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Written Questions and Answers for the Record, “Ensuring an Informed Citizenry: Examining the Administration’s Efforts to Improve Open Government”

U.S. Senate Committee on the Judiciary, Hearing May 6, 2015

Questions from Chairman Grassley:

1. I understand that in Fiscal Year 2014, State experienced a 60% increase in FOIA lawsuits, which according to State’s own Chief FOIA Officer Report, “necessitated the reallocation of resources from processing FOIA requests to handling FOIA litigation.” Such a reallocation of resources and manpower, I imagine, has consequences for the efficient processing of pending FOIA requests.
 - a. Should requesters have to shoulder that consequence? Doesn’t the reallocation of State’s resources to FOIA litigation only set itself up for additional litigation based on even more delays?
 - b. What should State be doing to ensure that it’s covering all its FOIA functions – not just litigation?

These insightful questions point to the core problem with State’s short-sighted strategy of shifting resources over from FOIA processing to litigation support. By slowing down the processing of existing FOIA requests, they almost certainly will generate more litigation, not less, and the resource shift becomes self-defeating. State did face extraordinary circumstances in 2014 and 2015, with a former Secretary of State running for president as the favorite for the nomination of her party. But instead of getting out in front of the inevitable flood of FOIA requests – and lawsuits – about her, State waited until federal judges set the deadlines. A more efficient approach would have included establishing a documentary SWAT team that would build its own expertise in the wide range of records involving the former Secretary, and expeditiously move them into the public domain. The e-mail from the private server is only the first challenge; next would come all the Secretary’s calendars and schedules; then her memcons and telcons and senior staff meeting notes. All of these records meet the criteria of high public interest, and the Department should not have waited to be asked, or ordered, to review and release them. Finally, existing law does give State the ability to set up separate lines for FOIA processing based on the complexity of the request. In this way, simpler requests by ordinary citizens or by researchers seeking a single document could make up their own queue, while those who are filing multiple requests or lawsuits would stand in line behind themselves.

2. State’s Chief FOIA Officer Report for 2015 says “the Department makes every effort to respond to FOIA requests within the statutory response period.” However, State is consistently found to have one of the longest request processing periods in the federal government. DOJ found that it takes State an average of 109 days just to respond to simple requests. This is more than five

times the average across the federal government of 20.51 days, even with all agencies feeling the squeeze of limited resources.

- a. What do you think explains these significant delays?
- b. Is the nature of the information that State handles, such as matters related to national security and foreign policy, any justification for these delays?

Talking with present and former State Department FOIA officials, they tell me the “limited resources” problem that all agencies feel does have a disproportionately large effect at State, primarily in the area of inadequate IT systems, described by many as at least two generations behind. We know, for example, that when Secretary Clinton asked in her first week at State for an encrypted Blackberry like the one President Obama carried, the National Security Agency was willing but officials concluded that State simply did not have the infrastructure to support such a Blackberry – and the infamous private server was the result. The National Security Archive’s experience with FOIA requests at State also suggests several other dynamics at work in the FOIA delays. Not least would be the lowly status and relative lack of authority in State’s FOIA office itself, with no direct line to the top of the agency except through several layers of bureaucracy, with no power to search for records itself except in the central cables database, with little discretion to order release of records if the program offices involved don’t sign off. This is a problem in many agencies, where the substantive officials have to clear any release, yet few are willing to take the time out of their daily grinds actually to review the materials and get them back to the FOIA office. FOIA compliance needs to become part of every employee’s performance evaluation at year-end, and part of employee training at the front end. But the part (b) of this question points to a final dynamic underlying State’s FOIA delays, that of security classification. Yes, State handles a wide range of sensitive information about foreign relations and national security, but the National Security Archive’s experience with State over the past 30 years demonstrates that over-classification is the norm, that most of State’s documentation could be released with a few years after its creation, that the highly subjective quality of most classification judgments does add real delay to the FOIA process. Two officials can look at the same document and come to opposite conclusions about whether it should be (or stay) classified. We have published examples where the same classification officer censored completely different portions of the same document in reviews just a week or two apart. There are few incentives inside the bureaucracy for challenging over-classification, so bureaucratic imperatives are likely to dominate, rather than the public’s right to know. Congressional oversight remains one of the few tools that actually works to combat the bureaucracy’s reflexive over-classification.

3. The mediation services that OGIS provides were intended to—and should—serve as a meaningful alternative to resolving FOIA disputes through litigation. The numbers show, however, that FOIA lawsuits continue to be on the rise. And the government’s often-vigorous defense of FOIA litigation is surely costing taxpayers money. I’m concerned that there could be more engagement with the requester community by agencies at an earlier stage to inform them of the mediation services that OGIS provides. I’m equally concerned that agencies aren’t warming up to the idea of mediation as a way to resolve FOIA disputes.

- a. Are the services OGIS provides being underutilized as a litigation alternative?
- b. What benefits would requesters receive if agencies take a more active and cooperative role in resolving FOIA disputes through mediation?

