

**Testimony**

**of**

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**FOIA at Fifty: Has the Sunshine Law's Promise Been Fulfilled?  
Committee on the Judiciary  
United States Senate  
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Mr. Chairman, Ranking Member Leahy, and members of the Judiciary Committee,

My name is Rick Blum, and I am director of the Sunshine in Government Initiative (SGI), a coalition of 9 media associations promoting open government policies and practices.

SGI members include the American Society of News Editors, The Associated Press, Association of Alternative Newsmedia, 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.

Thank you for the opportunity to celebrate with you a half-century (and counting) era of law meant to guarantee that the people's business is conducted publicly. Transparency is a core democratic value. It is also a powerful tool for democratic self-correction. Because of the efforts of this Committee and individuals in this room today, disclosures under the Freedom of Information Act (FOIA) have unearthed or prevented bad choices, helped save lives, kept taxpayer dollars in the treasure and given the public the ability to re-purpose and analyze information held and used by government agencies. I'd like to illustrate some ways FOIA has had an impact and address how to ensure transparency for the next half century.

I particularly want to congratulate and thank the many members of this committee, and especially you, Mr. Chairman, Senator Leahy, and Senator Cornyn, for your work most recently winning enactment of the FOIA Improvement Act of 2016. A presumption of openness, a more independent voice for the FOIA Ombudsman and a time limit for how long agencies can withhold policy deliberations that do not otherwise fall within an exemption are all going to limit abuses of the FOIA process and the government's ability to keep secrets.

In fact, Congressional action has been essential to strengthening transparency in government. Throughout FOIA's history, Congress has seen fit to strengthen the Act. In 1974, Congress established clear procedural requirements. In 1986, Congress created a fee waiver for requests that would broadly benefit the public. In 1996, Congress updated FOIA for the electronic age, requiring that agencies provide records in the form or format in which they exist and requiring affirmative disclosure of records in electronic reading rooms. In 2007, Congress took a number of steps to strengthen FOIA, improving reporting that agencies must do each year on their FOIA operations, restoring a requester's ability to recover legal fees incurred when challenging a wrongful agency denial, and establishing the Office of Government Information Services (OGIS) within the National Archives and Records Administration to mediate disputes and recommend to Congress and the President ways to improve FOIA.

The bipartisan, bicameral reforms signed into law less than two weeks ago take many strong steps forward, however inefficiencies, a lack of management controls, and avoidable long wait times continue to plague our premier transparency law. Before I recommend some ways Congress can further embed transparency within the executive branch, let me celebrate FOIA's 5 decades by highlighting some examples of FOIA's impact.

- *FOIA helps prevent or correct wrongdoing.* When KARE Channel 11 in the Minneapolis St. Paul area used FOIA, journalists found the Veterans Administration had relied on medical professionals unqualified to properly administer over 24,000 tests for traumatic brain injury, leading to veterans receiving wrong diagnoses or denied benefit claims. As a result of the story, the VA announced new tests.<sup>1</sup>
- *FOIA helps improve public safety and saving lives.* FOIA also helps journalists tell stories even when the documents are not front and center. Faced with a data- and document-rich investigation into Harrier jet crashes published in 2002, Los Angeles Times reporter Kevin Sack found in files obtained through FOIA a reference to a video taken by the pilot's mother of the jet crash that killed her son. The story the family told of the pilot's commitment to his mission and tragic death helped the story resonate and have an impact far greater than numbers can.<sup>2</sup>

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<sup>1</sup> A.J. Lagoe and Steven Eckert, "KARE Investigates: VA announces new TBI exams," May 26, 2016. Available at <http://www.kare11.com/news/investigations/kare-11-investigates-va-announces-new-tbi-exams/215023532>; accessed July 10, 2016.

<sup>2</sup> Note to FOIA Files (compilation by the Sunshine in Government Initiative), No. 203, "At least we got to say good-bye," *Los Angeles Times*, December 17, 2002 by Kevin Sack. Available at <http://www.sunshineingovernment.org/stories/index.php?op=show&id=203>; accessed July 8, 2016.

- Disclosure sometimes can help ensure the right call is made, even when it may be difficult. When body armor fails ballistics tests, the government probably should not send it to troops in harm's way, but that's just what happened. When a journalist called the official responsible seeking comment after using FOIA to obtain the government's own ballistics tests, within hours the official recalled the vests.<sup>3</sup>
- FOIA saves taxpayer dollars. When Congress allocates taxpayer dollars to support family farmers, it probably never intended those funds to support suburban sprawl, celebrities, and the well-to-do. But that's what happened with farm subsidies. After an investigation using FOIA uncovered the excesses, Congress acted and tightened eligibility requirements.<sup>4</sup>

These are just some examples of FOIA's 5-decade-long track record of important contributions to the public good and making government work better.

