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2 OPENING STATEMENT OF HON. CHARLES E. GRASSLEY, A U.S.  
3 SENATOR FROM THE STATE OF IOWA, CHAIRMAN, COMMITTEE ON  
4 THE JUDICIARY

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6 Chairman Grassley. Good morning. We are going to  
7 examine what this Administration has done to fulfill its  
8 promise of open government.

9 President Obama began his presidency with assurances  
10 on transparency. So as we do regularly, it is our  
11 opportunity to take stock of where things stand not only  
12 on FOIA, but throughout the year we do this several times  
13 on other issues.

14 There is perhaps no better tool that Americans have  
15 to help ensure open government than FOIA. Enacted almost  
16 5 decades ago, the purpose of the law is to help keep  
17 folks in the know about what the government is doing. No  
18 doubt an informed public helps to guarantee a more  
19 accountable government.

20 The Judiciary Committee has a long and bipartisan  
21 history of helping protect the public's right to know and  
22 ensuring that government effectively administers FOIA.

23 Earlier this year the Committee reported the FOIA  
24 Improvement Act of 2015 to the full Senate for  
25 consideration. The bill codifies the, quote-unquote,

1 "presumption of openness" standard so that agencies  
2 proactively disclose more information. Among other  
3 reforms, the bill makes it easier for the public to  
4 submit FOIA requests and improves the electronic access  
5 to records.

6 As many of you know, Ranking Member Leahy and Senator  
7 Cornyn have been FOIA leaders for many years and I  
8 appreciate the hard work that they put into this bill,  
9 and I happen to be a cosponsor.

10 Last year, thanks to their efforts, the Senate passed  
11 an almost identical bill by unanimous consent, and, of  
12 course, in the Senate, that is not an easy task.  
13 Unfortunately, we ran out of time at the end of the year  
14 and were unable to get the bill to the President's desk.  
15 I am hopeful that will not be the case this year and that  
16 the Senate will soon pass meaningful and much needed  
17 reforms.

18 But legislative reforms can only go so far.  
19 Experience shows that many in government continue to  
20 operate with an instinct of secrecy. This has been the  
21 case under both Democrat and Republican Administrations,  
22 as both have failed to live to the letter and, more  
23 importantly, the spirit of FOIA.

24 President Obama gave me high hopes for the change in  
25 the status quo. He pledged, quote, "a new era of open

1 government," end of quote, one where transparency is the  
2 rule and not the exception. On his first full day in  
3 office, the President called for agencies to administer  
4 FOIA, quote, "with a clear presumption, in the face of  
5 doubt, openness prevails," end of quote.

6 Unfortunately, over 6 years later, we continue to see  
7 this Administration under a do-as-I-say-and-not-as-I-do  
8 approach to transparency, similar to previous Republican  
9 and Democrat Administrations.

10 Recently, the Office of Information Policy Director  
11 Melanie Pustay, who is with us here today and a senior  
12 White House official, wrote in *USA Today* that the  
13 Administration, quote, "continues to demonstrate its  
14 commitments to improving open government and  
15 transparency," end of quote.

16 But the very next day, ironically, the first day of  
17 Sunshine Week, the White House announced it was removing  
18 regulations that for 35 years had subjected its Office of  
19 Administration to FOIA requests. According to the White  
20 House, this decision is consistent with court decisions  
21 holding that the office is not subject to FOIA.

22 But as one open government advocate put it, quote,  
23 "You have a President who comes in and says 'I am  
24 committed to transparency and agencies should make  
25 discretionary disclosures whenever possible,' but he is

1 not applying it to his own White House," end of quote.

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3 This is just one of many examples that lead me to  
4 question the President's declaration that his  
5 Administration is the most transparent in history, which  
6 was my expectation. But, again, I want to be fair to  
7 this President. If he goes by what every other President  
8 has done, both Republicans and Democrats have these  
9 shortcomings.

10 The numbers, I think, also speak for themselves. The  
11 Center for Effective Government recently released its  
12 annual Access to Information Scorecard, which grades  
13 Federal agencies' FOIA performances. While there were  
14 some glimmers of hope, the overall results indicate there  
15 is much room for improvement.

16 I am particularly concerned with the State  
17 Department's FOIA operation. According to Scorecard, the  
18 State Department processed only 17 percent of FOIA  
19 requests it received in 2013. For the second year in a  
20 row, the State Department was the lowest scoring agency  
21 by far, with performance that was, quote, "completely out  
22 of line with other agencies."

23 These results seem to confirm an ongoing issue with  
24 the State Department's ability to manage agency  
25 information and process FOIA requests.

1           In 2012, State Office of Inspector General issued a  
2 report concluding that, quote, "The Department's FOIA  
3 process is inefficient and ineffective" and that its  
4 records management practices, quote, "do not meet  
5 statutory and regulatory requirements," end of quote.

6           And just recently the IG released another report  
7 outlining State Department's failure to properly archive  
8 e-mails as official records. Out of over 1 billion e-  
9 mails sent by agency employees in 2011, just over 61,000  
10 of those were properly archived. And it is impossible  
11 not to acknowledge that former Secretary Clinton's  
12 exclusive use of a private e-mail account to conduct  
13 official State Department Business.

14           According to Jason Baron, the former Director of  
15 Litigation and National Archives and Records, quote, "A  
16 Federal employee or official choosing to carry out  
17 communications using non-dot.gov address, without making  
18 timely transfer of those records to an appropriate  
19 governmental system, compromises the ability of an agency  
20 to adequately respond to FOIA requests."

21           No doubt these failures undermine FOIA and have  
22 serious consequences for our oversight and for  
23 documenting U.S. diplomatic history. And as Secretary  
24 Kerry acknowledged, the preservation of records and the  
25 public's access to those records are, quote-unquote,

1 "interrelated principles."

2 I agree. After all, if a record cannot be found, it  
3 cannot be disclosed.

4 So I want to know where the breakdowns occur. I want  
5 to hear what State Department has done and plans to do to  
6 address these serious concerns.

7 Further, is this an isolated incident? If not, then  
8 how widespread are these issues and what can be done to  
9 turn the tide?

10 Finally, I want to know what steps the Administration  
11 is taking to ensure the public's right to know, which the  
12 President himself said is central to, quote, "the  
13 effective functioning of our constitutional democracy,"  
14 end of quote.

15 These, along with many others, are important  
16 questions that need to be answered and I am glad to have  
17 today's hearing. I am looking forward to hearing from  
18 our witnesses today who I am sure can shed quite a bit of  
19 light on these matters.

20 So I want to thank all for being here today.

21 [The prepared statement of Chairman Grassley appears  
22 in the appendix.]

23 Chairman Grassley. I now turn to my friend, Senator  
24 Leahy, for his remarks.

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

Senator Leahy. Thank you, Mr. Chairman.

This is an important hearing on one of our most cherished open government laws, the Freedom of Information Act, FOIA. For nearly half a century, FOIA has taken our great American values of openness and accountability and put them into practice by guaranteeing access to government information.

This Committee, as the Chairman noted, has a long tradition of working across the aisle when it comes to protecting the public's right to know. We have done this during both Democratic and Republican Administrations.

Senator Grassley and Senator Cornyn have been important partners in these efforts and our collaboration the three of us working together with others, has resulted in enactment of several improvements to FOIA, including the OPEN Government Act, the OPEN FOIA Act.

We are moving in the right direction. That is the good news. The bad news is obstacles to the FOIA process remain in place and progress has come much too slowly.

For the second year in a row, the Center for

1 Effective Government graded the responsiveness of 15  
2 Federal agencies that process most of the FOIA requests.  
3 Some agencies did show improvement from last year, but  
4 the results are disappointing.

5 Not a single agency received an A grade. Only two  
6 agencies received a B grade. The rest fell below a C.  
7 We have to do better than this. Two agencies, including  
8 the State Department, testifying before us today,  
9 received a failing grade for the handling of FOIA  
10 requests.

11 According to the report, only 7 percent of FOIA  
12 requests the State Department received were responded to  
13 within the 20 days required, 7 percent. The State  
14 Department denied FOIA requests in their entirety almost  
15 50 percent of the time.

16 I do not know how anybody could find that acceptable.  
17 I recognize the number of FOIA requests has increased  
18 over the years, but that is not a reason to fall down on  
19 the job.

20 If we need more resources, then ask for them. I am  
21 on the Appropriations Committee. I will vote for more  
22 resources for answering FOIA requests. But you are not  
23 going to solve it by money alone. We have to  
24 fundamentally change the way we think about FOIA.

25 Our very democracy is based on the idea that our

1 government should not operate in secret and we should  
2 embrace that. While it is not always popular,  
3 transparency is fundamental to the values on which our  
4 country was founded.

5 That is why I worked with Senator Cornyn to craft the  
6 FOIA Improvement Act of 2015. Both Senator Cornyn and I  
7 said at the time we want the strongest act possible,  
8 whether it is a Democratic or Republican Administration,  
9 because no matter which party is in control, they will  
10 want to tout their successes, but they are usually pretty  
11 reluctant to talk about any failures.

12 So ours is a comprehensive bill. It will codify what  
13 President Obama laid out in his historic 2009 memorandum  
14 requiring Federal agencies to adopt a presumption of  
15 openness when considering the release of information  
16 under FOIA.

17 Now, this policy was first put into place by  
18 President Clinton. It was repealed by President Bush,  
19 and President Obama reinstated it. It was one of his  
20 first acts in office.

21 By codifying the presumption of openness, Congress  
22 can establish a transparency standard that will remain  
23 for future Administrations of either party and agencies  
24 to follow. It embodies the very spirit of FOIA. If  
25 fully complied with, it would do more to improve the

1 effectiveness of FOIA than any other reform.

2 So I hope we can pass the FOIA Improvement Act  
3 without further delay. It had the unanimous support of  
4 the Judiciary Committee in February. It is nearly  
5 identical to legislation which was passed by the full  
6 Senate last year.

7 There are no objections on the Democratic side to  
8 move forward with this legislation. I hope we can bring  
9 it before the full Senate for consideration and we can  
10 pass this important bill.

11 Thank you, Mr. Chairman.

12 [The prepared statement of Senator Leahy appears in  
13 the appendix.]

14 Chairman Grassley. A couple of housekeeping things  
15 before I introduce the panel. After I ask my questions,  
16 I am going to turn the gavel over to Senator Cornyn to  
17 finish the meeting.

18 I have letters that were submitted on behalf of  
19 Information Governance Initiative, as well as ARMA  
20 International, which I would ask unanimous consent to be  
21 included in the record.

