

Testimony of Mike Howell
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Before the
Senate Judiciary Committee

“The Freedom of Information Act: Perspectives from Public Requestors”
April 8, 2025

Chairman Grassley, Ranking Member Durbin, members of the Committee. Thank you for the opportunity to testify about our experiences as frequent requestors for government records under the Freedom of Information Act (“FOIA”). My name is Mike Howell and I am the President of The Oversight Project. The Oversight Project is a 501(c)(4) nonprofit that uses FOIA and other investigative techniques to educate the American people about how their government works.

In the age of efficient e-discovery, automation, and technological advancements, the American people’s ability to obtain records from their government under FOIA should be easy. But that is not the case. Growing backlogs, agency failures to make timely determinations on requests, agency failures to meet proactive reporting requirements under the FOIA Improvement Act of 2016, arbitrary denials of requests, and excessive invocation of FOIA exemptions has made the government *less* transparent. As a result, the rights afforded the American people under FOIA are largely enjoyed solely by professional transparency organizations, journalists, and academic researchers. The average American, by and large, has been cut out.

About The Oversight Project

We launched The Oversight Project in 2022 because we recognized that congressional oversight of the Executive Branch has become ineffective. The erosion of Congress’s ability to procure documents from the Executive Branch, hold wrongdoers accountable, and provide transparency to the American people about how their government works has left a void. We have filled that void.

In our short existence, we have filed over 100,000 FOIA requests and sued the federal government over 75 times (with cases oftentimes including multiple federal defendants) for the Executive Branch’s failure to follow the FOIA statute. Through our work, we have procured

over 1.15 million pages of government documents on over 350 topics. We've recently launched our "Doc Depot" repository that allows the public to search our database of records obtained through FOIA and other means.¹

Through FOIA requests and litigation, we have been able to successfully obtain documents that reveal important information to the American people. Our cases animated some of the most controversial scandals of the Biden Administration. I have listed some examples of our FOIA work below:

- We filed multiple lawsuits surrounding the Department of Homeland Security's response to allegations that Border Patrol Agents "whipped" Haitian illegal aliens in Del Rio, Texas in 2021. Our work revealed that when Secretary Mayorkas and President Biden discussed the incident from the White House press podium, Secretary Mayorkas had previously received communications from his staff that the photographer who took the pictures of the incident stated that no whipping occurred. Instead of standing up for the truth, Secretary Mayorkas and President Biden fanned the flames of an inaccurate narrative and subjected those Border Patrol Agents to over a year of investigations before they were ultimately cleared of the whipping allegations.
- We, along with Judicial Watch and a conglomerate of media entities, have sued the Department of Justice for the audio recording of President Biden's interview with Special Counsel Robert Hur. In his report, Special Counsel Hur ultimately declined recommending prosecution of President Biden for mishandling classified materials because a jury would see him as a "well-meaning, elderly man with a poor memory." He

¹ Our "Doc Depot" can be found here: <https://docdepot.itsyourgov.org/>. The "Doc Depot" is in its infancy. We intend to make continuous improvements to usability and will add additional documents to the repository as we gather them.

based those conclusions off his interview with the President. Release of the audio recording of the interview would reveal key information concerning President Biden's mental decline while in office. We filed numerous motions to expedite briefing and to expedite the case itself. The Biden Administration withheld the tapes under clearly erroneous claims of Executive Privilege and Exemption 7(A). The Court never ruled on our motion to expedite and did not resolve the case prior to President Biden leaving Office, despite the case being fully briefed since *August 2024*. The case is now stayed pending review by the current Administration.

- We sued and obtained records concerning the U.S. Marshalls Service's interpretation of 18 U.S.C. § 1507 and its application of the statute with respect to security for U.S. Supreme Court Justices in the wake of the leak of the draft opinion in *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022). Our work, along with public whistleblower disclosures, revealed that the U.S. Marshalls Service's interpretation effectively grafted an additional element onto the statute to avoid charging *anyone* for their conduct outside the homes of Supreme Court Justices before the Court published its opinion in the case.
- We sued the FBI and Justice Department on multiple topics concerning the weaponization of law enforcement. In these cases, we obtained records concerning the lack of former U.S. Attorney for the District of Delaware David Weiss's independence in conducting the Hunter Biden investigation prior to his appointment as special counsel, procured documents showing FBI agents that kneeled in solidarity with Black Lives Matter rioters in 2020 were later promoted, obtained data revealing that FBI agents in Washington Field Office worked nearly 16,000 more man hours hunting January 6th

perpetrators than 2020 Black Lives Matter rioters, and other information about weaponized FBI agents.

