

Testimony of
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on behalf of
The Sunshine in Government Initiative
Before the
Committee on the Judiciary
United States Senate
on
“Ensuring an Informed Citizenry:
Examining the Administration’s Efforts to Improve Open Government”
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Chairman Grassley, Ranking Member Leahy, and members of the Committee,

Thank you for the opportunity to testify today about the Freedom of Information Act – FOIA. My name is Karen Kaiser and I am the general counsel for The Associated Press (AP). I am testifying today for the AP as well as the Sunshine in Government Initiative (SGI), a coalition of media associations of which AP is a member.

The Associated Press was formed in 1846 and it exists as a not-for-profit news cooperative. Its members are U.S. newspapers and broadcasters. AP operates in 280 locations in 110 countries, and serves a diverse array of newspapers, broadcasters and digital outlets. AP’s core mission is straightforward: to inform the world. Our journalists frequently use the federal FOIA and state open records laws to keep the public informed of matters of critical importance.

The Sunshine in Government Initiative was formed nearly 10 years ago to promote policies and practices that ensure our government is open, accessible and accountable. SGI members are committed to helping address FOIA’s obstacles with bipartisan, common-sense ways FOIA can work better for agencies and the public.

In addition to AP, SGI members include the American Society of News Editors, Association of Alternative Newsmedia, National Association of Broadcasters, National Newspaper Association, Newspaper Association of America, Online News Association, Radio Television Digital News Association, Reporters Committee for Freedom of the Press and Society of Professional Journalists.

Mr. Chairman, we appreciate your longstanding commitment to making federal agencies more open and responsive to the public, and we appreciate the chance to speak today about the state of transparency in the U.S. as well as to suggest ways to improve the process by which the public is able to access government records.

I would like to start by making a few points about the critical importance of preserving openness and transparency for government information. FOIA is a vital tool by which the public can learn what its government is up to; it is the means by which any citizen can learn what public officials are doing, how tax dollars are being spent, and what decisions are being made. FOIA opens the government to the public, and it is through that transparency that we are able to achieve accountability – a core element of our democracy.

The Associated Press is committed to this principle of access and is a leading and aggressive advocate of transparency and accountability in government. Requesting public records and fighting for access around the world has long been part of AP's DNA. Most years, our journalists file many hundreds if not more than a thousand requests under both the federal FOIA and state open records laws around the country. These requests result in important stories that the public would otherwise not have known. Here are just a few examples:

- An AP FOIA request to the Federal Emergency Management Agency showed that thousands of people who received government aid after Superstorm Sandy may be forced to give some or all of that money back, through no fault of their own, more than two years after the disaster.
- AP obtained records from the Veterans Affairs Department (VA) showing that VA doctors had determined that a gunman who later killed 12 people had no mental health issues despite serious problems and encounters with police during the same period.
- AP submitted public records requests to agencies in all 50 states, the District of Columbia and the U.S. military for an investigation revealing that at least 786 children died of abuse or neglect in the United States in a six-year span while they or their families had open cases with child protection agencies.

- An AP FOIA request to the Federal Aviation Administration (FAA) revealed efforts by the St. Louis County Police Department to restrict airspace during the violent street protests in Ferguson, Missouri, in order to keep away news helicopters.
- AP again used federal and state open records laws this year to investigate airfield perimeter security breaches at the top 30 airports by passenger volume in the United States. While requests to the Transportation Safety Administration remain outstanding, data obtained from the FAA and state agencies exposed significant security lapses at airports around the country.

These stories – and the accountability and changes that followed from AP’s reporting – would not have been achieved without reliance on our country’s robust freedom of information laws and the principles of transparency that are the backbone of those laws.

At the same time, obtaining documents through FOIA remains a slow and difficult process, and one which unfortunately is becoming increasingly arduous to use. Despite promises of greater transparency at the outset of this Administration, most agencies are not abiding by their obligations of openness under the law. We are witnessing a breakdown in the system – both on the procedural front, in the form of continual delays and agency non-responsiveness, and on the substantive front, with the vast over-use of exemptions and redactions.

A few examples are illustrative:

- Shortly after Malaysia Airlines Flight 370 went missing over the South China Sea in March 2014, AP asked the Pentagon’s top satellite imagery unit, the National Geospatial-Intelligence Agency, for records showing what the U.S. was doing to help the search. Agencies are required to give at least a preliminary response to such questions within 20 days. More than one year later, after the largest and most expensive search in aviation history, the agency is telling us that it has too many FOIA requests to meet its deadlines. Unfortunately this is an all-too-familiar response we hear from many agencies.
- It takes the State Department about 18 months to answer – or refuse to answer – anything other than a simple request. That is five times longer than any other agency. In March of this year AP filed a lawsuit against the State Department for failing to turn over files in response to six requests covering Hillary Clinton’s tenure as Secretary of State, including one request made five years ago, and the others made nearly two years ago. The State Department missed *all* its statutory deadlines, and even its own self-created deadlines. These requests concerned not only emails, but documents, correspondence, memos, and calendars on some of the most significant issues of our time, such as the Osama bin Laden raid, surveillance practices, documents relating to a defense contractor, and material on

some of Clinton's long-time aides. These are documents the public has a right to see and which the agency is required to release, yet the only way to force the agency to comply with the law was to sue them.

