franken. Technology.

10 Ms. Nisbet. If I may, Senator Franken, Rick Blum
11 referred to FOIA Online, which is a multi-agency FOIA portal
12 processing, tracking, and response system that OGIS was
13 involved in early on to see if this could be done, and it
14 has been very successful.

15 That is just the beginning, though. It is certainly a
16 good model. And now the law directs that there be a single
17 online portal.

18 That can go a long way to making it easier. Right now
19 people for the most part, unless they use FOIA Online,
20 really do have to go agency by agency to make a request.
21 That assumes that they know where to go to look for the
22 records that they are looking for, which can be very, very
23 difficult. So having a single entry point and having people
24 in the government who know where the records are get them to
25 the right place is a good start.

1 I also think that we are seeing big improvements,
2 including disclosures to commercial requesters by government
3 agencies, getting lots of data out there. It is sort of the
4 big data trend. And I think the more there are proactive
5 disclosures, the more there are good examples of how to
6 identify these categories of records that are requested over
7 and over again--

8 Senator Franken. I am a little concerned about the
9 government subsidizing commercial interests who are just
10 collecting this information and then selling it. That
11 seemed to be--but can I go to Mr. Blum on technology? And
12 then can I have a few more seconds?

13 Chairman Grassley. Yes.

14 Senator Franken. Or minutes? Hours?

15 [Laughter.]

16 Chairman Grassley. How about a couple minutes?

17 Senator Franken. Okay. Thanks.

18 Mr. Blum. Let me just say I think the private entities
19 are doing things that the government should be doing. They
20 should be gathering this information. They should be
21 indexing it and making it searchable and available so that
22 you are going--on an enterprise level, so that you are not
23 going to Miriam and saying, "Search through your emails and
24 pull up things that are relevant to this request." So the
25 private entities I think are doing things that the

1 government can be doing.

2 I think that the FOIA Improvement Act is wonderful in
3 requiring a portal. The law actually says that it should be
4 able to track requests. There is a lot more in FOIA Online
5 that it does for agencies so that they can manage their FOIA
6 process by looking at it and getting a good dashboard of
7 where they are on their backlogs, and for requesters. You
8 have got to build all of those things into one system. I
9 think this Committee could provide some oversight as this
10 gets implemented.

11 Senator Franken. The one portal is good. I just
12 wanted to ask, Mr. Cuillier, you say in your testimony that,
13 despite Congress' work to strengthen FOIA over the past 50
14 years, the United States lags other countries with respect
15 to transparency. The U.S. is ranked 46th among 105
16 countries that have laws similar to FOIA, and you point out
17 Uganda, Kyrgyzstan, and Russia have better, stronger
18 transparency.

19 I cannot believe that. By what measure possibly--how
20 does that--that is in your testimony.

21 Mr. Cuillier. It is.

22 Senator Franken. Explain to me how you would say that
23 Russia's freedom of information act is stronger. How can
24 that be a meaningful statistic? Because I do not--I just
25 want to know how that is arrived at and why you think that

1 is meaningful.

2 Mr. Cuillier. Right, right. And it strikes everybody
3 as odd because it makes no sense whatsoever.

4 Senator Franken. Yes.

5 Mr. Cuillier. And I have to be clear. This is the
6 text of their laws. It does not necessarily mean there is
7 more transparency in Russia or Kyrgyzstan or Kazakhstan or
8 Estonia, which also have stronger laws than ours. But just
9 because it is in the law does not necessarily mean that
10 there is better transparency, as we see in our own country.
11 But when you take a look at the laws as written, they are
12 very strong as written. And there is a systematic way of
13 measuring that. I have cited the website. You could take a
14 look at that yourself. You could see the methodology.

15 So when they look at whether or not it is in the
16 Constitution, right to know, whether or not there are
17 enforcement provisions, whether or not the turnaround is 5
18 days instead of 20, all of that is documented. But you make
19 a good point. If I were in--

20 Senator Franken. Well, right here, globally as well,
21 the United States is falling behind. Ratings of FOIA laws
22 in the--so that is the laws. Okay. I just want to stick up
23 for the old United States of America.

24 Mr. Cuillier. Right, right. You know, flag wave, I
25 agree. You know, "Go, America." But, you know, I do think

1 you have to have a good law. I mean, I think that is a
2 starting point. And you also have to have follow-through on
3 the law.

