Questions for the Record
Hearing on "The Freedom of Information Act:
Ensuring Transparency and Accountability in the Digital Age"
March 15, 2011
Submitted by Senator Amy Klobuchar

Questions for John Podesta

1. Professor Cohen testified that there were four areas where significant problems remain for journalists and others seeking to use FOIA – delays / response times, fees, access to electronic records, and disclosure of frequently requested records. Do you agree that those areas need significant improvement? Is there an area that you would prioritize first?

I agree that these are problems. I also believe they are related and should be looked at together. Delays and fees are more likely if information is not well managed in electronic formats. And if information is well managed in electronic formats, it is easier to disclose proactively through the Internet. As I note in my testimony, the need to rely on FOIA requests to access government information should decline as more of this information is made available and disseminated. Fewer FOIA requests should also reduce administrative burdens and improve the speed and quality of agency responses. That's why I recommend building a searchable database where the public can view all FOIA requests and responses. Such a system would help address all of Professor Cohen's concerns and should be a top priority.

2. Mr. Fitton testified about the grade he would give the Obama Administration on transparency and FOIA issues. What "grade" would you give this Administration?

Compared to the previous administration, the Obama administration gets an A+. But President Obama set a higher bar when he promised the most transparent administration in the nation's history. I also believe the administration should be judged against the opportunity to expand transparency, not just against its predecessors. The Internet and other advancements in information technologies open possibilities that never existed before. We should ask whether the administration is taking full advantage of this opportunity.

Judged by these standards, I give the administration a B. It's a mostly positive record, but there's room for improvement.

Let's start with the positives. As noted in my written testimony, the administration deserves high marks for expanding electronic disclosure through websites such as Recovery.gov, Data.gov, and the IT Dashboard. These websites not only serve the goal of transparency, but also help government cut waste and make better decisions.

The administration has also adopted a sound policy framework for greater openness. I cite Attorney General Holder's FOIA memorandum and the Open Government Directive in my testimony. But in assessing the administration's transparency record beyond FOIA, several other policy changes should be recognized as well.

The 9/11 Commission identified over-classification as a key problem in sharing information necessary to prevent terrorist attacks. In response, President Obama in December 2009 issued an executive order designed to prevent over-classification and reduce the backlog of classified records that are 25 years old or more (E.O. 13526). Less than a year later, he also signed into law the "Reducing Over-Classification Act," complementing the new executive order.

The previous administration, after the 9/11 attacks, put in place policies that made it even harder to share information. In particular, the Bush White House ordered federal agencies to "safeguard" information that is "sensitive but unclassified." Agencies adopted their own, often overly restrictive practices for making sensitive-but-unclassified designations. President Obama issued another executive order (E.O. 13556) in November replacing this ad hoc system with a government-wide standard, under the label "controlled unclassified information," that is designed to avoid a shadow classification system and promote greater information sharing. This E.O. further makes clear that a CUI designation does not exempt the information from FOIA requests.

The previous administration also went to court to block public access to White House visitor logs. In September 2009, the Obama administration became the first administration to disclose the names of White House visitors, which are searchable through the White House website.

The administration's record is not perfect, however. In my testimony, I talked about some of the problems implementing changes in FOIA policy. President Obama's executive order on classification and declassification suffers from similar implementation problems. For example, the Department of Defense, which produces more classified information than any other federal agency, has not updated its internal regulations for classifying information, as the E.O. requires. Some agencies have also resisted the requirement to automatically declassify records 25 years old or more—something called for not only in President Obama's executive order, but also in previous executive orders by Presidents George W. Bush and Clinton.

Another problem is the continued use of the so-called "state secrets" privilege to block information from being disclosed in litigation. The previous administration invoked the state secrets privilege in 48 known cases, far more than any previous administration, according to OpenTheGovernment.org's 2010 secrecy report card. In response, Attorney General Holder issued a memorandum in 2009 that puts the burden on federal agencies to justify state secrets claims; the privilege can only be invoked if an agency proves court disclosure will cause "significant harm" to national security.

This tough standard has resulted in fewer state secrets claims, but the Obama administration has continued to rely on the privilege in a number of cases originated during the previous administration. The problem in such cases is that we lack sufficient means to verify the government's assertions, because courts lack clear standards for checking these assertions and have generally deferred to the executive branch.

Without independent verification, there is a risk that government will use the privilege as a way to block legitimate judicial review or the disclosure of information that is simply embarrassing. I urge the administration to support the efforts of Sen. Leahy and other members of this committee to enact legislation setting forth the judiciary's responsibilities in reviewing state secrets claims.

Finally, even though recovery funds are expiring, the Recovery.gov model should live on, and the administration should develop a plan to ensure this happens. How do we improve on Recovery.gov and expand the approach to other government spending? And how do we bring this same level of transparency to other government business, such as regulation and credit programs? Recovery.gov was an enormous accomplishment, but it's time to take the next big step forward.