- President Obama has directed agencies not to withhold or censor government files merely because they might be embarrassing. Yet in government emails that AP obtained in reporting about who pays for Michelle Obama's dresses, the National Archives and Records Administration blacked out one sentence repeatedly from its documents, citing a part of the law intended to shield personal information such as Social Security numbers, medical files or personnel records. However, the government slipped and let it through on one page of the otherwise redacted documents. Here is what that one sentence said: "We live in constant fear of upsetting the WH [White House]." That was not a proper use of the privacy exemption.
- The Treasury Department recently sent us 237 pages in its latest response to our requests regarding Iran trade sanctions. This was in response to a request we submitted *nearly nine years ago*. Nearly all 237 pages were completely blacked out on the basis that they contained commercial trade secrets.
- AP reported in October 2014 on a U.S. government program in which the Department of Justice offered continued Social Security benefits to former Nazi SS guards to induce their voluntarily relocation from the U.S. without going through the formal deportation process. The AP report led President Barack Obama to sign the No Social Security for Nazis Act just two months later. The Social Security Administration (SSA), however, provided little help in response to several FOIA requests on the subject. Its responses included excessive delays, information that directly contradicted its own prior FOIA responses, and a gross misconstruction of the requests that seemed designed to negate the information's value to AP while simultaneously relieving the SSA of having to provide embarrassing information.
- Agencies sometimes even use FOIA as a tip service to uncover what stories news organizations are pursuing. Requests are routinely forwarded to political appointees at some agencies. At the agency that oversees the new health care law, for example, political appointees now handle the FOIA requests. This is plainly an improper use of FOIA.

These examples illustrate the wide sweep of the problems we face using the federal access laws. Non-responsiveness is the norm. The reflex of most agencies is to withhold information, not to release, and often there is no recourse for a requester other than pursuing costly litigation. This is a broken system that needs reform. Simply stated, government agencies should not be able to avoid the transparency requirements of the law in such continuing and brazen ways.

AP's frustration with the agencies' continued noncompliance with the law is shared by others. For Sunshine Week earlier this year, AP examined 100 federal agencies' own yearly data on how well they are keeping up with their obligations under FOIA. Although agencies must report annually to the Justice Department on their FOIA performance, it was difficult to collect this data from some agencies in time for Sunshine Week, set around the birthday of James Madison, who promoted open government at the founding of our nation. The analysis by AP's Ted Bridis, who heads our investigations team here in Washington, found to no one's surprise that agencies were having trouble keeping up with their FOIA requirements. Among its findings were the following:

- Federal agencies received approximately 715,000 FOIA requests in 2014, a new record.
- The government responded to about 647,000 requests, a four percent decrease from the prior year.
- The backlog of unanswered requests grew by 55 percent from 2013, to more than 200,000.
- Federal agencies more than ever censored materials turned over or fully denied access to records, doing so in more than 250,000 cases or 39 percent of all requests.
- On more than 215,000 additional occasions, federal agencies said they could not find records, a person refused to pay for copies, or agencies determined the request to be unreasonable or improper.
- Agencies cited exemptions including those for national security, personal privacy and trade secrets nearly 555,000 times last year, a new record. Exemption b(5) – the exemption for internal deliberations – was used over 71,000 times last year. Exemption b(5) is a discretionary exemption, which means that agencies should err on the side of release, even if the requested material could fall within the technical language of the exemption.
- In nearly one-third of cases, when someone challenged under appeal the administration's initial decision to censor or withhold files, the government reconsidered and acknowledged it was at least partly wrong. That was the highest reversal rate in at least five years.

This administration started in 2009 with a promise to be the most transparent administration ever. Yet these statistics speak to the opposite result. If agencies cannot make substantial progress so that FOIA will work better under an administration that has repeatedly stated its commitment to openness, then Congress should recognize that further action is needed. The United States sets the standards of openness and democracy to which other countries look for guidance. This country should set the example and be a beacon of light and transparency.

FOIA Reform Legislation

The legislation before you today, S. 337, is vital to making FOIA work better, to improving efficiencies for requesters, to reducing the troubling backlog, to driving agencies to decisions that better align with FOIA's goals, and to ensuring that our government operates from a presumption of openness. FOIA can be improved significantly with this legislation, and with the following fixes:

- **Codify the presumption of disclosure to cement the purpose of the Act and ensure that FOIA remains strong and consistent across administrations.** By codifying the foreseeable harm standard – and the presumption of disclosure mandated by President Obama in 2009 – into the statute itself, Congress would ensure that the government in this and future administrations follows the policy that in the face of doubt, openness should prevail. This policy is the foundation of the open records law; FOIA was created based on the concept that government should be open to the public. It is antithetical to the spirit of FOIA to err on the side of withholding. Yet agencies see the law as variable based on the administration then in power. For example, Attorney General Janet Reno issued FOIA policy requiring disclosure unless an agency could identify a specific and foreseeable harm. Attorney General John Ashcroft flipped that policy and advised agencies that the Department of Justice would defend all withholdings unless they lacked a sound legal basis. Attorney General Eric Holder reversed it back in 2009 by re-implementing the foreseeable harm standard. Perhaps it is not surprising that most agencies have a tendency to withhold; their guidance has not been consistent. This is not appropriate. The policies guiding compliance with the Freedom of Information Act should not fluctuate so greatly. This legislation achieves the admirable goal of stabilizing the governing policy, which will lead to less confusion, and a more uniform and correct application of the law.