4 Senator Franken. I just wanted to scratch that itch.
5 That is all.

6 Mr. Cuillier. Yes, I brought this up 2 years ago, and
7 you smirked when I said Kyrgyzstan, but you are not smirking
8 at this hearing.

9 Senator Franken. I have to stop.

10 Mr. Cuillier. Because I think it is funny.

11 Senator Franken. Okay. What is this expression?

12 Chairman Grassley. Senator Klobuchar.

13 Senator Klobuchar. Okay. Well, thank you very much,
14 Mr. Chairman and Senator Franken. Mr. Chairman, thank you
15 for holding this hearing, and I appreciate the importance to
16 talk about this important issue of government transparency
17 as we commemorate the 50th anniversary of our country's
18 Freedom of Information Act.

19 I had a few questions, and my questions were asked by
20 my colleague, but I think we maybe could start out with the
21 legislation that has been led by Senators Cornyn and Leahy
22 and Chairman Grassley to update FOIA. I know it was signed
23 into law by the President last month. Maybe we will start
24 with you, Ms. Nisbet. You have extensive firsthand
25 experience with FOIA. Why is this recent legislation

1 important?

2 Ms. Nisbet. Well, there are a number of significant
3 provisions, and I think that the ones that you have heard a
4 lot about, particularly in the press, fall into several
5 categories. One is really rewording the law to bring in a
6 presumption of disclosure so that agencies have to identify
7 a foreseeable harm if they are going to use an exemption to
8 withhold information. So a technical withholding is now not
9 what agencies are supposed to do but, rather, they really
10 need to identify that there would be a harm through
11 disclosure. That was policy before. Now it is in the law.

12 I think the cutback on the deliberative process
13 privilege, putting a sunset on that, will certainly be
14 helpful. That is an exemption that is used an awful lot and
15 sometimes for years after a record has made its way into the
16 government files.

17 And, of course, I think the numerous provisions that
18 really embed dispute resolution in the FOIA process are
19 commendable, and I would particularly note the provision
20 that directs the Office of Government Information Services
21 to be able to give its reports, recommendations, and
22 testimony directly to Congress without getting prior
23 approval. That independence issue actually is one of the
24 factors in assessing how good certain laws are, and our law
25 just checked off one of the boxes that is an important part

1 of having a strong FOIA.

2 Senator Klobuchar. Thank you very much.

3 Mr. Cuillier, my dad actually was a journalist for
4 years. He is now retired, but he was a newspaperman for the
5 AP and then a columnist for the Star Tribune in Minneapolis,
6 decades of work as a newspaperman, and so these issues have
7 hit close to home for me.

8 In your testimony you note that requesters are often
9 denied information because the agencies say they do not have
10 the information, it does not exist, and it is crucial to
11 ensure that FOIA exemptions are working appropriately and
12 effectively to protect the information. How can we ensure
13 that this balance is struck between granting FOIA requests
14 and preserving privacy interests?

15 Mr. Cuillier. Well, privacy interests are a huge
16 concern. I mean, that is the number one exemption used in
17 FOIA, and people are concerned about that. I do not think
18 journalists expect to get all the dirt on people's
19 backgrounds and their personal matters. And so I think we
20 can be reasonable in balancing that access to information
21 with privacy. There are good ways of balancing that. But
22 the one thing we cannot do is have blanket closures on
23 records just because we say "privacy." That is something
24 that needs to be handled more carefully.

25 Senator Klobuchar. So if you look at additional

1 reforms--you know, this law was just signed, but are there
2 additional reforms that you think would be helpful?

3 Mr. Cuillier. Well, one, we have to tackle FERPA, the
4 Family Educational Rights and Privacy Act. That is not FOIA
5 per se, but that is probably more of a problem for most
6 journalists than FOIA. It keeps educational records--

7 Senator Klobuchar. In what way?

8 Mr. Cuillier. --secret. Schools. And schools have
9 gamed that system, too, towards ludicrous. And former
10 Senator Buckley has talked about how that has been warped
11 out of control. And it is throughout our governments,
12 State, local, Federal. Privacy is really the number one
13 problem. We talk about national security. That is an
14 issue. We definitely need access to important issues we
15 talked about today, but, really, the big 800-pound gorilla
16 in freedom of information is privacy and how to make that
17 balance.