22 [The letters referred to follow:]

23 \*\*\*\*\*COMMITTEE INSERT\*\*\*\*\*

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3 Chairman Grassley. As always, the record will  
4 remain open 1 week for the submission of written  
5 questions for either one of our panels, any of our  
6 panelists, and other material that people want to put in.

7 Senator Leahy. Mr. Chairman, I would ask consent,  
8 because I will not be here, that my questions be  
9 introduced for the record and that the witnesses be  
10 requested to answer them.

11 Chairman Grassley. Yes. Please respond to all the  
12 questions, but particularly to the Ranking Member,  
13 because he is a leader in this area of openness in  
14 government.

15 Our first witness, Melanie Pustay, Director, Office  
16 of Information Policy, Justice Department. Her office  
17 has statutory responsibility for directing agency  
18 compliance with FOIA. Before becoming director, she  
19 served 8 years as deputy director and has worked  
20 extensively on open government issues with government  
21 officials.

22 Nikki Gramian is Acting Director of the Office of  
23 Government Information Services, the Federal FOIA  
24 ombudsman office. She joined the office after 7 years at  
25 the Department of Homeland Security IG, where she

1 supervised a FOIA team that processed many sensitive,  
2 high visibility requests.

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4 Joyce Barr is State Department's Assistant Secretary  
5 for Administration, as well as Chief FOIA Officer. As  
6 Assistant Secretary, she is responsible for the day-to-  
7 day administration of various functions ranging from  
8 logistics to records management and privacy programs.  
9 She has been a member of the Foreign Service for over 35  
10 years, serving in posts around the world, including U.S.  
11 Ambassador to the Republic of Namibia.

12 Welcome and thank you for all being here today. You  
13 will each have 5 minutes to make your opening statement  
14 and, of course, your complete written testimony will be  
15 included in the record.

16 So I am going to go in the order of Ms. Pustay, Ms.  
17 Gramian, and then Ms. Barr. Would you proceed, please?

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STATEMENT OF MELANIE ANN PUSTAY, DIRECTOR, OFFICE OF  
INFORMATION POLICY, U.S. DEPARTMENT OF JUSTICE,  
WASHINGTON, DC

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Ms. Pustay. Thank you. Good morning, Chairman  
Grassley and Ranking Member Leahy and members of the  
Committee.

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I am pleased to be here today to discuss the FOIA and  
the Department of Justice's ongoing efforts to encourage  
agency compliance with this very important law.

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There are several areas of success that I would like  
to highlight today. Despite receiving continued record  
high numbers of FOIA requests and operating at the lowest  
staffing levels in the past 6 fiscal years, agencies have  
continued to find ways to improve their FOIA  
administration. Seventy-two out of 100 agencies subject  
to the FOIA ended fiscal year 2014 with low backlogs of  
fewer than 100 requests.

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Processing nearly 650,000 requests, the government  
also continued to maintain a high release rate of over 91  
percent. Agencies overall also continue to improve  
processing times.

1           OIP has for a number of years encouraged agencies to  
2 focus on their simple track requests, with the goal of  
3 processing them within an average of 20 working days. I  
4 am pleased to report that this past fiscal year, the  
5 government's overall average was 20.5 days for these  
6 requests.

7           ~~And~~<sup>It</sup> there are also many achievements that are not  
8 easily captured by statistics. Agencies continue to  
9 proactively post a wide variety of information online in  
10 open formats. They are making discretionary releases of  
11 otherwise exempt information, and they are utilizing  
12 technology to improve FOIA administration.

13           The Department of Justice continued to work  
14 diligently throughout the year to both encourage and  
15 assist agencies in their compliance with the FOIA. I  
16 firmly believe that it is vital that FOIA professionals  
17 have a complete understanding of the law's legal  
18 requirements and the many policy considerations that  
19 contribute to successful FOIA administration. ↗

20           ↖ As a result, one of the primary ways that my office  
21 encourages compliance with the FOIA is through the  
22 offering of a range of government-wide training programs  
23 and the issuance of policy guidance.

24           In 2014 alone, my office provided training to  
25 thousands of individuals through a variety of programs.

1 and ~~in~~<sup>g</sup> addition, we issued guidance on a range of  
2 topics, including comprehensive guidance on the FOIA's  
3 proactive disclosure provisions. That guidance includes  
4 strategies for identifying frequently requested records  
5 and encourages agencies to post records even before  
6 receipt of a single request in accordance with the  
7 President's and Attorney General's FOIA directives.

8 ~~And then~~<sup>g</sup> I am also particularly pleased to highlight  
9 for you ~~all~~<sup>g</sup> today the substantial progress that we have  
10 made on a number of initiatives to modernize the FOIA.

11 ~~So,~~<sup>g</sup> First, in collaboration with the 18F Team at GSA, we  
12 have been working on the creation of a consolidated  
13 online FOIA service to be added to the resources that are  
14 available on ~~FOIA~~<sup>FOIA</sup>.gov. This consolidated service will  
15 allow the public to make a request to any agency from a  
16 single ~~website~~<sup>we</sup> and will include additional tools to  
17 improve the customer experience.

18 Second, OIP has been working on the potential content  
19 of a core FOIA regulation. We formed an interagency task  
20 force to tackle this project. We have met with civil  
21 society organizations to get their input and our team is  
22 now hard at work drafting initial language. We look  
23 forward to continuing our engagement with both civil  
24 society and our agency colleagues as we all collaborate  
25 on that project.

1 Third, in an effort to improve internal agency  
2 practices, OIP launched a new series of best practices  
3 workshops ~~and we started~~ <sup>ing</sup> ~~that~~ with the important topic of  
4 improving timeliness and reducing FOIA backlogs. These  
5 workshops provide a unique opportunity for agencies to  
6 learn from one another and to apply innovative solutions  
7 more broadly across the government.

8 ~~And then~~ <sup>9F</sup> Finally, just this past March, we completed  
9 our commitment to enhance FOIA training by making  
10 standard e-learning resources available to all Federal  
11 employees. ↗

12 Embracing Attorney General Holder's message that "FOIA  
13 is everyone's responsibility," these new training  
14 resources target the entire spectrum of Federal  
15 employees, from the newly arrived intern to the senior  
16 executive.

17 These training resources are available to all agency  
18 personnel anywhere in the world and at no charge. They  
19 address the FOIA's many procedural and substantive  
20 requirements and they also emphasize the importance of  
21 good communication and good customer service.

22 Given how important training is to successful  
23 implementation of FOIA, I am particularly proud that OIP  
24 was able to provide these resources to all government  
25 employees.

1           So in closing, in the face of many challenges this  
 2 past fiscal year, agencies have achieved success in many  
 3 areas. But still there is more work to be done and we  
 4 will continue our efforts to encourage and assist  
 5 agencies going forward.

6           We look forward to working with the Committee on this  
 7 important matter. Thank you.

8           [The prepared statement of Ms. Pustay appears in the  
 9 appendix.]

10           Chairman Grassley. Thank you, Ms. Pustay.

11           Now, we will hear from Ms. Gramian.

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3 STATEMENT OF NIKKI N. GRAMIAN, ACTING DIRECTOR, OFFICE OF  
4 GOVERNMENT INFORMATION SERVICES, NATIONAL ARCHIVES AND  
5 RECORDS ADMINISTRATION, COLLEGE PARK, MARYLAND

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7 Ms. Gramian. Good morning, Mr. Chairman, Ranking  
8 Member Leahy and members of the Committee. I am Nikki  
9 Gramian, Acting Director of the Office of Government  
10 Information Services, known as OGIS, a component of the  
11 National Archives and Records Administration, known as  
12 NARA.

13 As acting director, it is my great honor to appear  
14 before you to share our observations on the current state  
15 of the Freedom of Information Act and update you on OGIS'  
16 activities.

17 It has long been OGIS' observation that access to  
18 records under the FOIA is linked to and greatly enhanced  
19 by good records management. OGIS recognizes that when an  
20 agency achieves excellence in records management, FOIA  
21 and records management programs succeed.

22 Linking improvements to the FOIA with improvements in  
23 records management programs is an OGIS best practice.

24 I am pleased to also share that since OGIS' last  
25 appearance before this Committee, NARA has hired two

1 additional OGIS staff members to work on our review  
2 mission. The review team members are now on board and in  
3 fiscal year 2014, OGIS launched a formal agency  
4 assessment program. This program will assess individual  
5 agency FOIA programs by reviewing the agency's FOIA  
6 regulations, Website, and FOIA request files.

7 In addition, the program will survey and conduct  
8 onsite interviews with agency FOIA professionals and  
9 produce a report at the conclusion of each agency  
10 assessment.

11 OGIS' assessment reports are not designed to provide  
12 grades, rankings or include a comprehensive tally of  
13 every aspect of the agency's FOIA program. Rather, the  
14 reports are intended to provide thoughtful and practical  
15 analysis in a readable and useful format.

16 Since its establishment, the review team has  
17 completed reviews of two of NARA's FOIA programs.  
18 Reviews are currently underway of six components of the  
19 Department of Homeland Security. We are very excited  
20 about this robust new review framework.

21 As shared in our 2014 testimony before this  
22 Committee, OGIS is working closely with the Department of  
23 Justice and the Administration to implement the five  
24 FOIA-related commitments included in the second Open  
25 Government National Action Plan. Specifically, OGIS,

1 with the support and guidance of NARA, is supporting the  
2 FOIA Advisory Committee.

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4 In May 2014, the Archivist of the United States,  
5 David Ferriero, appointed 20 members to the FOIA Advisory  
6 Committee. The members are split evenly between those  
7 who work within the government and those who do not.

8 The advisory committee is looking at what FOIA  
9 oversight mechanisms currently exist. In addition, the  
10 committee is identifying the barriers to proactive  
11 disclosure and studying how agencies can use data about  
12 FOIA requests to improve proactive disclosure practices.

13 Finally, the committee is discussing whether and how  
14 to reform the methods by which agencies assess fees in  
15 the FOIA process.

16 Although we do not have newer recommendations to  
17 share at this time, I want to update you on our continued  
18 work.

19 OGIS continues to request that agencies update their  
20 system of records notices, known as SORNS, to include  
21 routine uses that allow OGIS and the agency to discuss  
22 and share information about an individual's FOIA request.  
23 Currently, the absence of an appropriate routine use  
24 creates a logistical challenge for our review work and  
25 our capacity to provide efficient and effective mediation

1 services.

