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Before the Committee on the Judiciary
United States Senate

**Hearing on “We the People: Fulfilling the Promise of Open Government
Five Years After the OPEN Government Act of 2007”**

Wednesday, March 13, 2013

Mr. Chairman, the distinguished Senator from Iowa, members of the Committee: thank you very much for your invitation to testify today about open government and the Freedom of Information Act. My name is Tom Blanton and I am the director of the independent non-governmental National Security Archive, based at the George Washington University.

I have a simple headline for you today, based on the latest government-wide Freedom of Information audit that my organization completed in December and updated for publication on the Web today to mark this hearing and celebrate Sunshine Week. The headline is: **The Majority of Federal Agencies Are Just Not Obeying the OPEN Government Act of 2007.**

Our audit shows that **53 out of 100 federal agencies have not changed their Freedom of Information regulations** to meet the requirements Congress put into law with the OPEN Government Act of 2007. As you well know, that legislation prohibited agencies from charging processing fees if they missed the response deadlines, ordered agencies to cooperate with the new FOIA ombuds Office of Government Information Services, and required a number of other reforms and reporting changes.

I am sure it is no consolation to you, but the **agencies are ignoring the President’s orders too, not just yours.** Our audit found an even larger number of agencies – **59 out of 100** – failed to update their FOIA regulations after the 2009 Obama-Holder guidance on Freedom of Information. Announced by the President on his first day in office and followed up by the Attorney General in less than 60 days with a new

memorandum intended to overturn restrictive Bush administration practices, that guidance declared a “presumption of disclosure,” encouraged discretionary releases even when the information might technically be covered by an exemption, required a “foreseeable harm” test for withholding, ordered proactive online publication of records of greatest interest to the public, and told agencies to remove “unnecessary bureaucratic hurdles.”

I should point out, however, that the **Holder memo did not order agencies to revise their regulations to comply with the new standards** – a profound failure, as we now know – and neither did the memo order a review of all pending FOIA litigation to apply the new standards, settle cases and disclose records. In this sense, the Holder memo failed even to match the requirements that President Clinton’s Attorney General, Janet Reno, put into her FOIA memorandum in 1993. Instead, Attorney General Holder left a hole big enough for a Hummer to drive through, leaving it up to the career Justice Department litigators to apply the new standards in their cases “if practicable”!

This failure may explain why my organization and the other FOIA litigators I know cannot trace a single case since 2009 in which the Justice Department has changed its litigation posture and refused to defend an agency withholding decision. In fact, you need to know that the **Justice Department is directly litigating against the OPEN Government Act**. Justice has filed an amicus brief in the *CREW v. FEC* (Citizens for Responsibility and Ethics in Washington versus Federal Election Commission) case, taking the position that a agency’s postcard acknowledgement of a FOIA request is enough to qualify as a “determination” under the law. If the courts agree, then the OPEN Government Act’s provision that agencies cannot charge fees if they respond in an untimely fashion turns into a dead letter. This was one of the few actual enforcement procedures in the law, and Justice wants to scuttle it. We requesters will get our postcards but not the government’s documents, and agencies will keep threatening us with fees to make us go away. Not what you intended.

But let me explain our audit, and that headline of non-compliance. My organization, founded in 1985 by journalists and historians who tried to use the FOIA systematically to open national security-related records, has filed more than 50,000 requests of our own over the years. We’ve won the

Peabody, George Polk, and Emmy awards – among others – for our work “piercing self-serving veils of government secrecy” (the Polk citation in April 2000). Our staff and fellows have produced more than 70 books in print, including Pulitzer and Gelber Prize winners, more than 400 electronic books, and a series of massive indexed digital collections of documents for university libraries. Most pertinent to today’s hearing, we have carried out a **dozen government-wide audits of Freedom of Information performance since 2002** – using FOIA requests to test FOIA responsiveness.

For example, we tested whether Attorney General John Ashcroft had succeeded in his efforts to close down FOIA requests with that 2001 memo telling agencies he’d defend them against FOIA claims almost no matter what. We were surprised by what we found. Yes, there were a handful (15%) of agencies that dramatically restricted their FOIA process, but a majority (52%) just passed the Ashcroft memo around to their components without any implementation; and one wrote us back to ask, “What Ashcroft memo? We never got that one. Could you send us a copy?”