18 I mean, think about it. We were all in a big database
19 everyone saw 20 years ago. We called it the "phone book"--
20 home address, home phone number. But if you put that out
21 for everybody, people would freak out. We have changed as a
22 society, and we have to navigate through that.

23 Senator Klobuchar. All right. Does anyone want to add
24 anything more? Mr. Blum?

25 Mr. Blum. I would like to add, I was in a meeting

1 recently, sitting next to a librarian who works in
2 government, and she was saying, "What we are trying to do
3 now is have SWAT teams of librarians go in"--

4 Senator Klobuchar. Okay, that sounds very scary.

5 Mr. Blum. It does sound very--you know, she had a
6 smile on her face. She said, "We would like to be a SWAT
7 team of librarians that go into an agency, and our pitch is,
8 if you are having a FOIA problem, we will go in and we will
9 talk to your records managers, and we will see what should
10 be affirmatively disclosed. How can you take information
11 out of the FOIA process?" And FOIA, for all of its good and
12 all of its strength, its weaknesses are a result of things
13 that really in large part do not have anything to do with
14 FOIA. Are we saving and preserving records? The National
15 Archives has a program. They have a deadline for the end of
16 this year to have in searchable form records of emails. How
17 is that program working? What are we going to learn from
18 that? How can we extend that throughout the Federal
19 Government? That is going to speed things up. It is going
20 to take things out of FOIA, hopefully. You know, perhaps
21 this Committee could have a joint hearing with other
22 committees that deal with records management to really
23 explore, so for the next 50 years--the last 50 years, we
24 have talked about how do we improve the process, how do we
25 improve FOIA? Maybe the next 50 should be how do we improve

1 the Federal Government so that transparency is improved, so
2 that when I go to have, you know, dinner with a friend that
3 works in government and she says, "Boy, you must be happy
4 about the new FOIA law," you know, her response to me is not
5 really, "Well, we do FOIA, but it really depends on how much
6 money we put to the process." It should be, "We do
7 disclosure, and every day it is part of what we do. When we
8 start a program, we should include disclosure check-offs
9 when we create information."

10 That is the kind of thing where, when you go in for a
11 search, you know, and you put in a FOIA request, you are
12 going to get that back a lot faster, and that is going to
13 help everybody.

14 Senator Klobuchar. Okay.

15 Chairman Grassley. Senator Blumenthal, if you are
16 ready, I will call on you. Otherwise, I--you are ready? Go
17 ahead, then.

18 Senator Blumenthal. Thanks, Mr. Chairman, and I
19 appreciate your having this very important hearing.

20 I want to come back to an area of the FOIA that I think
21 is very important in terms of dispute resolution. In 2014,
22 I urged Secretary of Defense Chuck Hagel to issue new
23 guidance requiring the Department of Defense to give
24 "liberal consideration" to veterans applying for discharge
25 updates who could demonstrate that their discharges were

1 related to post-traumatic stress resulting from their
2 service in the military. And I was a staunch supporter of a
3 Freedom of Information Act lawsuit filed on behalf of
4 veterans who suffer from post-traumatic stress who were
5 seeking access to information within the DOD from the boards
6 of military records in each branch of the military. This
7 lawsuit was brought by the Yale Legal Services Clinic,
8 veterans clinic, very ably brought by them.

9 In response to the FOI lawsuit, the services in several
10 cases refused to produce information, documents and other
11 information from their respective boards. The Navy, for
12 example, insisted that to search for and disclose the
13 records for PTS-based discharge upgrade cases or statistics
14 would be "unduly burdensome," to quote them. And so my
15 question is whether dispute resolution and potential changes
16 in the FOI would enable in areas like this one or others
17 where veterans are concerned, where the military is
18 concerned, for it to be more forthcoming and for dispute
19 resolution to work better.

20 Ms. Nisbet. Yes. This sounds like a perfect situation
21 for bringing a mediator, an ombudsperson, particularly--and
22 this is something that the FOIA Ombudsman Office has done,
23 is when there is a request involving more than one agency or
24 agencies within a department, to bring them together so that
25 everybody is on the same page, and so that, for example, the

1 veterans are not getting very different responses from
2 different branches.