Yes, OGIS is being underutilized as a litigation alternative, partly because agencies have not uniformly included resort to OGIS as part of their reply letters to requesters, partly because OGIS is seen more as a hot line than as a mediator with real influence, and partly because the Justice Department has not exactly steered agencies towards OGIS. In fact, the Office of Information Policy at Justice actively worked to undermine OGIS even after Congress specifically ordered OGIS into existence. Requesters would benefit significantly from a more active agency role in cooperation with OGIS, for speedier replies and more consistent customer service. Congress will need to continue its oversight both of OGIS and of the Justice Department. But Congress should also consider other measures to enhance the authority of OGIS. This Committee should be aware that the U.S. FOIA, compared to the more than 100 other countries with access to information laws, does not rank very highly, in fact, only a middling score, 51st out of 103 in one recent study by a Canadian research group; and the low rating was largely based on our lack of a powerful tribunal or information commissioner who could resolve FOIA disputes – not just provide FOIA therapy to givers and receivers of FOIAs. In countries like Mexico and India, the information commissioners even have the power to overrule ministers and order the release of records when exemptions were wrongfully applied. More authority and more resources for OGIS will be necessary to make our FOIA process work nearly as well.

4. Is there anything you wish to add to, or correct for, the record? If so, please take this opportunity to provide any additional remarks or commentary.

I would like to emphasize the portion of my testimony that concerned the generational failure in the U.S. government to e-archive e-mail. There is no small irony in the fact that had former Secretary Clinton used a state.gov account rather than her private server, we would likely today have only a few hundred – not 30,000 – of her e-mail messages from her time as Secretary of State. The so-called POEMS system that all undersecretaries and most assistant secretaries at State used only handled the e-mail electronically in real time, but not as an archive. For preservation of historic or administratively valuable records, either the sender or recipient had to “print and file” the message – which is why there are so few messages surviving from former Secretary Colin Powell’s four years at State. My recommendation for this Committee is to look closely at the December 31, 2016 deadline now in place for agencies across the government to manage and archive their e-mail electronically. Oversight will be called for, both before and after this deadline.

Question from Senator Vitter:

Under exemption 5, a pre-decisional document does not lose its protection after the decision is made unless the agency incorporates the pre-decisional information into its final decision, either expressly or

by reference. Nevertheless, establishing that the pre-decisional document was actually incorporated into a final decision can be a difficult hurdle for a requester. Do you think that modifying this exemption so that pre-decisional documents lose the protection post decision is an effective and responsible way to address the lackluster speed with which some agencies process FOIA requests?

In general, I would support any effort by Congress to limit the breadth and scope of exemption 5. Originally meant to protect deliberative space for officials, the exemption has become what one expert called the “withhold it because you want to” exemption. The first two years of the Obama administration saw a significant decline in the number of times that agencies invoked this exemption to deny FOIA requests. Perhaps there was a real effect from the President’s Day One pronouncements on open government. But agencies stopped believing the White House around year three of the Obama presidency, and use of the 5th exemption soared and remains at all-time record levels, according to the Associated Press tabulation of agency FOIA reports. At the same time, I am somewhat wary of a textual modification to the exemption that broadly drops any protection to pre-decisional documents once the relevant decision is made. Certainly such a change would require additional litigation to work out its parameters. It seems to me that a more effective and responsible way to address the exemption challenge is to include in FOIA the kind of public interest balancing test that other countries have incorporated into their access laws, for example, in Mexico there is an override of exemptions if the records concern grave abuses of human rights, and in Japan there is an override of exemptions if the records concern a danger to public health. Combined with a sunset on the deliberative exemption such as the Presidential Records Act gives former presidents (12 years after they leave office), such a public interest test could give agencies and judges the basis for faster and more effective processing.

**Questions for the Record Submitted to
Assistant Secretary Joyce A. Barr by
Senator Vitter
Senate Committee on the Judiciary
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Question 4:

According to the Testimony of Mr. Blanton, the State Department has a \$1 billion IT budget. How do you justify the speed with which your agency processes FOIA requests when this budget indicates plentiful resources to address the problem?

Answer:

The Department's \$1.6 billion IT budget covers a wide variety of requirements, including the periodic technological refresh of computers and server equipment at all of our domestic facilities and overseas missions; personal communication devices such as cell phones and Blackberries; the operations, maintenance and security of the Department's intranet platform and electronic outreach efforts; and the development systems designed to standardize and improve management processes, ranging from logistics and human resources to passport and visa processing.

Personnel costs are the largest share of the FOIA Office's operating budget, and are funded out of Diplomatic and Consular Programs. Though the Department's FOIA Office has identified technological solutions that could aid in their work, the increase in the Department's FOIA backlog is

more complicated than a simple lack of IT resources. In recent years, the FOIA office has seen a significant workload increase (nearly 20,000 requests in 2014, growing over 300 percent since 2008) as well as an increase in litigation over open cases, while funding constraints have meant that the office's resources haven't kept pace with this increasing demand. Once a case enters litigation, reaching resolution is far more labor intensive due to additional requirements. Additionally, the Department deals with many complex FOIA requests requiring coordination across bureaus and posts overseas and must thoroughly review responses to prevent the release of sensitive and potentially damaging information.

The Department continues to determine what will be needed to meet the Administration's Open Government Directive, requiring agencies to reduce their backlogs of FOIA requests by 10 percent each year. The Department's goals related to FOIA compliance for the near future are twofold: to reduce the open FOIA case backlog and deploy enhanced technology on the unclassified networks to improve workflow. In the coming months, the Department will seek to determine the appropriate response and whether an increase in staffing and/or funding is required to meet these needs to both reduce this backlog and to ensure that the FOIA office has the IT capabilities to handle the growing workload going forward.