

**Testimony of**

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**On**

**“FOIA at Fifty: Has the Sunshine Law’s Promise Been Fulfilled?”**

**Before the**

**United States Senate Committee on the Judiciary**

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Chairman Grassley and Members of the Committee on the Judiciary,

Thank you for the opportunity to testify today on behalf of the Society of Professional Journalists (SPJ), founded in 1909 as the largest and most broad-based journalism organization in the nation, currently representing 7,000 members. I also come to you in my capacity as a researcher and teacher of freedom of information at the University of Arizona School of Journalism.

Kudos to all of you for your continued work to improve the people's access to their government. I have been impressed with your work, Mr. Chairman, as well as the dedication of Senators Leahy and Cornyn, to continue to improve Americans' ability to see what their government is up to. Honestly, I worry for the time when you all decide to retire or move onto other careers. We need strong, principled leaders who believe in the fundamental principles intended in our nation's founding.

The 2016 FOIA Improvement Act, signed into law June 30 on the eve of FOIA's 50<sup>th</sup> anniversary, is an extraordinary accomplishment, demonstrating that people from different perspectives and political persuasions can come together collaboratively to serve the best interest of all citizens. Because of the amendments, we now have a law that codifies the presumption that government records are public unless disclosure would cause foreseeable harm. The Office of Government Information Services now can be more frank and unfettered in its advice to Congress about how to improve the administration of FOIA. Federal agencies are now instructed to provide the public a single online portal to streamline requests. These and other provisions will help citizens and journalists better understand their government, and ultimately improve our society.

Despite these advances, though, I must say that much, much more work is needed to create a law and "sunlight system" as originally intended when FOIA was first enacted in 1966. The law is broken. FOIA has been co-opted as a tool of secrecy, not transparency. I hear from journalists and citizens nearly daily about their problems in maneuvering through an intimidating system fraught with delays, confusion, and excessive fees that often results in no records or pages delivered in unusable formats blacked out entirely or in part. As a result, information that can shed light on unsafe drinking water, inappropriate expenditures, and inefficient government operations remains hidden from the public. I am not exaggerating when I say we have reached a tipping point – a crisis situation – when it comes to freedom of information in this country. We are frogs in the kettle of slowly heating water, and if we don't jump out now we will find ourselves in a sticky and murky stew.

The research is clear: Requesters are having a harder time than ever in getting the information they need. While agencies are becoming more efficient in processing 700,000 requests a year, denials and the use of exemptions to hide information are rising.<sup>1</sup> An Associated Press analysis this year of FOIA request data showed that the Obama administration has set a record in the rate requesters are denied information or told that it doesn't exist – 77 percent of the

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<sup>1</sup> Ben Wasike, "FoIA in the age of 'Open.Gov': An analysis of the performance of the Freedom of Information Act under the Obama and Bush administrations," *Government Information Quarterly* (April, 2016).

time.<sup>2</sup> In 2012, agencies' use of exemptions to deny requests increased 22 percent over the previous year.<sup>3</sup> Comparing the last three years of the George Bush administration to the first three years of the Obama administration, the percentage of denials among most agencies has increased.<sup>4</sup> The culture of secrecy grows beyond FOIA as journalists struggle to receive basic information about schools because of the Family Educational Rights and Privacy Act, and through excessive message management through public information officers. Journalists have become so frustrated that last year the Society of Professional Journalists and more than 50 other journalism organizations sent a letter to the White House urging a stop to the excessive secrecy.<sup>5</sup> A delegation met with White House staff last December to discuss the problem but has yet to see any action.<sup>6</sup>

Globally, as well, the United States is falling behind. Ratings of FOIA laws in the 105 nations that have them indicate that U.S. FOIA ranks 46<sup>th</sup> in its strength, behind such countries as Uganda, Kyrgyzstan, and Russia.<sup>7</sup> Even Mexico's FOIA ranks better than ours, at ninth place. Other countries have incorporated significant elements into their laws. For example, a dozen nations, such as Liberia, have declared the right to know as a constitutional right, and some international courts have even deemed it a basic human right. In some nations, such as South Korea, FOIA applies to the judicial and legislative branches. South Africa, Brazil, and Estonia require that government contractors doing the government's business adhere to FOIA. China provides reduced or waived fees for those who demonstrate financial hardship, and officials are required to assist the illiterate and disabled in their requests. Romania requires agencies to respond within five business days, and India assesses monetary penalties against agencies that do not comply with the law. Countries such as Ethiopia provide a public records ombudsman with the authority to force agencies to disclose records, saving citizens the time and expense of litigation. Colombia requires agencies to provide records in different languages and the state of Sinaloa in Mexico requires freedom of information to be taught in the schools.