3 So I would like to think that that could have been very
4 helpful in that case had it been an option, had somebody
5 thought to make it an option. And I think with the changes
6 in the law we are going to see that there are more
7 opportunities for that because people are going to be much
8 more aware that those services are available to them as a
9 matter of right.

10 Senator Blumenthal. And I think that maybe there is a
11 need for not just changes in the law but also changes in
12 culture within the Department of Defense, and maybe other
13 agencies, too. But I do not know whether you have any
14 observations about that aspect of these challenges.

15 Ms. Nisbet. Well, this is still--I know you can look
16 at the fact that the 2007 amendments first introduced
17 mediation and dispute resolution to be part of the FOIA
18 process, but it does take time not only for people to become
19 aware--agencies and requesters to be aware that those
20 services are available, but people have to be trained in
21 order to do it.

22 So, for example, the FOIA Ombudsman's Office has
23 trained, starting in 2010, hundreds of Freedom of
24 Information Act professionals at the agencies in dispute
25 resolution skills, because it is a little bit--it is

1 different. It is a little bit different. But I think it
2 does--that process alone can--Senator Leahy was talking
3 about distrust of government in another situation, but it
4 certainly does pervade many aspects of our lives. And when
5 you have a real discussion between someone in an agency and
6 a requester about what is really going on, what we can do,
7 what we cannot do, how we might be able to help you,
8 certainly that will help dispel distrust and create more
9 openness.

10 Senator Blumenthal. I think that changes in culture
11 are often as important as changes in law, particularly when
12 we are dealing with an agency like the Department of Defense
13 where the training is not to resolve disputes but fight them
14 better. I do not mean to oversimplify, but the culture
15 there is not going to be likely let us figure out how we can
16 reason together to give you more information, although I
17 think that the Department of Defense is becoming more and
18 more enlightened in that regard, and certainly Secretary
19 Hagel and Secretary Carter have both been very sympathetic
20 to this cause. So I thank you all for your good work, and
21 my time has expired.

22 Thank you, Mr. Chairman.

23 Chairman Grassley. Thank you.

24 I will not keep you long now, but I would like to ask a
25 couple more questions. If nobody else comes in, then we

1 will adjourn the meeting.

2 Following up in the discussion, Ms. Nisbet, that you
3 just had with Senator Blumenthal and a similar discussion
4 you had with Senator Leahy about these dispute resolutions,
5 I am interested in whether in the first place were agencies
6 receptive participants in the dispute resolution process.
7 And then, secondly, what more can be done to encourage
8 greater cooperation?

9 Ms. Nisbet. Well, of course, not every agency
10 responded with open arms, but a number of them did. As a
11 matter of fact, I am sorry that Senator Blumenthal just had
12 to leave because I wanted to mention that the Office of the
13 Secretary of Defense was one of the first to create and
14 really support a FOIA Public Liaison in that office to work
15 with OGIS. But a lot of it really is--it is getting out
16 there, it is letting people know that the services are
17 available. And the more that agencies see that it is
18 helpful to them as well as requesters to have this kind of
19 communication, I think you are going to see that it expands
20 and that it is going to be one of the best things that came
21 out of the amendments.

22 Chairman Grassley. Okay. Mr. Blum, at least year's
23 FOIA oversight, the general counsel of the Associated Press
24 told this Committee that oftentimes "the only way to force
25 the agency to comply with FOIA was to sue them." Do you

1 feel that this is often still the case? And what do you
2 think are the most important elements to resolving FOIA's
3 dispute before it ends up in litigation?

4 Mr. Blum. I do, sadly, think that still characterizes
5 a lot of the requests that the media files, or non-media
6 requesters. You have to sue to get their attention, and
7 that is very unfortunate.

8 I think that in the 2007 amendments, Senator Cornyn
9 championed something called "fixing the Buchanan tax," which
10 made it easier for requesters to have agencies pay if an
11 agency wrongly withholds information, and if they have to
12 sue and then the agency turns around and just delivers it,
13 even before a court order, then it was easier for the
14 requester to receive reimbursement for fees. And I think
15 that has helped. I think you have to put it in--you know,
16 go to the money, and I think that has helped a lot. I think
17 having a stronger OGIS, even stronger than what was created
18 with the 2007 amendments and again with these amendments
19 that were just signed, to ensure independence so that you
20 can be sure if the Defense Department is saying it is unduly
21 burdensome, there should be an independent eye to be able to
22 say, "Actually, that is not true." And you could solve the
23 problem this way, and to be able to write advisory opinions
24 repeatedly about repeated problems so that we can unearth
25 what works and what does not and where there is wrongful and

1 correct decisions.