2 During an agency assessment, our review team will  
3 evaluate a sample of agency FOIA case files against the  
4 FOIA's requirements and the selected DOJ and OGIS best  
5 practices. If the agency has updated its SORNS to  
6 include a routine use for the disclosure of records to  
7 OGIS, the agency is permitted to share case files without  
8 taking additional steps.

9 However, the absence of an appropriate routine use  
10 requires additional administrative steps OGIS and the  
11 agency must take to share information.

12 In addition, in the course of our mediation work,  
13 when an appropriate routine use is not available, our  
14 practice is to seek the individual's consent to allow  
15 OGIS and the agency to share information. However, it  
16 can be an obstacle when an agency is seeking our  
17 assistance with a requestor with whom communications have  
18 broken down.

19 Finally, I would like to inform you that OGIS'  
20 additional activities in the last year are outlined in  
21 our annual report and written testimony.

22 I appreciate the opportunity to appear before this  
23 Committee and thank you for your support that you have  
24 shown to the Office of Government Information Services.

25 [The prepared statement of Ms. Gramian appears in the

1 appendix.]

2 Chairman Grassley. Thank you, Ms. Gramian. Now,

3 Ms. Barr?

1 STATEMENT OF HON. JOYCE A. BARR, ASSISTANT SECRETARY,  
2 BUREAU OF ADMINISTRATION, U.S. DEPARTMENT OF STATE,  
3 WASHINGTON, DC  
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5 Ms. Barr. Chairman Grassley, Ranking Member Leahy,  
6 and members of the Committee, good morning.

7 Thank you for the invitation to appear before you  
8 today and for your advocacy for improving transparency to  
9 the public.

10 I am Joyce Barr. I serve as Assistant Secretary for  
11 Administration, as well as Chief FOIA Officer, for the  
12 Department of State.

13 Part of my current mission is to respond to requests  
14 under FOIA, as well as to manage and maintain official  
15 records at the State Department. The State Department is  
16 committed to openness. It is critical to ensuring the  
17 public trust, as well as to promoting public  
18 participation in and collaboration with the U.S.  
19 Government.

20 Meeting our commitment to openness is very  
21 challenging. We currently face a large backlog of over  
22 18,000 FOIA requests. We know this is unacceptable and  
23 are working to reduce it.

24 In the past year, we achieved a nearly 17 percent  
25 reduction in our backlog of initial requests and nearly

1 23 percent reduction in our appeals backlog by  
2 streamlining case processing.

3 We made progress, but more is needed.

4 There are several reasons for the backlog. Since  
5 2008, our caseload increased over 300 percent. In fiscal  
6 year 2008, the State Department received fewer than 6,000  
7 new FOIA requests. Fiscal year 2014, we received nearly  
8 20,000. Since the beginning of this fiscal year, we have  
9 already received nearly 14,000 new requests.

10 Many of these cases are increasingly complex. The  
11 State Department is often the public's main destination  
12 for information and documents related to national  
13 security issues. Other national security agencies are  
14 partially, if not completely exempt from the FOIA. As a  
15 result, requesters often come only to the department to  
16 request information on any and all national security  
17 issues.

18 These complex requests require multiple searches  
19 throughout many of our 275 missions around the world.  
20 They involve the review of classified material or highly  
21 sensitive material, and we must coordinate with other  
22 Federal agencies.

23 They generate large volumes of paper and electronic  
24 materials that must be reviewed by State and interagency  
25 subject matters across the Federal Government.

1       We get a lot of complaints about delays and our goal  
2 is to do everything we can to complete each request as  
3 quickly as possible with as much information as possible.

4       You may already know that Secretary Kerry reinforced  
5 this point in his March letter to our Inspector General.  
6 In that letter, as you acknowledged, Mr. Chairman, the  
7 Secretary explained that he recognized the work that has  
8 been done and that the department is already acting on a  
9 number of challenges to meet its preservation and  
10 transparency obligation.

11       He has asked the IG to review and ensure that we are  
12 doing everything we can to improve and to recommend  
13 concrete steps that we can take to do so.

14       I am here as the department's senior FOIA official to  
15 assure you that we are committed to working cooperatively  
16 with the IG and any recommendations that may follow.

17       My testimony for the record includes information  
18 about related issues, like our FOIA Website and  
19 Presidential libraries.

20       Again, the Department of State is committed to public  
21 access to information.

22       Mr. Chairman, I thank the Committee for the  
23 opportunity to testify today and would be pleased to  
24 address questions that you or any other member of the  
25 Committee may have on FOIA within the State Department.

1 Thank you.

2 [The prepared statement of Ms. Barr appears in the  
3 appendix.]

4 Chairman Grassley. Thanks to each of you,  
5 especially for keeping within your allotted time. It  
6 helps us manage time better here. I appreciate it very  
7 much.

8 I am going to start with you, Ms. Barr. I think I  
9 need to emphasize that we are talking about the State  
10 Department. This is a government-wide problem. It just  
11 happens that maybe things are a little more obvious in  
12 the State Department of changes needed to be made for  
13 FOIA.

14 The 2012 IG report concluded that the State  
15 Department's FOIA process is, quote, "inefficient and  
16 ineffective." The same report concluded that its  
17 records management practices, quote, "do not meet  
18 statutory and regulatory requirements," end of quote.

19 The report cites a lack of oversight, performance  
20 monitoring and enforcement. Because of these failures, a  
21 substantial number employees' e-mails were not being  
22 properly recorded.

23 I am afraid the problems have not been resolved. We  
24 now have a subsequent IG report released this March  
25 showing continued problems in the State records

1 management operation, with only a tiny fraction of  
2 employees' e-mails being properly recorded in the  
3 archiving system.

4 So my question to you. Why has there apparently been  
5 no improvement in the State records management operation  
6 since that 2012 IG report? And maybe more importantly,  
7 then leading into my second and third questions, were any  
8 actions taken after the 2012 report to improve oversight,  
9 performance and compliance with record-keeping  
10 obligations? And if those things did take place, why did  
11 they fail to resolve the issues?

12 Ms. Barr. Thank you for that question. When that  
13 OIG inspection started, I had been on the job for less  
14 than 6 months and it was one of the first major issues  
15 that I had to face.

16 It was very difficult for me to read that report and  
17 find out that I had a serious problem in that section.  
18 So I took a number of actions. I made it a priority. I  
19 met with the team. I looked at what the staffing and  
20 what the resources were. At that time, I was able to  
21 provide more people to help in that section.

22 One of the other issues that we had is that we had a  
23 lot of vacancies in key positions. I made sure that that  
24 was taken care of and, in fact, right after the report --  
25 we got the first draft of the report, we had hired an

1 absolutely fantastic director that made a huge difference  
2 in how we operated.

3 We implemented more training. We tried to improve  
4 lines of communication because it had been brought to our  
5 attention that there was a morale problem in the section.  
6 That was a priority with me and I made sure that  
7 supervisors had proper training, that they made sure that  
8 they provided good guidance for their subordinates.

9 Now, part of what we tried to accomplish in this  
10 section is responding quickly and appropriately when we  
11 get these FOIA requests in and we have done -- I think we  
12 have made great strides. Most of the recommendations  
13 have been closed to the satisfaction of the IG and we  
14 continue to work with them on that.

15 But there are a couple of things that have made it  
16 difficult for us to completely resolve some of our  
17 problems with keeping up. As noted in the testimony by  
18 my colleague in the Department of Justice, our requests  
19 have continued to skyrocket. We have over 18,000  
20 requests that we processed in 2014, but things keep  
21 rolling in while we are trying to get on top of it.

22 This type of work is very exacting. But when we get  
23 a request in, it is not just our individual review, but  
24 making sure that we task that out to all of our  
25 embassies, to different bureaus within the State

1 Department, that we get responses and good materials  
2 back. We review it again, perhaps send it out again  
3 through the interagency. Then it comes back for release.

4 So while we have gotten better at streamlining and  
5 training and being responsive, more work has come in.

6 With regard to the second OIG report that you are  
7 referring to, we are working on responses to that right  
8 now and those are not yet complete and I do not have a  
9 detailed response for you.

10 So I would not say that we have done nothing. I  
11 would say that we are better, but we need to further  
12 improve to really get on top of that and that is one of  
13 the reasons we are working closely with the Department of  
14 Justice, as well as NARA, to not only improve our  
15 individual systems, but to be part of a government-wide  
16 response to address some of the things that you said  
17 earlier about the public needing and wanting more  
18 transparency.

19 Chairman Grassley. Senator Cornyn? I will leave  
20 you here to take charge. Maybe there are a couple of  
21 questions I was going to ask you can ask for me.

22 Senator Cornyn. Sure.

23 Chairman Grassley. Thank you.

24 Senator Cornyn [presiding]. Thank you, Mr.

25 Chairman. Thanks for convening this hearing today. And

1 thank you, to all of the witnesses, for being here.

2 I think this is a critical hearing. I wish we gave  
3 this the sort of attention that I think it deserves.  
4 There is this idea out there that the Freedom of  
5 Information Act is something we do for the press. That  
6 is a fundamentally flawed way to look at it, from my  
7 perspective.

8 This is about the public's information that was  
9 generated by people who work for the government and  
10 information that was generated by their tax dollars. And  
11 I believe there should be a presumption that the  
12 information that is held by the U.S. Government should be  
13 open and accessible to the public.

14 I certainly understand the sensitivity of some of the  
15 information you mentioned, for example, Ms. Barr, and the  
16 importance of going through that to make sure that the  
17 sensitive, classified and other information is preserved.

18 But I just do not understand why we should tolerate  
19 the poor record of response by agencies like the State  
20 Department. I respect the job you are trying to do, Ms.  
21 Barr, and it sounds like you are understaffed and under-  
22 resourced. But the 37 out of 100 that the State  
23 Department has gotten on your Scorecard for FOIA is an  
24 embarrassing failure of the agency and I do not know how  
25 we could call it anything different.

1           But what really bothers me is when people plan in a  
2 premeditated and deliberate sort of way to avoid the  
3 Freedom of Information Act and Federal Government  
4 Requirements that require them to make public information  
5 available to the public. Of course, we are all familiar  
6 with the news accounts of what happened with former  
7 Secretary Clinton.

8           Ms. Barr, did either you or Under Secretary for  
9 Management Patrick Kennedy know that Secretary Clinton  
10 was operating exclusively on a personal and private e-  
11 mail server?