### **Ensuring transparency in FOIA's next 50 years**

As I already described, FOIA is a mechanism for our democracy to correct identify problems and improve itself. To help the strong oversight and legislative efforts this Committee provides along with the House Oversight and Government Reform Committee, this committee can help ensure the mechanisms to strengthen FOIA are working better.

First, agencies should be more responsive to correcting problems with FOIA and held accountable. Let's look for a moment at the 20-day statutory deadline that agencies have for responding to a request. An agency can claim "unusual circumstances" justify extending the 20 days if the agency tells the requester that either (1) the agency needs to search "voluminous amounts of records," (2) the agency must locate records in multiple offices, and (3) the agency must get advice from another agency or multiple sub-offices. Further, as the Justice Department notes, "In many instances, however, agencies cannot meet these time limits due to a high volume of requests, resource limitations or other reasons."<sup>5</sup> As long as an agency shows progress to reduce backlogs or can show an unexpected uptick in requests, long wait times are tolerated. Probably the single biggest factor deterring journalists from using FOIA is the long waits.

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<sup>3</sup> Summary to FOIA Files No. 24, "Marine Corps issued flawed armor," *Marine Corps Times*, May 9, 2005 by Christian Lowe. Available at <http://www.sunshineingovernment.org/stories/index.php?op=show&id=24>; accessed July 8, 2016.

<sup>4</sup> Matt McKinney and Glenn Howatt, "Fam bill beneficiaries include urban dwellers," *Minneapolis Star Tribune*, April 29, 2008. Available at <http://www.startribune.com/farm-bill-beneficiaries-include-urban-dwellers/11223441/>; accessed July 10, 2016.

<sup>5</sup> U.S. Department of Justice Office of Information Policy, *Guide to the Freedom of Information Act*, p. 62. Available at [https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/procedural-requirements\\_0.pdf](https://www.justice.gov/sites/default/files/oip/legacy/2014/07/23/procedural-requirements_0.pdf); accessed July 8, 2016.

Second, FOIA suffers from insufficient investment in technology. The portal required under the FOIA Improvement Act is good to have in law as it requires the Office of Management and Budget to build a single public interface for all agencies to accept FOIA requests and allows OMB to add additional features as it sees fit. I would encourage this Committee to help ensure that this requirement is implemented to maximize its benefits. It should not be simply a series of links to agency request forms, or a single form that is sent to any agency of one's choosing. A true portal is a request-to-response processing and tracking tool so that agencies and requesters alike can manage their requests and responses through a seamless system. FOIA Online is an example.<sup>6</sup>

OGIS worked with the Environmental Protection Agency and Department of Commerce to create a system for agencies to accept, manage and respond to FOIA requests. FOIA Online is a tool available to all agencies and was designed to serve the needs of requesters and agencies alike. This is the kind of solution that addresses persistent problems. We need more like it.

Third, we must do more to defend FOIA from efforts to make a thousand cuts through statutory exemptions proposed by agencies and special interests. These statutory exemptions, recognized under subsection b(3) of FOIA, are proposed many times each year. Over the years, this Committee's bipartisan work, along with counterparts in the U.S. House, has helped stop or narrow overbroad proposals to put information beyond the public's reach. I respectfully suggest we need better gatekeeping – and earlier reviews – to ensure any new proposed statutory exemption to disclosure under FOIA meets strict, clear criteria to ensure new secrecy is justified, necessary, narrowly tailored to the need, clearly defined and time-limited.

When the head of a commodity promotion board run by the United States Department of Agriculture appeared to be trying to influence the Food and Drug Administration on an egg substitute product, disclosure of the communications under FOIA brought these dealings to light and the chairperson resigned. Months later, snuck into a spending bill was a provision making all of USDA's commodity promotion boards completely exempt from FOIA. We appreciate you, Mr. Chairman, for speaking out publicly against confidentiality for these boards and the Committee's ongoing efforts to defend FOIA from statutory exemptions quietly placed into large spending bills. While the outcome of this particular debate is uncertain, we do not see justification to grant an exemption to FOIA for these boards. Quite the opposite, the disclosures powered by FOIA in this case show the strong public interest in transparency.