Then we saw agency reports to Congress claiming their FOIA backlogs were only about a year old, when we ourselves had requests pending much longer at those very agencies, so we asked for and published the oldest FOIA requests in the government, the ten oldest at each agency – some of them had been hanging for 20 years! Our 2006 audit tested whether agencies were complying with Congress’s intent in the 1996 E-FOIA amendments, and found only a quarter of the agencies met all the criteria for online openness even ten years after Congress passed that law.

Our audits of agency FOIA performance after Obama’s inauguration in 2009 already showed **dismaying inertia in the bureaucracy** to change any of their FOIA processes, whether guidance or training or procedures or regulations; but we gave points for any process reforms that agencies could show us. Even then, only 13 of 90-plus agencies after the first Obama year could show us any FOIA change. That headline woke up the White House, precipitated a “nudge” memo to agency heads in March 2010 signed by the White House Chief of Staff and Counsel, and some real impact.

By the end of the second Obama year, upwards of 49 agencies could show us some FOIA process change, which we reported in our 2011 audit as “Glass Half Full.” Of course, this left a majority of agencies lagging, and one of our key audit supporters, Knight Foundation senior adviser Eric

Newton, commented that at this rate, it would be the end of Obama's first term before the agencies did what he ordered on Day One. As it turns out, the story got worse.

In 2011 the Justice Department proposed new FOIA regulations for its own processing that would have let officials lie to the public about existence of records, and throw up fee barriers to new-media reporters and students, among **many other regressive provisions**. Justice put the rule changes on hold only after the public interest community and some key members of Congress blasted them (the National Security Archive gave the Department our infamous "Rosemary Award" for worst FOIA performance in 2011, named after President Nixon's secretary who erased Watergate tapes).

That Justice Department gambit on regulations made us take a closer look. During sessions of the professional society of government FOIA officers (where we actively participate to give the requester viewpoint), we heard senior agency officials discuss the controversy and point to regulations as the key to the FOIA process. Those senior officials told government FOIA trainees they needed to look to their **agency's own regulations as the most important guidance** on FOIA, not to the President's policy directives. So we started looking at those regulations.

We investigated. We scoured agency Web sites, where by law agencies are required to post their rules, only to find dozens AWOL. We dredged the Code of Federal Regulations, only to find enormous variations even in the formats that agencies used to propose and promulgate their FOIA rules. We interviewed key government officials, only to find that **no one inside government had a complete listing or registry of all the agency FOIA regulations**, even the Office of Government Information Services set up by the 2007 FOIA amendments to be the mediator between agencies and the public.

We filed FOIA requests with every agency that had failed to post its FOIA regulations online. The work took us months, much longer than we originally expected – and I want to give credit here to Nate Jones and Lauren Harper, my ace auditors, for all their hard labor here – but by December 2012 we had created **the first-ever complete listing and posting of all agency FOIA rules**, presented chronologically so that the key legal, statutory and policy changes could be included as the metric against which agencies could be judged.

We even found that one agency, the Federal Trade Commission, had never updated its original 1975 regulations, despite multiple statutory and policy changes in the years since then. Another agency, the U.S. Trade Development Agency, did not have regulations of any kind, much less on FOIA, so even their “no records” response was highly informative.

The color-coded charts in green and red that resulted from our FOIA regulations audit provide excruciating detail on **official inertia over decades** – not just since 2007. These charts present a testament to the resistance of the bureaucracy to transparency, an **indictment of the Justice Department and the Office of Management and Budget for lack of leadership**, and a signal of opportunity right now for real change.

We have updated the numbers that we released on December 4, 2012 – sparking headlines in the *Washington Post* (“Agencies lag on transparency, report says”) and in dozens of other publications ranging from the *Houston Chronicle* to *The Atlantic*. We have added the new Consumer Financial Protection Bureau to the agency list, making the total 100. Three other agencies have updated their FOIA regulations since we published that audit, moving the numbers on the Obama-Holder guidance down from 62 (out of 99) to the 59 (out of 100) we are reporting today. Similarly, on the number of agencies that failed to upgrade their regulations after the OPEN Government Act of 2007, that number went from 56 to 53.