12           Ms. Barr. I have no information on that, sir. I  
13 was not aware of that.

14           Senator Cornyn. Are you aware of anybody else in  
15 the United States Government who is operating on a  
16 private, personal e-mail server in a way that defeats the  
17 very purpose of our freedom of information laws? Are you  
18 aware of anybody else who is operating in such a manner?

19           Ms. Barr. I am not personally aware of that, sir.

20           Senator Cornyn. Well, prior to the recent return --  
21 and I think that was in 2014, October 2014 -- of some of  
22 Secretary Clinton's official e-mails, how did the State  
23 Department process Freedom of Information requests for  
24 information that was held by Secretary Clinton?

25           Ms. Barr. Well, as I mentioned earlier, we get

1 thousands of requests and we process them -- we have a  
2 specific protocol for processing them.

3 The e-mail is not the only way we capture information  
4 about what the Secretary does. We have documents that  
5 are in the form of memos, briefings, agendas, et cetera,  
6 that are also --

7 Senator Cornyn. Would you actually call Secretary  
8 Clinton and say there has been a request under the  
9 Freedom of Information Law and do you have any documents  
10 that are responsive to that?

11 Ms. Barr. What we do is when a process comes in, we  
12 task, first, ourselves in the department for information  
13 that might be applicable.

14 Senator Cornyn. But I am asking how would you  
15 access the private e-mail?

16 Ms. Barr. Because we have other archive systems,  
17 like Everest, where we process all of the paper. So if  
18 the Secretary is going on a trip and we have asked people  
19 to provide documents and background information for that  
20 trip, we collect it in that system, and that is --

21 Senator Cornyn. I understand that. But I am asking  
22 about her e-mails on her personal e-mail server. How  
23 would you access that?

24 Ms. Barr. Well, we have them now, sir.

25 Senator Cornyn. In response to a Freedom of

1 Information request.

2 Ms. Barr. Well, we have them now, sir.

3 Senator Cornyn. Do you have all of them?

4 Ms. Barr. We have the e-mails that she has released  
5 to us, all of the official ones.

6 Senator Cornyn. Do you know what percentage that  
7 represents of all the e-mails she has on her server?

8 Ms. Barr. No, I do not.

9 Senator Cornyn. So you do not have any way of  
10 verifying that you have all of the official e-mails that  
11 she processed on her personal e-mail account.

12 Ms. Barr. We have been told that she has provided  
13 those to us.

14 Senator Cornyn. Who told you that?

15 Ms. Barr. The Secretary.

16 Senator Cornyn. So you are taking her word for it.  
17 I am sorry, yes?

18 Ms. Barr. Yes, sir.

19 Senator Cornyn. My time is up, but maybe we can get  
20 a chance to do another round since it is just Senator  
21 Tillis and myself.

22 Senator Tillis. Senator Cornyn, continue with this  
23 line of questions, if you want.

24 Senator Cornyn. Thank you very much. So, Ms. Barr,  
25 I understand it was not until October 2014 when the first

1 attempt to retrieve the official e-mails was made by the  
2 State Department. Can you verify that date, October  
3 2014?

4 Ms. Barr. Could you give me some context to that,  
5 sir?

6 Senator Cornyn. Well, I would just cite news  
7 reports because that is the only source of my  
8 information. I am just asking you to verify it, if you  
9 can. But according to news reports, the State Department  
10 did not request return of official records maintained by  
11 Secretary Clinton on her private account until October  
12 2014.

13 Can you verify those reports in the news?

14 Ms. Barr. Well, I know that we actually asked for  
15 former Secretaries of State for their e-mail records.

16 Senator Cornyn. I am talking about Secretary  
17 Clinton.

18 Ms. Barr. Yes. We did send a letter last year  
19 asking for those e-mails.

20 Senator Cornyn. And was that the first request that  
21 you, as the Chief Freedom of Information Officer at the  
22 State Department, had made to her for these private e-  
23 mails?

24 Ms. Barr. As far as I am aware, sir, yes.

25 Senator Cornyn. That is the first time. Why did

1 the agency wait nearly 2 years after Secretary Clinton  
2 left office to first request those official e-mail  
3 records?

4 Ms. Barr. Well, sir, I do not have specific  
5 information on that, but I can say that the Secretary has  
6 asked the Inspector General to review that and I hope  
7 that through that review we will find out more  
8 information that can give us -- inform us as to what we  
9 should have done, what happened, and from that take  
10 lessons to make sure that records about the Secretary do  
11 not get separated from the larger collection at the  
12 department.

13 Senator Cornyn. So is Secretary Clinton going to  
14 make available to the Inspector General all of the e-  
15 mails that were collected on her private e-mail server so  
16 the Inspector General can objectively look at them and  
17 decide whether Secretary Clinton's separation of official  
18 from personal e-mails is indeed accurate and correct?

19 Ms. Barr. I am not really privy to how the  
20 Inspector General is shaping his investigation.

21 Senator Cornyn. Do you know how Secretary Clinton  
22 provided for security of this information? We are all  
23 well aware that cyber attacks are rampant and some state  
24 sponsors of cyber attempts to steal information that is  
25 both sensitive intelligence and other information that

1 presumably would be on Secretary Clinton's e-mail server.  
2 Are you aware of any attempts to secure that server in a  
3 way that would protect that information from cyber  
4 criminals and intelligence efforts by our adversaries?

5 Ms. Barr. No, I do not have information.

6 Senator Cornyn. Would that concern you?

7 Ms. Barr. Perhaps.

8 Senator Cornyn. Perhaps. Well, I would hope it  
9 would concern all of us, because as you point out, the  
10 Department of State has access to very sensitive  
11 information and, of course, as a member of the  
12 President's Cabinet, presumably even information from  
13 other Cabinet members, maybe communication from the  
14 President himself would be subjected to theft by cyber  
15 criminals, and we know there are state sponsors of that  
16 sort of activity that would love to learn the innermost  
17 deliberations and communications of the President with  
18 his Cabinet.

19 So that would concern you -- you say perhaps and I  
20 will just tell you it concerns me a lot.

21 Are you concerned -- and I will conclude on this and  
22 turn it over to Senator Tillis for now -- that there  
23 would be a premeditated and deliberate attempt by a  
24 member -- by a high level official in the United States  
25 Government to set up a personal e-mail system in a way

1 that would circumvent all of the laws that Congress has  
2 passed to enforce the public's right to know, including  
3 the Freedom of Information laws? Does that concern you?

4 Ms. Barr. So I just want to paraphrase. You are  
5 asking me if I would be concerned if a Cabinet member  
6 deliberately set up an e-mail account to circumvent the  
7 laws.

8 Senator Cornyn. That is correct.

9 Ms. Barr. In theory, yes.

10 Senator Cornyn. In theory.

11 Ms. Barr. Yes.

12 Senator Cornyn. Senator Tillis?

13 Senator Tillis. Thank you, Senator Cornyn.

14 Ms. Gramian, I want to start with you and go back to  
15 some of the foundational problems we seem to have in  
16 terms of record-keeping. I think the Inspector General  
17 just this year indicated that there were some billion e-  
18 mails sent by agency employees, but only about 61,000 of  
19 them were properly archived.

20 Back early in my career, I worked in records  
21 management and did record scheduling, retention  
22 scheduling, identifying classifications of documents, and  
23 making sure that they were properly maintained and  
24 disposed of. So if you are not the right person to  
25 answer this question, anyone else can chime in.

1           But how on earth could we have a records management  
2 operation in one of the most important areas of  
3 government seem to be so bush league? I mean, this just  
4 does not happen in the private sector where critical  
5 records are actually maintained, categorized and managed  
6 proactively. It seems like they are void of that.

7           Am I missing it? How do you get the variable between  
8 1 billion and 61,000 and think that someone is confident  
9 in managing the records retention programs?

10          I kind of poisoned the well with the question.

11          Ms. Gramian. As you correctly stated, sir, I am not  
12 the right person. But I know that part of NARA is  
13 looking into this issue and the Archivist of the United  
14 States has previously testified about the problems with  
15 e-mail.

16          Senator Tillis. To me, the reason I directed the  
17 question to you, being associated with OGIS, is that  
18 there are a lot of tools available to make this archiving  
19 almost as seamless and as automatic as possible.

20          Either there was a conscious decision not to use the  
21 tools that they should have available or the people that  
22 were in charge had no idea what they were doing and what  
23 tools were available.

24          So from an IT perspective, why on earth would these  
25 not have been a part of an automated program for

1 retention and disposition within whatever the retention  
2 schedule should have been for certain classifications of  
3 documents on e-mail?

4 Ms. Gramian. I know that the National Archives is  
5 leading on the capstone program and in 2016, I believe  
6 all agencies are required to be in line with this  
7 particular situation.

8 I do not have the answer for that, but I am happy to  
9 obtain the additional information you request.

10 Senator Tillis. Thank you. This is for anyone on  
11 think panel. Are there any policies in place that say  
12 that you really should not be consolidating your records  
13 that you create in the normal course of business of doing  
14 your job on a private server where you are responsible  
15 for the retention and security of it? Do we have any  
16 specific policies that were violated as a result of this  
17 or do we need to pardon these policies to make something  
18 that is pretty obvious well documented?

19 Ms. Gramian. I understand National Archives has  
20 issued policy and guidance on this particular situation  
21 and my understanding is that individuals who are using  
22 personal e-mails are required to copy their official e-  
23 mails, as well.

24 There are situations when this may occur and that is  
25 how to remedy it.

1           Senator Tillis.   Ms. Barr, within the Department of  
2 State, if we had a mid-level department director work for  
3 the department for a couple of years and come back into  
4 the department and say, "You know what? I just decided  
5 to put all of my stuff on a private server," would they  
6 be subject to any disciplinary action?

7           It would seem like at the lower level, if someone did  
8 that, that it would be a violation of common sense, if  
9 not a violation of policy. Would that be okay for  
10 someone to do that provided that when you finally say,  
11 "Okay. Well, now we need to see those e-mails" and they  
12 send it back to you?

13           What kind of recourse would you have for somebody  
14 like that in the organization?

15           Ms. Barr.   So this is a theoretical question that  
16 you are asking me.

17           Senator Tillis.   Yes. I am just asking whether or  
18 not the practice that we are discussing here that Senator  
19 Cornyn -- is it okay? Are we sending a message to anyone  
20 in the office that as long as you promise to give them  
21 back when we need them, that it is okay to have them  
22 hosted on private servers?