- We exposed the partisan application of President Biden's Executive Order 14019, which mobilized the federal government to support voter registration, the sending of mail in ballots, and coordination with exclusively left-wing non-governmental organizations to increase turnout of voters likely to vote for Democrats. Last year, we set up a document repository of records obtained through FOIA requests and litigation about the partisan implementation of the Executive Order. Our work was cited in multiple lawsuits by state Attorneys General challenging the Executive Order, and in three House Committees' investigations into the Executive Order during the 118th Congress.

These are just a few examples of the important FOIA and other transparency work our organization conducts. We have been criticized by left wing media outlets for the volume of FOIA requests we have sent and those criticisms have cherry picked search terms in particular requests to suggest our work has some sort of nefarious purpose. That narrative is false.

We send a high volume of requests because we have to. Agencies frequently deny or significantly delay processing requests that seek large volumes of records or are overly complex. We send targeted requests with specific custodians, search terms, and date ranges because we have to. Agencies frequently deny or significantly delay processing broadly written requests. Even when we provide specificity, agencies have denied our requests claiming we have not "reasonably described" the records sought as required by the FOIA statute. In turn, we have to administratively appeal those frivolous denials and potentially sue in order to exercise our fights and provide transparency to the American people.

FOIA No Longer Serves Everyday Americans

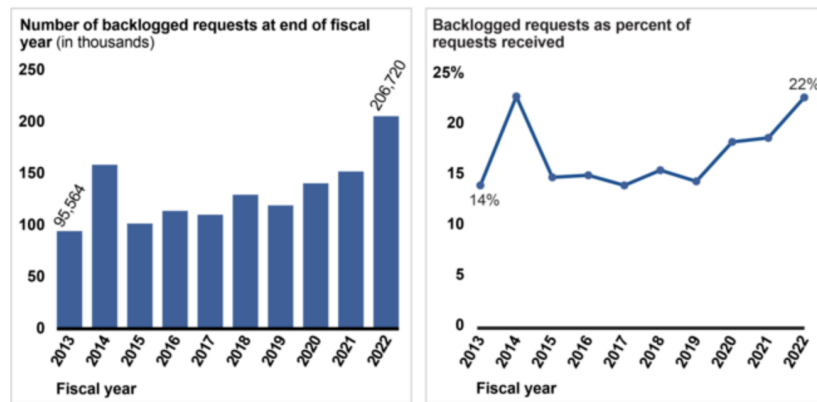
The Supreme Court has explained that FOIA’s “basic policy of ‘full agency disclosure unless information is exempted under clearly delineated statutory language,’ indeed focuses on the citizens’ *right to be informed about what their government is up to.*” *U.S. Dep’t of Just. v. Reps. Comm. For Freedom of Press*, 489 U.S. 749, 773 (1989) (emphasis added, internal citations omitted). But in our experience, FOIA has become foreclosed to the average American. Instead, successful navigation of the FOIA landscape is reserved for professional FOIA practitioner organizations like ours, media conglomerates, and academic researchers. Several factors have led us to reach that conclusion.

Over the past decade, agencies have gotten worse at processing FOIA requests within the statutory time limits. Generally, agencies have 20 business days to process FOIA requests. 5 U.S.C. § 552(a)(6)(A)(i). They can invoke a provision of the FOIA statute to give them an additional 10 business days if a particular request is complex, or otherwise falls under “unusual circumstances.” 5 U.S.C. § 552(a)(6)(B). A 2024 Government Accountability Office (“GAO”) report found “the government-wide request backlog has risen over the last decade, demonstrating that agencies face persistent challenges processing requests within required time frames.”²

² U.S. Gov’t Accountability Office, *Freedom of Information Act: Additional Guidance and Reliable Data Can Help Address Agency Backlogs*, GAO-24-106535 (Mar. 2024), <https://www.gao.gov/assets/gao-24-106535.pdf>.