But **new regulations are not necessarily good regulations** (as the Justice Department example itself shows). Of the three agencies that have acted since December, only the Department of Interior followed Congress’s direction and included references to the Office of Government Information Services and its mediation services in the new regulations. Sadly, none of the three agencies (Interior, Federal Communications Commission and Federal Housing Finance Agency) included the “foreseeable harm” standard in their new regulations.

The conclusion we draw from our overall audit and today’s revised results is pretty straightforward. Outdated agency regulations represent a **tremendous opportunity for Congress – and for the Obama administration – to order real change in agency behavior** on Freedom of Information requests. Either Congress or the President could order agencies to update their regulations by a date certain. I was pleased to see yesterday that bipartisan

legislation introduced in the House by the chair and the ranking member of the Oversight and Reform Committee does just that.

But the updated regulations need to follow a “best practices” template, not the sorry example provided by the Justice Department in its unfortunate attempt at new regulations in 2011. At the Archive, we have benefited from advice from a wide range of groups and present and former officials to draft the following **“top ten” suggestions for “best practice” FOIA regulations**, and we would welcome your input and that of all other FOIA advocates to make this list more focused and effective. We believe new FOIA regulations should:

- * Mandate that FOIA officers embrace direct communications with requesters.
- * Require agencies to receive requests by e-mail, post all FOIA responses and released FOIA documents online, in addition to proactively posting documents of likely interest to the public on their website before they are requested via FOIA.
- * Direct agencies to update their FOIA processing software so that it can generate all FOIA data (including responses and documents) in a non-proprietary machine-readable format that can be posted to any online repository, including the government-sponsored FOIAonline portal.
- * Encourage agencies to join the FOIAonline portal to improve FOIA efficiency and save money on expensive processing systems.
- * Include specific language on the availability and importance of mediating FOIA disputes with the Office of Government Information Services to avoid the animosity and costs of litigation.
- * Ameliorate "consultation" and "referral" black holes (where requests are shipped off to other agencies for seemingly countless reviews and re-reviews) by requiring monthly reminders to the receiving agency, and monthly updates to the requester.
- * End the practice of using fees to discourage requests (collected FOIA fees make up just one percent of all FOIA costs, but a large percentage of all FOIA hassles).
- * Follow Attorney General Holder's instruction to reduce dramatically the use of discretionary withholdings, such as the b(5) "deliberative process" exemption.
- * Change the "tolling" provisions that keep requests in purgatory until (unnecessary) fee issues are resolved, and enforce the provision of the 2007 OPEN Government Act that prevents agencies from collecting fees if they

miss their 20-day deadline.

* Provide adequate deadlines for appeal rights (the Federal Reserve System allows requesters just ten days to appeal FOIA denials – including postal transit time).

These recommendations are certainly not the direction the Justice Department is going on FOIA, either with its own regulations or its litigation posture or its implementation role. In fact, that disjuncture ranks as one of the core themes of my testimony today. There is a **profound cognitive dissonance between the rosy view provided by the Justice Department on how FOIA is working, and the actual experience of requesters.**

For example, Justice claims a government-wide FOIA "release rate" of over 90%. This is misleading, to say the least, because it only includes final processed requests. This statistic leaves out 9 of the 11 reasons that Justice turns down requests so they never reach final processing, such as claiming "no records," "fee-related reasons," and referrals to another agency. Counting those, the actual release rate across the government is a more pedestrian (and realistic) number between 50 and 60%.

The point is important because citing the high number disguises some real problems with FOIA. In our experience here at the Archive, the vast **majority of "no records" responses are errors by the agency** involved, and require communications between the requester and the agency (and sometimes OGIS and sometimes litigation) to work out. For example, The FBI until a few years ago (when we gave them the Rosemary Award) had a deliberate "no records" response in two-thirds of their requests, because they only searched a single index that they knew did not include most of the FBI's records. But the FBI strategy worked to make many requesters give up and go away.