23           Ms. Barr.   Well, I think that the actions that we  
24 have taken in the course of recovering these e-mails have  
25 made it very clear what people's responsibilities are

1 with regard to record-keeping. We have done -- we  
2 continue to do training, but we have sent department  
3 notices, telegrams. We have talked to directors. And I  
4 think that -- I think the message is loud and clear that  
5 that is not acceptable.

6 Senator Tillis. So it is a completely unacceptable  
7 process going forward and it should have been  
8 retrospectively.

9 Ms. Barr. Going forward, yes, sir.

10 Senator Tillis. And retrospectively, the reason we  
11 have arrived at those policies is now we realize it was a  
12 bad decision made on the part of other people. Secretary  
13 Clinton is one of them, there may be others. But it was  
14 just a bad decision that really raised -- one of the  
15 reasons why you are probably experiencing the threefold  
16 increase in requests is that these kinds of things just  
17 absolutely undermine the confidence of the American  
18 people.

19 It was a bad decision. I hope that we go so far as  
20 to say if you do this in the future, you get fired, and  
21 the department takes a very definitive stand that it is  
22 unacceptable particularly for someone at the top -- if  
23 the person at the top is doing it, then you can pretty  
24 much count on the reality that over some period of time,  
25 people at every level of the agency have, and it

1 undermines your ability to do what you need to do.

2 I do not envy you for having to take the  
3 responsibility for providing records requests. As  
4 Speaker of the House, I was inundated with them. I  
5 understand how complicated it is and the work that you  
6 have to do to protect privileged information, secret and  
7 classified information.

8 But I think that a part of the reason why you are  
9 dealing with this are the acts of some people that have  
10 undermined their confidence in being able to get the  
11 information they deserve.

12 Thank you for being here and for your hard work. If  
13 I get a chance, I have got some other questions on  
14 streamlining the process and other things to service the  
15 FOIA requests.

16 Thank you, Mr. Chair.

17 Senator Cornyn. Senator Franken?

18 Senator Franken. Thank you, Mr. Chairman.

19 I will pick up on this because it seems like one of  
20 the issues, Ms. Barr, has been that Congress has been  
21 slow itself to update and to modernize Federal laws  
22 relating to government transparency, such as the Federal  
23 Records Act.

24 It was not until 2014, after Secretary Clinton had  
25 left the State Department, that we required agency

1 employees using personal e-mail accounts for official  
2 purposes to make sure a copy went to their own work e-  
3 mail account; is that right?

4 Ms. Barr. Yes.

5 Senator Franken. Yes. So it strikes me that that  
6 is one of the many instances in which Federal law lags  
7 behind the technology. In general, I think this is an  
8 issue that Congress needs to grapple with. We have  
9 really yet to modernize the Federal Government's Privacy  
10 Act or commercial privacy laws, for that matter, and we  
11 have yet to truly modernize FOIA, which is one of the  
12 reasons I support Senator Cornyn's and Senator Leahy's  
13 FOIA Improvements Act.

14 In your view, are there any other areas where  
15 Congress needs to take steps to ensure that the State  
16 Department's practices and policies reflect current use  
17 of technology?

18 Ms. Barr. Well, first, we are actively working to  
19 meet the deadline that my colleague from NARA mentioned  
20 about making sure that we have an electronic system that  
21 can cope with the types of requests we get.

22 But the one thing I would probably need more of, I  
23 mean, we always want people and resources, is maybe more  
24 time. Twenty days is very quick and if we had more time  
25 to respond before we could be sued to get that

1 information, that might be very helpful.

2 Senator Franken. Thank you. Does anybody else have  
3 a comment on that, because it is kind of a broad  
4 question? No?

5 [No Response]

6 Senator Franken. I know that the Chairman talked a  
7 little bit about Secretary Clinton's use of e-mails. I  
8 just want to point out a couple of things.

9 Colin Powell admitting to using personal e-mail to  
10 conduct business while Secretary of State and admitted to  
11 not preserving any of those e-mails, but no one is  
12 accusing him of breaking the law. And I think, as we  
13 pointed out, that the law really did not change on  
14 preserving those or sending those to the State Department  
15 e-mail until 2014, as you acknowledged, Ms. Barr.

16 There was nothing improper, even unusual with  
17 Secretary Clinton selecting which e-mails to preserve and  
18 there was nothing improper about deleting those that were  
19 personal. And under the guidelines issued by the  
20 National Archives, every employee is responsible for  
21 determining which of their e-mails to preserve as Federal  
22 records and which to delete, and that is how the system  
23 works.

24 Nevertheless, talking about the State Department, Ms.  
25 Pustay, it seems that the State Department has struggled

1 for some time now to provide appropriate, timely  
2 responses to FOIA requests.

3 IN your position, you have the opportunity to examine  
4 the compliance practices of the various Federal agencies  
5 and help them achieve full implementation.

6 Are there particular qualities, characteristics or  
7 features of the State Department that you think have made  
8 it particularly difficult or challenging for the agency  
9 to comply with FOIA and have contributed to its  
10 disappointing record? And to what extent is that record  
11 a function of the agency's structure, its substantive  
12 focus, its culture, its resources or other factors?

13 Ms. Pustay. I think that one thing that  
14 distinguishes the State Department, of course, in terms  
15 of challenges is the worldwide nature of their work and  
16 the ~~multi~~<sup>many</sup> agencies that have a stake in the records that  
17 they create. <sup>So</sup> Those things are -- they are not unique  
18 to State, <sup>Department,</sup> but they are particularly challenging to State.  
19 <sup>The</sup> ~~But~~ State <sup>Department also</sup> faces challenges much as the other large  
20 departments <sup>have</sup> ~~face~~ the past few years in terms of rising  
21 numbers of requests, increased complexity of requests,  
22 and decreased staffing.

23 <sup>So</sup> ~~It~~ this past fiscal year, the government overall was  
24 operating ~~with 6 percent~~ with the lowest staffing  
25 levels in 6 years. So those <sup>things</sup> ~~are~~ necessarily going to

1 pose challenges to all Federal agencies <sup>administering</sup> ~~processing~~ the  
2 FOIA.

3 What we have done is we have really tried to focus on  
4 the importance of backlog reduction and improving  
5 timeliness as a cornerstone of the Attorney General's  
6 FOIA guidelines. As I mentioned, we chose that topic for  
7 our very first best practices workshop, because what we  
8 are trying to do at my office is help and assist agencies  
9 in facing these challenges.

10 We have the challenges, but then the question is what  
11 can we do to overcome them. So we have been issuing  
12 guidance on best practices for reducing backlogs. We are  
13 encouraging greater use of technology in processing  
14 requests. We encourage agencies to have agreements with  
15 one another to cut down on the need to have  
16 consultations.

17 So there are a number of different approaches that  
18 all need to be taken collectively to help tackle backlogs  
19 and improve timeliness.

20 And finally, what we have been doing every year is  
21 assessing agencies on how they do in reducing backlogs  
22 and improving timeliness. <sup>g</sup> and we assess agencies both on  
23 the numbers of requests in their backlog, if they have <sup>a backlog,</sup>  
24 ~~them,~~ and ~~also focusing~~ <sup>g</sup> on the age of the oldest  
25 requests, because we think backlog reduction has two

1 elements.

2 Senator Franken. What is the age of the oldest  
3 request at State?

4 Ms. Pustay. I do not know what it is for State.  
5 But what we do is have a distinct goal that --

6 Senator Franken. What is the longest outstanding  
7 one you have seen, just for kicks?

8 Ms. Pustay. In the whole government? In the whole  
9 government, the oldest ones are from the 1990s.

10 Senator Franken. I think that is one I filed.

11 [Laughter]

12 Senator Franken. I am sorry. I have run well over  
13 my time, but if you have more to offer on that.

14 Ms. Pustay. I think it is really important for  
15 agencies to set a distinct goal of closing their 10  
16 oldest <sup>requests</sup> because only by systematically doing that every  
17 year can you have the age of the backlogs get much closer  
18 to the current time.

19 Senator Franken. Thank you. I apologize for  
20 jumping in and out, but I am in a HELP hearing, as well.

21 Thank you, Mr. Chairman.

22 Senator Cornyn. Thank you, Senator Franken.

23 I know we have another panel. Senator Tillis, do you  
24 have any other questions you would like to ask verbally  
25 of this panel or can we go to the next panel?

1           Senator Tillis.   No, Mr. Chair.  I will submit some  
2   for the record, but I am particularly interested in  
3   seeing what systematic changes are being done, what  
4   resources you have had to allocate to it, just the  
5   processes.  But we will hold that for the record.

6           Senator Cornyn.  I would like to, on behalf of  
7   Senator Grassley, he asked me to ask one more question on  
8   his behalf, Ms. Barr.

9           Apparently, in June 2013, Chairman Grassley wrote to  
10  the State Department regarding its use of special  
11  government employee designations, including for Ms. Huma  
12  Abedin, a senior advisor to Secretary Clinton.

13           His concern was for potential ethics issues, and a  
14  number of media outlets have made FOIA requests on this  
15  topic.  In June 2013 and March of 2015, Chairman Grassley  
16  requested copies of e-mail communications between Ms.  
17  Abedin and her private employer while at the State  
18  Department and as of today he has not received a response  
19  from the State Department.

20           On behalf of Senator Grassley, can you tell us when  
21  can the Committee expect to receive the documents  
22  requested and will the department be searching the e-  
23  mails from Secretary Clinton's private server for  
24  responsive documents?

25           Ms. Barr.  I have no information on that for you,

1 sir, but I can certainly take that back.

2 Senator Cornyn. I would appreciate it and I am  
3 confident Senator Grassley would appreciate a prompt  
4 response. That was June 2013 and March of 2015 when he  
5 made those requests. So some of them are quite old.

6 Thank you very much for joining us. And we will now  
7 ask the second panel to take their places.

8 Our second panel is composed of Karen Kaiser and  
9 Thomas Blanton. Ms. Kaiser is the General Counsel for  
10 *The Associated Press*. Prior to that, she was associate  
11 general counsel for newsroom legal matters.

12 As general counsel, she advises *The Associated Press*  
13 newsroom globally on all editorial matters, including  
14 subpoena defense, government investigations, reporters'  
15 privilege, news gathering and source issues, libel  
16 defense, prepublication review, Freedom of Information  
17 Act issues, and other access issues.

18 Thomas Blanton is Director the National Security  
19 Archive at George Washington University, which was  
20 founded in 1985 by journalists and scholars to serve as a  
21 check on government secrecy.

22 He served a the Archive's first director of planning  
23 and research beginning in 1986 and became deputy director  
24 in 1989 and executive director in 1992.