Importantly, the presumption of disclosure does not alter the substantive scope of the exemptions or the agencies' ability to withhold exempt material where disclosure would cause any foreseeable harm. It compels agencies to bring us back to the original intent of FOIA that information should be available to the public unless there is specific reason to withhold it. And it codifies the guidance that the agencies should have been following for the last six years – that a principle of transparency underlies this law. Codifying this guidance provides consistency across administrations and prevents the principles of FOIA from being diluted based on the administration then in office.

- **Make the Office of Government Information Services (OGIS) independent to help it achieve its stated purpose – implementing effective change and providing meaningful support for requesters.** The creation of OGIS in 2007 was a ground-breaking step in strengthening the law. It was intended to provide mediation services to resolve FOIA disputes rather than resort to costly litigation, and to review agencies' FOIA policies,

procedures and compliance. Yet those goals have been stifled by a system that does not allow OGIS to act independently.

Under current practice, OGIS lacks ability to force an agency into mediation, and does not write an advisory opinion without a completed mediation. That means that requesters are still left without meaningful recourse save litigation if an agency stalls on a request or over-redacts material. Further, with respect to its ability to issue recommendations to improve the process, OGIS must first send its draft recommendations to certain executive agencies and to the Office of Management Budget for review before it can go to the White House or to Congress. Those internal reviews are to ensure that any recommendations from OGIS are consistent with other agencies and with administration policy. Congress intended OGIS recommendations, however, to inform legislative and administrative improvements to policy and practices, not the other way around. The current approach negates the independence that was intended to be given to OGIS, and does not allow it to achieve meaningful results.

The current legislation strengthens the independent voice with which OGIS was meant to speak and clarifies that Congress wanted OGIS to issue advisory opinions and take other steps to ensure that existing disputes that come to OGIS provide lessons to help avoid disputes and problems in the future. While OGIS is not a FOIA police capable of ordering agencies to disclose information, the bill is an important step toward allowing OGIS to speak forcefully in substantive disputes and to make recommendations that inform policy change.

- **Establish a modern FOIA portal to intake and track requests, and mandate the posting of frequently requested documents, each of which will significantly reduce backlogs and enhance public access to records.** Establishing a modern and uniform FOIA portal and requiring agencies to post documents that have been requested on at least three occasions will do wonders to decrease the ever-growing backlog. An electronic system that allows requesters to make requests and receive status updates and responses from the same system that the agency uses to receive and process the requests would allow requesters to track progress without additional government involvement. Such a system would help agencies better monitor and manage their FOIA responses, allocate resources, and communicate with other agencies as needed. It would vastly improve the use of limited agency resources and would free up FOIA officers to respond to substantive requests in a timely manner. Further, by mandating the online posting of frequently requested documents, this legislation takes a clear and direct step to reduce the growing backlog and enhance record availability. Every frequently-requested document posted online saves the agency time in processing multiple future requests for the same material. Through this legislation, Congress takes concrete steps to tackle the daunting issue of delays.

- **Curtail the over-use of Exemption 5 withholdings.** By allowing agencies to limit the application of Exemption 5 to 25 years, without revealing classified, private or otherwise protected material, Congress would impose important limitations on an often-abused power to withhold internal deliberative information that would otherwise be of enormous educational and historic value. As this Committee noted in its Feb. 23, 2015, Report, enforcing this 25-year outer limit will help ensure that a proper balance is struck between FOIA's goal of transparency and avoiding the unintended consequences that might chill internal decision-making between government employees.

The current bill takes important steps to make FOIA work better. The ultimate beneficiary of these revisions is the American public. These improvements to FOIA will result in a more informed citizenry and a more transparent and accountable government.

Conclusion

In conclusion, Mr. Chairman, it is our fundamental belief that public officials need to be accountable to the people they serve, and that the public has a right to witness government in action. Yet we have found that too often, and in too many corners of this country, government officials and agencies are working against that value.

If secrecy is not challenged, we risk a departure from the principles of open government, accountability and robust debate that form the foundation of our democracy. We need to strengthen the laws that support transparency. The reforms sought here today are essential to support the tools necessary to keep government transparent and accountable to the public.

Mr. Chairman, Senator Leahy, members of the Committee, thank you very much for allowing me this opportunity to speak to you about these important issues today. And thank you for your commitment to FOIA, and to the liberties it does so much to protect. I look forward to answering your questions.