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<sup>6</sup> FOIA Online at [foiaonline.regulations.gov](http://foiaonline.regulations.gov) is a separate tool from FOIA.gov, a website run by the U.S. Department of Justice. FOIA.gov currently provides reports and annual statistics on FOIA performance submitted by agencies.

Fourth, Congress should strengthen leadership on FOIA at all levels. The 2016 amendments formed a Chief FOIA Officers Council, which we hope will help agencies share best practices. Chief FOIA Officers should have adequate tools to be aware of and held accountable for their agency's FOIA performance. Across agencies, we need better analysis of what unnecessarily burdens agencies and creative solutions.

Fifth, Congress should reconsider the way the government captures, organizes and stores electronic information so disclosure is built in at the front end, not the back end. In the digital age, the amount of information is growing and the problem will continue to swamp agencies. The National Archives and Records Administration (NARA) has a December 2016 deadline to preserve in searchable form email communications from select position within agencies. The success and shortcomings of this effort should interest everyone concerned about the preservation of information in digital form. I encourage this Committee to work collaboratively with other committees with jurisdiction over records management.

Just last week the U.S. Court of Appeals for the District of Columbia ruled that FOIA reaches email communications regarding official business regardless of whether those communications occurred on government or non-governmental email systems.<sup>7</sup> If not, agencies will continue to be swamped with FOIA requests and time-consuming processes that result in long reviews and incomplete searches and agencies straining to meet production schedules set by frustrated judges.

By contrast, managing complex logistics is possible. Amazon does not store goods piled in boxes in its warehouses. It catalogs the row and shelf location for each item so retrieval is efficient enough to have a box on my doorstep in two days. Digital storage and retrieval should speed government responses, not complicate and slow it down.

There are a number of specific actions that Congress and the President might focus on to strengthen FOIA administration. For example, Congress might:

- Establish a public-interest balance test so that agencies and judges determine whether an interest underlying an exemption overcomes the presumption of openness and the public's interest in disclosure.
- Encourage agencies to better assess their own FOIA performance and the FOIA Ombudsman to address cross-cutting problems in FOIA administration, rather than individual agency performance. Assess whether OGIS should be given the authority to

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<sup>7</sup> Sophie Murguia, Court rules FOIA can apply to private email accounts," Reporters Committee for Freedom of the Press, July 6, 2016. Available at: <http://rcfp.org/browse-media-law-resources/news/court-rules-foia-can-apply-private-email-accounts>; accessed July 8, 2016.

require an agency to disclose records when OGIS concludes the agency improperly withheld information or violates FOIA.

- Explore ways to bring consultations and referrals to a close by establishing a clear process and deadlines while properly applying exemptions.
- Explore non-custodian searches and reviews of information so that the person holding the information is separated as much as possible from the decision to withhold or release and the timing of the response.
- Specify requirements for affirmative disclosures.

Many of these steps have been discussed, and work has already begun to assess how they might work in practice.

In short, to fix FOIA into the next 50 years, we look forward to working with you to strengthen the mechanisms within the executive branch for identifying problems, their root causes and solutions; strengthening leadership within and across federal agencies; and giving senior managers, FOIA officers and requesters the tools and resources needed to continue improving FOIA.

I appreciate the opportunity to testify today, Mr. Chairman, and I look forward to answering your questions.

Rick Blum is the director of the Sunshine in Government Initiative, a coalition of media groups promoting transparency in government. Since 2006, Rick has helped the coalition actively support efforts to strengthen the federal Freedom of Information Act, raise awareness of the value and impact of FOIA, and find commonsense solutions to FOIA's limits. He has led efforts to push back against anti-disclosure proposals on issues ranging from "space situation awareness" ("tracking space junk" to us laypeople) to high-speed rail. He has testified before Congress several times on FOIA matters. He serves on the Steering Committee of OpenTheGovernment.org. In March 2016, he was inducted into the Freedom of Information Act Hall of Fame.

Prior to joining SGI, Rick served as the founding director of OpenTheGovernment.org from 2004 to 2006. Prior to that he worked at OMB Watch (since renamed the Center for Effective Government) and led efforts to maintain public access to information about possible risks from chemical plants to surrounding communities.

He holds a master's degree from Indiana University, where his studies focused on democratization efforts in Russia, and a bachelor's degree from the University of California, Berkeley. He lives in Silver Spring, Maryland with his wife, two kids and one dog.