25 I want to extend the Committee's welcome and thanks

1 to both of you for being here with us today.

2 Each of you will given 5 minutes to make opening  
3 statements and then I am sure Senator Tillis and I and  
4 perhaps some other Senators who may join us will have  
5 some questions for you.

6 Ms. Kaiser?

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1 STATEMENT OF KAREN KAISER, GENERAL COUNSEL, THE  
2 ASSOCIATED PRESS, NEW YORK, NEW YORK

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4 Ms. Kaiser. Good morning. Chairman Grassley,  
5 Ranking Member Leahy, and members of the Committee, thank  
6 you for inviting me to testify today about ways to  
7 improve open government and thank you for your  
8 longstanding and unwavering commitment to the public's  
9 right to know.

10 My name is Karen Kaiser and I am the general counsel  
11 for *The Associated Press*, the global, independent news  
12 organization. I am testifying today on behalf of AP and  
13 the Sunshine in Government initiative.

14 AP's mission is simple and straightforward -- to  
15 inform the world. AP journalists frequently rely on the  
16 Federal FOIA and state open records laws in their  
17 reporting. Most years, our journalists file many  
18 hundreds, if not more than 1,000 requests under these  
19 laws and we challenge denials of that right to access.

20 Our requests often lead to important stories that  
21 could not have been told without reliance on our  
22 country's robust freedom of information laws and the  
23 principles of transparency that are its backbone.

24 As this Committee well knows, FOIA is a powerful tool  
25 that allows any person to learn what public officials are

1 doing, how tax dollars are being spent, and what  
2 decisions are being made.

3 FOIA opens the government to the people and it is  
4 through that transparency that we achieve accountability,  
5 a core element of our democracy.

6 However, despite promises of greater transparency at  
7 the outset of this Administration, most agencies are not  
8 abiding by their obligations. Earlier this year, AP  
9 filed a lawsuit against the State Department for its  
10 failure to respond to six requests covering Hillary  
11 Clinton's tenure as Secretary of State, including one  
12 request made 5 years ago.

13 The State Department missed all its statutory  
14 deadlines and even its own self-created deadlines.

15 The requests, importantly, concerned not only e-  
16 mails, but documents, correspondence, memos, calendars on  
17 some of the most significant issues of our time, such as  
18 the Osama bin Laden raid, surveillance practices,  
19 material on some of Clinton's longtime aides, and an  
20 important Defense contractor.

21 These are documents that the public has a right to  
22 see and which the agency is required to release. Yet,  
23 the only way to force the agency to comply with its  
24 regulations and its requirements was to sue them.

25 The State Department, as we have learned, receives a

1 large number of requests, 19,000 or 20,000 last year, but  
2 I think anyone will agree that no matter the backlog, 5  
3 years is too long to wait. And this is just one example.

4 Non-responsiveness is the norm and the reflex at most  
5 agencies is to withhold information, not to release it.

6 A recent AP study of FOIA compliance showed an  
7 alarming increase in both the backlog and in denials; 39  
8 percent of requests processed last year were denied in  
9 whole or in part and even more were rejected for  
10 procedural reasons.

11 So this bill could hardly be timelier. The changes  
12 proposed in S.337 are vital to making FOIA work better,  
13 to driving the agencies to decisions that better align  
14 with FOIA's goals, and to ensuring that our government  
15 operates from a presumption of openness.

16 The ultimate beneficiary, of course, is the American  
17 public.

18 To start codifying the presumption of disclosure is  
19 critical. With this step, Congress cements the purpose  
20 of the act and ensures that FOIA remains strong across  
21 Administrations. And importantly, this change does not  
22 alter the substantive scope of the exemptions or the  
23 agencies' ability to withhold truly exempt material where  
24 disclosure would cause a foreseeable harm.

25 Rather, the reform captures the intent of FOIA.

1 Writing the presumption into the law thwarts the dilution  
2 of transparency.

3 Second, the legislation will allow OGIS to speak  
4 forcefully in substantive disputes and make  
5 recommendations that inform changes in a way that  
6 captures the forward-looking approach that Congress had  
7 in mind when it enacted OGIS in 2007.

8 By establishing a modern, integrated FOIA portal to  
9 intake, track and process requests, requesters will gain  
10 better access to information and agencies will enjoy  
11 freed resources. And mandating the posting of frequently  
12 requested documents saves agency time in processing  
13 multiple requests for the same material.

14 Finally, we need some limitations on Exemption 5, the  
15 exemption for deliberative process. Despite being  
16 discretionary, this exemption is frequently used as a  
17 catch-all by agencies.

18 In conclusion, it is our fundamental belief that  
19 public officials need to be accountable to the people  
20 they serve and that the public has a right to witness the  
21 government in operation. If secrecy is not challenged,  
22 we risk a departure from the principles of open  
23 government, accountability, and robust debate that form  
24 the foundation of our democracy.

25 We need to strengthen the laws that support

1 transparency and the reforms that are sought here today  
2 will keep government transparent and accountable and this  
3 country as a beacon of light.

4 Mr. Chairman, Senator Leahy and members of the  
5 Committee, thank you very much for allowing me to speak  
6 here today and thank you for your commitment to FOIA. I  
7 look forward to answering your questions.

8 [The prepared statement of Ms. Kaiser appears in the  
9 appendix.]

10 Senator Cornyn. Thank you, Ms. Kaiser.

11 Mr. Blanton?

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1 STATEMENT OF THOMAS S. BLANTON, DIRECTOR, NATIONAL  
2 SECURITY ARCHIVE, THE GEORGE WASHINGTON UNIVERSITY,  
3 WASHINGTON, DC  
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5 Mr. Blanton. Thank you very much, Senator Cornyn,  
6 Mr. Chairman. It is a real honor for me to be here both  
7 with the *Associated Press*, that has been such an  
8 effective user and advocate of the Freedom of Information  
9 Act and also one of the founders of Sunshine Week we  
10 celebrated earlier this year.

11 My own little organization, we are veterans of about  
12 50,000 Freedom of Information requests across the  
13 government. We brought the White House e-mail lawsuit  
14 back against every President from Reagan through Obama  
15 that forced the White House to save those e-mails and  
16 ultimately make them available to the public.

17 We have got some hands-on experience. We have done  
18 14 government-wide audits of how agencies actually  
19 respond using Freedom of Information requests to test  
20 that response. We have won awards like the Emmy Award  
21 and the George Polk Award and the James Madison Award,  
22 and I was really proud earlier this year to see you,  
23 Senator Cornyn, joining that incredible list of open  
24 government advocates. Much deserved and I applaud your  
25 work on S.337 and the work this Committee has done to

1 really move the Freedom of Information Act forward.

2 Today we are really talking about the good, the bad  
3 and the ugly. The good -- it is not just Clint Eastwood  
4 who does this -- the good is there are some historic  
5 breakthroughs in open government, mostly in the data  
6 area. The Veteran's Administration, a veteran used to  
7 have to file a Freedom of Information request to get  
8 their service records or their medical records. Now  
9 there is an online button they can go to and get that  
10 stuff instantaneously, saves the whole system, helps the  
11 veteran, helps the public, helps the taxpayer. That is  
12 efficiency.

13 The Medicare cost data, like from hospitals, we found  
14 out that George Washington University charges twice what  
15 Georgetown Hospital charges for the same hip replacement.  
16 This is absurd and it should help us reform our health  
17 care system.

18 These are breakthroughs. They come from Freedom of  
19 Information pressure. They come from the President's  
20 open government directive. They come from congressional  
21 oversight and attention to the agencies. And they come  
22 from -- some of the agencies have been given space to  
23 jump into the gap and show some leadership. That is the  
24 good.

25 The bad is, as you have heard today, the Freedom of

1 Information Act just is dysfunctional. We and the  
2 Associated Press and many others are still making  
3 headlines out of our results from FOIA requests and yet  
4 none of would say that it is working because we wait  
5 months, years, 5 years. We have to bring lawsuits.

6 The State Department, for one, has set up a system  
7 where if you do not use, you can wait 7 years. We  
8 finally had to sue over some records from Secretary  
9 Kissinger's tenure that we have been waiting on appeal  
10 for 7 years.

11 That is an absurd situation. And then you read the  
12 State Department chief FOIA officer's report and they  
13 say, "Oh, we are going to have to move some of our  
14 resources into FOIA litigation support."

15 Well, this becomes the endless loop. It means that  
16 they are going to slow down requests on the front end and  
17 create more litigation on the back end. s

18 I think the ugly of today is the e-mail records  
19 preservation and it is not just State Department, it is  
20 across the government. We have lost a generation of e-  
21 mail. The government should have been on notice dating  
22 back to 1993 when we won against the White House that  
23 they needed to save their e-mail and then sort it out  
24 later using computer power which is expanding all the  
25 time.

1           But I think for the purposes of this hearing, I just  
2 wanted to make a couple of comments on previous  
3 testimony. I really endorse what *Associated Press* had to  
4 say. I had huge problems with what the Justice  
5 Department had to say.

6           You have got the Justice Department saying we have  
7 got a 91 percent release rate, and yet the headline on  
8 the *Associated Press* story of those same statistics is,  
9 and I quote, "U.S. Sets New Record for Denying, Censuring  
10 Government Files." Now, who is right? Well, I place my  
11 money on the *Associated Press* because you get behind  
12 those numbers and you see what the Department of Justice  
13 is talking about, 91 percent, they are leaving out nine  
14 of the 11 reasons the government does not respond. They  
15 say no records or there is a fee issue or there is a  
16 referral to another agency.

17           Just the ones that get released, yes, that release  
18 rate runs at about 50 to 60 percent. So right there you  
19 see a big disjuncture and the need for this kind of  
20 hearing and this kind of oversight.

21           The Justice Department is proud that they are finally  
22 giving some proactive guidance to agencies to get  
23 documents out to the public, but this is years late.  
24 This is 5 years after the President and Attorney General  
25 said that is what the agencies ought to do.

1           The Justice Department is claiming credit for  
2 expanding foia.gov, but we looked at those plans and it  
3 is nothing like the kind of FOIA portal that my colleague  
4 here has just described and that we all need and every  
5 requester needs.

6           I am glad to see that they are underway with doing  
7 government-wide regulations. Our audits that we  
8 presented to this Committee show that they did not pay  
9 attention back in 2007 when the Cornyn-Leahy bill changed  
10 the standards. It should have changed the regulations.  
11 Half the agencies never did it.