2 Chairman Grassley. Director, you testified before in
3 Congress, "The openness of developing a culture"--or, no,
4 let me start over again: "The importance of developing a
5 culture of openness that transcends legislation and the
6 whims of changing Presidents." Yet despite successive
7 amendments to FOIA and directives from the White House, the
8 government continues to find ways to undermine the law's
9 fundamental purpose. How do you think that we can best
10 ensure a culture of openness regardless of amendments to
11 FOIA or directives from the White House?

12 Mr. Cuillier. Well, it does start from the top, so we
13 need leadership that insists on transparency and does not
14 just say it but follows through. But it is a huge issue. I
15 mean, the Federal Government is a big ship, and you wonder
16 if one person can turn it around. Secrecy is infused in a
17 bureaucracy. It is its natural state and tendency.

18 So, you know, these things that we talked about today I
19 think can help. I think it is certainly important for
20 Congress and your Committee to keep focused on this because
21 it is probably going to be something that goes on for the
22 rest of our lives. It is an eternal battle between
23 transparency and secrecy. And it is not going to end
24 anytime soon, so we just have to keep at it.

25 Chairman Grassley. And this will be my last question.

1 Ms. Nisbet, the Managing Government Records Directive issued
2 in 2012 requires agencies to manage both permanent and
3 temporary email records in an accessible electronic format
4 by December 31st this year. I am curious to know more about
5 the opportunities that this transition provides for
6 improving records and FOIA information and FOIA operation.
7 Specifically, could it result in more efficient and
8 effective FOIA request processing? And won't the
9 incorporation of modern technology improve the FOIA process
10 for both requesters and agency personnel?

11 Ms. Nisbet. I think it is pretty fundamental--and I
12 know that you have recognized this, Chairman Grassley--that
13 the FOIA process depends upon being able to find the
14 records. The records have to have been kept, and they have
15 to be kept in a way that someone can locate them in response
16 to a FOIA request.

17 So I think all of these efforts with regard to
18 electronic recordkeeping, not just for emails but all
19 records that are being created now, is certainly going to
20 aid the FOIA process.

21 Chairman Grassley. I said that was the last question,
22 but I want to ask my last question of Professor Kwoka. I am
23 interested in how we can get records out to the public
24 before they have to be requested. How can we best
25 accomplish more proactive disclosure? Do you think an act

1 of Congress is necessary, or could the administration be
2 doing this on its own authority right now?

3 Ms. Kwoka. I think that is absolutely key, Chairman
4 Grassley, and I think Congress does have a role. Requiring
5 agencies to take certain steps, for instance, make public
6 their own FOIA logs, who is requesting and what are they
7 requesting most often, so that we can all see how they are
8 using their FOIA resources--transparency about the
9 transparency process itself--and then requiring agencies to
10 perhaps evaluate those logs annually for opportunities to
11 publish whole categories of records. So if one agency is
12 receiving 2,000 or 4,000 requests for the exact same type of
13 record a year, then maybe that agency should have to justify
14 why it can or cannot affirmatively disclose those records as
15 a whole category. And I think, you know, there could be
16 some sort of oversight or enforcement provision related to
17 that as well.

18 You know, I think one--it goes hand in hand. We
19 celebrate the success of FOIA now in part by saying how many
20 requests are processed or how quickly are we processing
21 them. We could also on the flip side celebrate success by
22 saying how many requests never had to be made because we had
23 all of those records already available. And so in some ways
24 reducing the number of FOIA requests that even have to be
25 made in the first instance would be a measure of that

1 success.

2 Chairman Grassley. Thank you all very much. We are
3 going to keep the record open for a week for people to ask
4 questions in writing. So if you get some of those, I would
5 appreciate your answering them.

6 Thank you very much for your hard work. The meeting is
7 adjourned.

8 [Whereupon, at 11:28 a.m., the Committee was
9 adjourned.]

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