The chart below from the GAO report is instructive:

Year-End FOIA Request Backlogs Government-wide, Fiscal Years 2013–2022



Source: GAO analysis of agency-reported Freedom of Information Act (FOIA) data on FOIA.gov. | GAO-24-106535

GAO found that in fiscal year 2022, nearly one quarter of FOIA requests *government-wide* remained pending beyond the statutory timeframes. These widespread processing delays make FOIA less accessible to the general public. When the government fails to meet the statutory timelines under FOIA, in practice, your only option to get the government to even start a search for responsive records is to file a lawsuit. This leaves the exercise of rights under FOIA for a sizeable population available only to requestors who have the means, ability, and desire to litigate for their statutory rights.

Even if we are able to get a response in a timely manner, requestors face challenges getting information about their requests. Many agencies use canned responses that provide little meaningful information on the volume of potentially responsive documents, the types of documents pulled, or the grounds for denial of a request or assertion of FOIA exemptions. The law enforcement and intelligence agencies, in particular, broadly categorically deny or assert *Glomar* responses to requests. Since FOIA requires administrative exhaustion prior to initiating a lawsuit, requestors are often appealing adverse determinations in the kangaroo administrative

processes of the agency that denied them, and are forced to make arguments in the abstract without any meaningful information. This process erects additional barriers to transparency, further delays the procurement of records, and makes it harder for your average American to see what their government is up to.

Our experiences have shown that if you want to get records on basically anything controversial in a timely manner, you need to file a lawsuit. The lion's share of FOIA cases are heard in the District Court for the District of Columbia. Given the broad language contained in commonly asserted exemptions such as Exemption 5 (privileges like deliberative process, attorney-client, work product, etc.), Exemption 6 (personal privacy) and Exemption 7 (law enforcement records), litigants are at the mercy of D.C. District Court judges and the D.C. Circuit Court of Appeals to assert their rights. Judges throughout the District view the breadth of certain exemptions more broadly than others, have different views on what issues are at the forefront of the public interest, and differ on what an appropriate production schedule and volume is depending on the case.

Even the day-to-day process for litigating FOIA cases has been frustrating for requestors. Oftentimes, we learn for the first time how many responsive records exist to our requests when the Justice Department attorney we are litigating against tells us. When we are arguing over whether an asserted FOIA exemption is proper, we frequently receive the government's *Vaughn* Index explaining the basis for redactions with their motion for summary judgment. Upon review of the *Vaughn* Index, we often decide not to challenge every withheld document because the *Vaughn* Index and accompanying declaration reveal that the government appeared to apply the exemption properly. But the fact that litigants do not have the opportunity to potentially narrow the issues in dispute *prior* to summary judgment briefing not only wastes the resources of the

Justice Department in writing the opening briefs, but also harms judicial economy by setting briefing schedules that may not be necessary.

Conclusion

Congress can take measures to make FOIA more accessible to the everyday American. The FOIA Improvement Act of 2016 requires agencies, with certain exceptions, to proactively disclose records “that have been requested 3 or more times.” 5 U.S.C. § 552(a)(2)(D). While this was a welcome step in mandating transparency, multiple agencies have failed to meet these requirements and there is no mechanism in place to enforce noncompliance with the mandatory disclosure requirements.³ FOIA reading rooms are often filled with dead links and requesters are still forced to submit requests for records that should be proactively disclosed.

In considering changes to FOIA, Congress can expand the universe of records that are proactively disclosed and enact penalties for noncompliance. In addition, Congress can provide additional clarity and specificity to the broad language contained in the exemptions, particularly to Exemptions 5, 6, and 7. Additional clarity in the statutory text can reduce the time agencies spend in making determinations thereby reducing the backlog, reduce the need to administratively appeal adverse determinations at the agency level, and narrow issues in dispute in litigation.

The Oversight Project has a simple mission of informing everyday American about how their government works. That is why our motto is “It’s your government!” We work hard every day to live up that motto and execute our mission. We are happy to work with Congress to

³ See generally U.S. Gov’t Accountability Office, *Freedom of Information Act: Actions Needed to Improve Agency Compliance with Proactive Disclosure Requirements*, GAO-21-254 (Mar. 2021), <https://www.gao.gov/assets/gao-21-254.pdf>

improve FOIA for the American people. Thank you for the opportunity to testify and I am happy to answer any questions.