12           On the State Department, she wants more time. She  
13 wants 5 years. I am sorry. More time is not going to do  
14 it. What the State Department has got to do, they have  
15 got increasing requests because they have got a former  
16 Secretary running for President. There is a lot of  
17 public interest in these records. They need to create a  
18 SWAT team that goes in, reviews all of the Secretary's  
19 calendars, reviews her memcons and telcons, and gets  
20 those e-mails out the door. None of them are supposedly  
21 classified. We ought to be able to see them in a month  
22 or 2. And it is up to, I think, this Congress and to  
23 those of us on the outside to hold them to it.

24           Finally, I would just point out that the crisis in  
25 the e-mail records management, the State Department has

1 \$1 billion IT budget. The chief information officer  
2 directly supervises \$750 million. It is not resources.  
3 It is will. It is leadership. It is saying to your  
4 people we have got this nice little SMART system -- that  
5 is the acronym for their archiving e-mail system -- but  
6 their implementation was awfully dumb, because they did  
7 not tell their folks they had to use it.

8 It is not hard. You go look online, you can look in  
9 the Foreign Affairs manual, there is a simple click,  
10 these are the instructions, click to convert to archive  
11 button. You can do that on any e-mail, it is up to you.  
12 They should tell everybody to do it. There needs to be  
13 some leadership here.

14 So those are my basic comments on what was said  
15 earlier. I welcome your questions and I applaud this  
16 Committee's attention to these really pressing open  
17 government issues.

18 [The prepared statement of Mr. Blanton appears in the  
19 appendix.]

20 Senator Cornyn. Thank you, Mr. Blanton. I think  
21 Senator Leahy said it well. This is not a partisan issue  
22 and as you point out, there are problems with compliance  
23 that go back many Administrations.

24 As somebody who is a conservative, I think instead of  
25 more laws and regulations, what we need is greater

1 transparency and greater accountability, because I think  
2 I understand a little bit about human behavior and when  
3 people realize that what they are doing is going to be  
4 exposed to public scrutiny, most of us change our  
5 behavior or modify our behavior.

6 So I think this is really a critical issue and I am  
7 just in despair, frankly, at what you are telling us; not  
8 that you are telling us, but the facts, and that is that  
9 there is this culture of noncompliance and secrecy and  
10 passive-aggressive behavior and people are not  
11 embarrassed about it and they do not see any reason to  
12 change.

13 We need to change the culture here in Washington, DC  
14 where the rhetoric is matched by the actions of the  
15 United States Government across the board through  
16 Republican and Democratic Administrations.

17 Ms. Kaiser, beyond the threat of a lawsuit, are there  
18 any other remedies available to requesters in dealing  
19 with a noncompliant agency? Are there other tools that  
20 you think would be useful in compelling the production of  
21 information?

22 Ms. Kaiser. Well, certainly strengthening OGIS and  
23 its ability to conduct mediations and issue advisory  
24 opinions even in the absence of mediation would go a long  
25 way to helping requesters, because currently there really

1 is very little resource other than litigation.

2 As we know, OGIS is a very powerful tool and its use  
3 can be strengthened. Currently, OGIS cannot force an  
4 agency to the table to mediate. So we need them to have  
5 some ability to issue advisory opinions and help even in  
6 the absence of mediation.

7 Senator Cornyn. I know Senator Leahy and I felt  
8 strongly, and based on my experience as a State Attorney  
9 General, that an ombudsman would serve a very beneficial  
10 purpose because of the repetitive, redundant requests,  
11 and I am glad to see now that some agencies are posting  
12 the most frequently requested information so as to  
13 obviate the need for additional Freedom of Information  
14 requests.

15 So there is a lot we can do to make things better --  
16 Ms. Kaiser. Absolutely.

17 Senator Cornyn. -- if we can just, as I said,  
18 change some of the attitudes and the culture.

19 You mentioned in your written testimony that some  
20 agencies, Ms. Kaiser, forward Freedom of Information  
21 requests to political appointees so that they can be  
22 screened by the political appointees before the agency  
23 that has custody of the document actually produces it in  
24 compliance with the law on a timely basis.

25 Does that delay or cause other problems with

1 compliance, in your view?

2 Ms. Kaiser. Absolutely. And not only does it cause  
3 a delay, but it also is improper. I mean, FOIA is a very  
4 independent mechanism for the public to gain access to  
5 government records. It is not a means to try to set any  
6 type of political agenda or political reaction in terms  
7 of what can be released and what should not be released.

8 So it is improper and it also causes delay. Every  
9 level, every extra level of review will cause a delay in  
10 this instance.

11 Senator Cornyn. Well, it really strikes me as a  
12 blow at the fundamental idea of open government. If a  
13 political appointee can nix the production of a document  
14 that meets the request and there is no legal prohibition  
15 to the release of the document, then it ought to be  
16 released, because we all understand that not all this  
17 stuff is going to be complementary. Some of it may be a  
18 little embarrassing. Some of it might, if revealed,  
19 cause government agencies to change their behavior in a  
20 way that helps the public.

21 So it is very, very important and I hope you will  
22 continue to work with us, all of us on this Committee, to  
23 try to look for other ways to help improve compliance.

24 It is just not acceptable to hear a witness say it is  
25 just too hard, we just cannot do it, and we ought to be

1     applauded for chipping away at a huge backlog. I have a  
2     lot of sympathy for Ms. Barr. I think she did a good job  
3     as a witness, but she has been put in an impossible  
4     position where the State Department is just -- it is a  
5     37. That is a failing grade in any school I went to.

6             So I have some more questions for Mr. Blanton, but  
7     let me ask Senator Tillis if he has questions.

8             Senator Tillis. Thank you, Mr. Chair.

9             Ms. Kaiser, I kind of like being on the asking end of  
10    a question dialogue with somebody from the *Associated*  
11    *Press*.

12            [Laughter]

13            Senator Tillis. I wanted to follow-up, just  
14    something that Senator Cornyn said prompted me to ask.

15            In instances where we do believe that requests for  
16    information are going before political appointees,  
17    presumably with in the department, are you all aware of  
18    any instances where maybe those have rolled out of the  
19    department to higher levels where other people are  
20    influencing the processing and the result of any Freedom  
21    of Information requests for this Administration or any  
22    other one?

23            Ms. Kaiser. Unfortunately, I am not currently aware  
24    of that. I would be happy to get back to you with some  
25    more detail on that.

1           Senator Tillis. Thank you. And either for Mr.  
2 Blanton or Ms. Kaiser. You were talking about the -- I  
3 was trying to get at -- I have a background both in terms  
4 of records management and then in IT in terms of normal  
5 practices or common practices, I should say, in business.  
6 And one question I have when you are talking about the  
7 SMART system, why would we even allow someone to  
8 determine whether or not they should opt in to archiving?

9           Why should we not be recording a specific event when  
10 they opt out and to let that be used? So that the  
11 presumption is if it is being created in the normal  
12 course of business, it is a business record that the  
13 government should generally assume that they need to  
14 keep.

15           Do you agree with that?

16           Mr. Blanton. Yes, sir. And I would also say this  
17 was the big fight with our whole White House e-mail  
18 lawsuit and ultimately we won and the way it worked was  
19 they save it all and they sort it out later. And  
20 especially with the declining cost of computer storage  
21 and the rising power of algorithms and searching, this is  
22 actually what the National Archives of the United States  
23 should be in the business of doing.

24           You can sit there and have many angels dancing on the  
25 head of the pin about what level in the bureaucracy

1 should the e-mail get saved, but I am with you on this.  
2 I think if it is created on government time, on  
3 government machines for government business, it ought to  
4 be saved. And if there are privacy issues or a Social  
5 Security number buried in that record, it is not  
6 difficult to create a search algorithm to sort those  
7 things out and leave that privacy piece aside.

8 That is what they ought to be doing, but instead you  
9 have -- in my prepared testimony, I talked about decades  
10 of sort of dereliction of duty. Our National Archives,  
11 with the connivance of the Office of Management and  
12 Budget, agreed to have a print-to-file strategy for  
13 saving e-mail from the 1990s all the way to today.

14 One of the reasons they could not find Secretary  
15 Powell's e-mails is apparently not many of them got  
16 printed out and stuck in a box somewhere, and the same  
17 problem I think they are running into with every current  
18 e-mail.

19 But it is a whole mindset change that has to happen  
20 and I think this Committee being on this case will help  
21 move that forward.

22 Senator Tillis. Are there any areas that in your  
23 good, the bad and the ugly construct, maybe taken a  
24 different way, are there any agencies that seem to be  
25 doing things particularly well that we can learn from?

1           Mr. Blanton.    Yes, there are.  All the agencies that  
2   are part of the FOIA online portal, which was originally  
3   built by the Environmental Protection Agency, with help  
4   from Commerce and other folks, they are doing Freedom of  
5   Information Act the way it ought to be done, a one-stop-  
6   shopping, single point of contact, posting the records  
7   after they get released.

8           And I have to say State has taken a beating this  
9   morning, but I want to say one positive thing about them.  
10   In our latest audit, looking at this issue, as Senator  
11   Cornyn said, the only way out of this resource trap is  
12   for agencies to get ahead of the curve.  Post the records  
13   in advance if there is a chance there is going to be a  
14   FOIA request for them.

15          I would go even further and it comes from teaching a  
16   bunch of college students issues about the Cold War,  
17   which is from their point of view, if it is not online,  
18   it does not exist.  And what agencies ought to think of  
19   is a presumption of openness or anything that gets  
20   released through the Freedom of Information Act should  
21   just be put online unless there is a good reason not to,  
22   like a Social Security number or the like.

23          And if we can get to that point -- we went through  
24   and we audited 165 agencies this year and found 17 of 165  
25   were e-stars.  They were posting their stuff online,

1 making it easy for citizens to use, making it efficient  
2 for themselves to find their own records, and they were  
3 not getting stuck in how many times the thing had to be  
4 requested before it went up.

5 I think that is one of the few problems with the  
6 bill, the Cornyn-Leahy bill currently is it still has  
7 that old has to be requested three times language. I  
8 think in the Internet age, that is not the language we  
9 need to go for.

10 The presumption of openness means, I think, a  
11 presumption of posting. There are 17 agencies out there  
12 that are doing it right. It is not a matter of  
13 resources. When State Department built that excellent  
14 online reading room, not a single new dollar was  
15 appropriated. It was out of current budget.