The Justice Department also brags about how many cases are being "closed" from the FOIA backlogs. The real question is, how many of those "closed" cases are actually generating substantive responses? In our experience here at the Archive, many **"closed" requests do not actually amount to "responded" requests.** For example, the Treasury Department reduced its backlog by sending letters to requesters after a year or two of waiting, asking whether we were still interested and giving us 10 days to respond or else

they'd close the request. No substantive search or response at all. When we said yes, we still want the request, another year would go by and we'd get another query, are you still interested?

You can see the same dynamics at work when Bloomberg News asks for the travel records of top government officials, and after six months, more than half of President Obama's Cabinet members have not even responded to the FOIA request – including Attorney General Holder. These are **documents that agencies should be posting online** within some short period after the travel takes place, to ensure some basic accountability, along with top officials' calendars and visitor logs, to name just a few. I should note that there are detailed recommendations produced by my colleagues in groups like the Center for Effective Government and the OpenTheGovernment.org coalition, on the subject of proactive disclosure, about the necessity of building routine disclosure into agency procedures. And I would join other witnesses in saying the obvious, that systematic online posting of government information both proactively and in response to requests, is the only way out of the resource trap of FOIA processing – the zero-sum characteristic of the system in which each new request slows down the previous ones.

I've been speaking here today primarily from the viewpoint of an experienced FOIA requester, advocate, and auditor. But this hearing also should remind us to step back and take a long view of our Freedom of Information Act. When it passed in 1966, it did not work. Agencies figured out ways to frustrate requesters, and even members of Congress could not pry loose the information they needed to do their jobs. Not until the amendments of 1974, passed by Congress over President Ford's veto, did the law really begin to work, changing the power relationships in government information and fueling an information industry. Back then, **our law was a model to the world, but today, the world has passed us by.**

Last year, a network of international experts coordinated by advocacy groups based in Canada and Spain analyzed each of the 90 access-to-information laws around the world. According to that Global RTI Rating, our U.S. law now ranks as only the 39th best in the world, as measured against a consensus set of international statutory norms. Right up front I should say that ranking understates the actual transparency levels of the U.S.

government and the actual output of our FOIA law – my own organization publishes thousands of documents every year that would still be secret today without the FOIA. But we FOIA advocates should recognize that international norms are passing our statute by, and look at that Rating as yet another signaling mechanism for changes that we could and should pursue.

Some examples: The U.S. law only scored 14 out of possible 30 points on the “appeals” part of the RTI Rating because we have **no independent appeals body like the ones in Mexico or Chile or Hungary or every state in India**. We have an underfunded, understaffed Office of Government Information Services that – important as it is – only has mediation and policy recommendation authority, not release authority. As a FOIA advocate who works internationally, I tell foreigners not to look at our law as a model, but to Mexico’s, because their information institute has really driven implementation of the law, and has some real power.

Our U.S. law only scored 16 out of a possible 30 points on the international norms for exemptions, because most of ours **lack a harm test** before the government can withhold information. Unlike most of the Latin American access laws, ours lacks a **public interest override** for human rights abuse information. Unlike Japan’s law, ours lacks a public interest override for public health information.

The point is that there is some **serious statutory work that needs to be done** to improve the Freedom of Information Act, and there’s a perfectly reasonable starting point for this, in the form of the administration’s current declaratory policy for FOIA. That policy emphasizes the “presumption of disclosure,” demands “foreseeable harm” before withholding, encourages proactive disclosure, seeks to eliminate “bureaucratic hurdles” among which I would give the whole fee process the top billing, so to speak. If Congress simply put those declaratory policies into the statute, that would be real progress.

Finally, if there’s one lesson I’ve learned from nearly 30 years of watchdogging the federal government on freedom of information issues, it is that paying attention matters. Congress has a lot on its plate these days, but **the kind of attention and focus that this hearing represents is truly indispensable** to making the government more transparent and accountable. So I applaud your initiative today, and I appreciate your invitation to testify.