16 That is one thing I think that Freedom of Information  
17 shop at State deserves some real credit for.

18 Senator Tillis. Well, it seems to me -- I know that  
19 some of the discussion is around, well, let us update our  
20 policies and provide some direction to the agencies so  
21 that they can tighten up their information, retention and  
22 management efforts, but it just seems to me if we have a  
23 good benchmark out there, people that are getting it  
24 right, that that becomes the standard. It is not  
25 optional for an agency to do it. This is a standard you

1 have to meet.

2 I would support more specific direction from Congress  
3 to that end, because then I think it will help with  
4 consistency, make it easier for you to interact, because  
5 there is a common engagement model and I think a more  
6 reliable way to get to the information.

7 I also believe that a lot of this information should  
8 just be put out there through a portal before it is ever  
9 requested.

10 Mr. Blanton. Amen.

11 Senator Tillis. I mean, simply, one of the ways  
12 that Ms. Barr will be able to solve her problem -- that  
13 is why I wanted to ask some process questions -- is to  
14 eliminate the base that she ultimately has to review.  
15 Put a lot of it out there presumptively that it is open  
16 to the public, searchable. The printed e-mails can be  
17 easily digitized. They can be through character  
18 recognition brought back online, subject it to indexing.  
19 Those are the sorts of things that we should require so  
20 that we get that information out there, reduce the queue,  
21 so that they are really only spending their time on the  
22 things that truly are sensitive.

23 Here sensitive is is it politically sensitive versus  
24 is it sensitive in terms of the -- whether it is a  
25 Democrat or Republican -- sensitive in terms of the

1 content of the document for privacy, security, national  
2 security.

3 Thank you.

4 Senator Cornyn. Senator Klobuchar?

5 Senator Klobuchar. Thank you very much, Senator  
6 Cornyn. I stopped by earlier, but we had another hearing  
7 in Commerce. So I come here at the end, but I wanted to  
8 thank both of our witnesses.

9 Following up on some of Mr. Blanton's statements, I  
10 was just listening in, on how you could have a more open  
11 portal, Ms. Kaiser, do you want to talk about what  
12 progress has been made? He mentioned some of the work at  
13 the State Department. And then what kind of online  
14 portal would you like to see?

15 Ms. Kaiser. Sure. Well, the online portal that we  
16 endorse is the one that I believe is currently in the  
17 current legislation. It is an integrated system that  
18 allows one portal for the intake, tracking and processing  
19 of requests for all the agencies, and I think something  
20 like that not only greatly increases efficiency, but as  
21 noted before, the documents will already be out there and  
22 searchable for any other requester.

23 So it definitely saves time on the back end for the  
24 FOIA officers who need more time and more resources. So  
25 what is currently being proposed with the FOIA online

1 portal is the right move.

2 Senator Klobuchar. And I know you have filed  
3 lawsuits in this area, the AP has, other news  
4 organizations. How well does the mediation process work  
5 with the Office of Government Information Services?

6 Ms. Kaiser. We have not tried it with the lawsuit  
7 that we filed. We went straight to litigation on this  
8 one because we had been waiting for so long for these  
9 records that it made no sense to add another layer to  
10 that process.

11 My experience in the past has been that,  
12 unfortunately, OGIS was not able to bring an agency to  
13 the table for mediation. So unfortunately, unless the  
14 agency is willing to come to the table for mediation, we  
15 have very little recourse in forcing them to mediate.

16 So there are some limitations with that system.

17 Senator Klobuchar. Did you want to add something,  
18 Mr. Blanton?

19 Mr. Blanton. Just to add that I think the  
20 legislation that is pending that was passed unanimously  
21 by this Committee and which we have endorsed would really  
22 help strengthen OGIS in some extremely useful ways. It  
23 will give OGIS independent reporting up to Congress,  
24 which it needs. It will send a signal of real backing.  
25 It will give them some more leverage to make the agencies

1       come to the table.

2           Frankly, if you look around the world at the ombuds  
3       or information commissioner function, ours is one of the  
4       weakest in the world in terms of budget, staff and power.  
5       The information commission in Mexico can overrule an  
6       agency and order the release of documents and does so  
7       through an online portal that is very robust.

8           We need to get there, I think, in our country and it  
9       is a shame that we have fallen behind even our neighbors  
10       in our Freedom of Information Act, which used to be one  
11       of the best in the world.

12          Senator Klobuchar.    Thank you, Mr. Blanton.

13          Ms. Kaiser, one last question.  Are there any other  
14       changes you would like to see to the FOIA process in  
15       order to improve access for the press and the public  
16       besides what we just talked about with the portal and how  
17       the situation is working with mediation lawsuits?

18          Ms. Kaiser.    That is a great question.  There is  
19       probably a lot more that we would like to see.  I think  
20       starting first off with the presumption of disclosure is  
21       the most important and somehow getting the agencies to  
22       abide by their requirements under the law is the first  
23       and most important item we would like to see.

24          We could have all the wonderful laws on the books and  
25       the presumptions of disclosure written in, but if the

1 agencies do not abide by their requirements, we are in a  
2 bad position.

3 So I would like to see some more force behind getting  
4 the agencies to abide by their requirements under the  
5 law.

6 Senator Klobuchar. Thank you. I do not know if you  
7 know, but my dad got his start with the *Associated Press*  
8 in the Bismark, North Dakota, which once won a Pulitzer  
9 for Dust Bowl reporting. It was quite a while ago. And  
10 then he went on from there to the Star Tribune. But he  
11 had a really good career with the *AP* for a long time both  
12 in North Dakota and then in Minneapolis.

13 So thank you for your work. And thank you, Mr.  
14 Blanton.

15 Senator Cornyn. Thank you, Senator Klobuchar.

16 Mr. Blanton, let me ask you about Exemption 5 and the  
17 sunset that is proposed. National Security Archive has  
18 been a strong supporter of imposing a sunset on that  
19 provision, which the FOIA Improvement Act would do.

20 Can you explain the importance of that provision, in  
21 your opinion?

22 Mr. Blanton. The fifth exemption is the one that  
23 covers deliberative process, the backroom discussions in  
24 the bureaucracy. It also covers attorney-client  
25 privilege and I think it has been one of the real

1 holdups, that people have seen inside the government any  
2 attempt to limit the exemption as a threat to attorney-  
3 client privilege.

4       Instinctively, every lawyer in this room will bristle  
5 at that. That is not the point here, because I think the  
6 record shows courts are completely deferential to  
7 attorney-client privilege. The problem is that the other  
8 part of the exemption, deliberative process, has become  
9 what a former staffer of this Committee, John Podesta,  
10 called the "withhold if you want to" exemption.

11       And the bureaucrats have applied it to just about  
12 anything, to draft histories 30 years old, to discussions  
13 of a draft resolution at the United Nations 20 years ago  
14 on Rwanda. It is just really abused.

15       In the first 2 years of the Obama Administration, it  
16 looked like the rate of the use of that exemption was  
17 dropping. It dropped from in the 60s -- 60,000 times  
18 down to 50,000 times, and the Obama Administration  
19 claimed it as credit and said, look, this shows that the  
20 presumption of disclosure is working.

21       The last 3 years it has zoomed back up and by our  
22 count, although this year's reports, the numbers are not  
23 precisely there, but between the *Associated Press*  
24 reporting and our calculation, we think the use of B5 may  
25 have hit an all-time record last year, over 80,000

1     invocations.  And this is a totally discretionary  
2     exemption.

3             The Presidential Records Act puts a 12-year limit on  
4     the use of that exemption to cover Presidential records.  
5     And for those of us on the outside, it boggles our mind  
6     that Presidents get only 12 years, but the bureaucrats  
7     basically have infinity today unless you pass the S.337  
8     and put a sunset on it.

9             The sunset, no damage is going to be done.  We have  
10    had an experiment these last 35 years with the  
11    Presidential Records Act putting a sunset on the  
12    exemption.  We do not have a spate of lawsuits.  We do  
13    not have reopened litigation.  We do not have problems.  
14    We have a little embarrassment, like the Stephen Breyer  
15    issue, that memo that came out of a junior White House  
16    lawyer saying this guy Breyer is not really qualified to  
17    be on the Supreme Court.  So the attorney was  
18    embarrassed, had to apologize to Justice Breyer, who made  
19    a joke about it, we all got amused and we got a lesson in  
20    open government and accountability, and that is what we  
21    need.

22            Senator Cornyn.  Mr. Blanton, let me ask you a  
23    hypothetical question.

24            Mr. Blanton.  Yes, sir.

25            Senator Cornyn.  A government employee decides, as a

1 matter of their personal convenience, not to use their  
2 government e-mail, but rather to set up a personal e-mail  
3 account and to use that for both official business and  
4 personal business.

5 If every government employee decided to do that, what  
6 would that do to the Freedom of Information Act and the  
7 public's right to know?

8 Mr. Blanton. That is the end of the Federal Records  
9 Act and the Freedom of Information Act and it is an  
10 enormous challenge and it is wrong. It is wrong because  
11 in the specific instance, you had the head of a Federal  
12 agency doing it who is responsible under the Federal  
13 Records Act for records systems that preserve agency  
14 records. It is wrong.

15 Was there a specific prohibition? No. I think  
16 Senator Franken was correct that that specific  
17 prohibition you had 20 days to move the stuff over to a  
18 work system, that was not in place yet.

19 But it was wrong. And yet I would point out the  
20 irony. It is actually more of a tragedy because it is a  
21 commentary on our whole record-keeping system. That we  
22 are probably going to end up with more saved, preserved  
23 e-mails from those materials handed over by Ms. Clinton  
24 because she had them on a private server than if she had  
25 kept them all on a state.gov system, because the

1 state.gov system was totally broken, and that is a  
2 tragedy.

3 That is a commentary on record-keeping and something  
4 we have got to change and we are just -- but is the irony  
5 of this current discussion that we are going to have more  
6 of those e-mails I think in the public domain as a  
7 result.

8 Senator Cornyn. Thank you very much. I know  
9 Senator Tillis has some additional questions.

10 Senator Tillis. No more questions.

11 Senator Cornyn. Well, thank you. Thank you for  
12 your participation today and, more importantly than that,  
13 thank you for your ongoing efforts to help us help the  
14 public enforce their right to know what their government  
15 is doing on their behalf and with their hard-earned tax  
16 dollars.

17 Thank you very much.

18 Mr. Blanton. Thank you very much.

19 Ms. Kaiser. Thank you.

20 Senator Cornyn. This hearing is adjourned.

21 [Whereupon, at 11:11 a.m., the hearing was  
22 concluded.]

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24

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