How could these nations pass us by? It makes sense, really, since the majority of other FOIA laws have been passed in just the past 15 years. Technically, Congress enacted FOIA as an amendment to the Administrative Procedures Act of 1946, which was created to deal with the growing federal bureaucracy. Amendments through the years tinkered with FOIA, but as we know, significant leaps do not occur often in our political system. Think of U.S. FOIA as a 1966 Ford Mustang. A revered classic. A 2016 Hyundai, however, has better mileage, safety features,

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<sup>2</sup> Ted Bridis and Jack Gillum, "When it comes to providing government records the public asks to see, the Obama administration has a hard time finding them," *The Associated Press*, March 18, 2016.

<sup>3</sup> Jack Gillum & Ted Bridis, "FOIA requests being denied more due to security reasons than any time since Obama took office," *The Associated Press*, March 11, 2013.

<sup>4</sup> Martin E. Halstuk, Benjamin W. Cramer, & Michael D. Todd, (2014). "Tipping the Scales: How the U.S. Supreme Court Eviscerated Freedom of Information in Favor of Privacy," in Charles N. Davis and David Cuillier (eds.) *Transparency 2.0: Digital Data and Privacy in a Wired World*, Peter Lang Publishing.

<sup>5</sup> "More than 50 journalism groups again urge President Obama to stop excessive controls on public information," Society of Professional Journalists, Aug. 11, 2015, <http://www.spj.org/news.asp?REF=1368>.

<sup>6</sup> "Journalists ask White House for commitment to openness," Society of Professional Journalists, Dec. 15, 2015, <http://www.spj.org/news.asp?REF=1402>.

<sup>7</sup> Access Info Europe and the Centre for Law and Democracy, "Global Right to Information Rating," <https://www.rti-rating.org/country-data>; Also, for a comparison showing how countries should not use the U.S. as a model for FOIA, see Stephen Lambie (June 2003). "FoI as a United States' foreign policy tool: a carrot and stick approach," *Freedom of Information Review*, 105, 38-43.

sound, reliability, and air conditioning. If we look past sentimentality and focus on efficiency, then perhaps it is time to garage the Mustang, trade up, or at least give it a complete overhaul.<sup>8</sup>

What we have created over the past 50 years in our nation's governments – at all levels – is a growing culture of secrecy. It infuses our bureaucracies, and is difficult for any one president to change. But Congress can take actions to turn the tide, to set us back on track and create a culture of openness and accountability:

1. **Require FOIA training of all employees.** Many of the complaints I receive from journalists is that they encounter government employees who are ignorant of the law, or don't see the reasoning behind the law – they see it as a hindrance to their day-to-day work, which is likely true in many cases. The Office of Government Information Services has provided training for hundreds of FOIA officers. Funding should be provided to expand training to not just FOIA officers, but all government employees.
2. **Add enforcement mechanisms.** Expecting a grandma from Topeka to hire an attorney to sue an agency is unreasonable. The deck is stacked against the citizen, and journalism organizations are less likely to sue for public records than they were in the past.<sup>9</sup> Some states provide penalties for agencies or officials who fail to follow public record laws, such as suspension or removal, or sometimes even criminal repercussions. Those provisions are rarely enforced, but send a strong message. At minimum, courts should be required to assess reasonable attorney fees for plaintiffs that prevail and punitive fines against agencies found to be arbitrary and capricious. States that have such provisions in their laws are some of the most transparent. Perhaps OGIS should be given authority to force disclosure, or delegate that power to an independent entity that could act based on OGIS investigations (good cop, bad cop). Other enforcement models at the state level, such as in Connecticut, or international stage should be examined.
3. **Streamline the system.** As Professor Margaret Kwoka points out in her testimony, the bulk of FOIA requests are submitted by commercial interests out to make a buck, not necessarily to help the public find out what its government is up to. Those requests, subsidized by taxpayers through millions of dollars, create backlogs that impede requests from citizens and journalists. Commercial requesters, which, by the way, have lobbied since the 1950s for secrecy exemptions,<sup>10</sup> should be assessed higher fees to recoup the costs and create a more efficient system for requesters working in the public interest.

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<sup>8</sup> See the forthcoming article with suggestions for overhauling FOIA, Daxton R. “Chip” Stewart and Charles N. Davis, “Bringing back full disclosure: A call for dismantling FOIA,” *Communication Law and Policy* (Fall 2016).

<sup>9</sup> See study funded by the Knight Foundation where editors reported their news organizations were less likely to sue for public records than they were 10 years ago, published April 21, 2016, <http://www.knightfoundation.org/publications/defense-first-amendment>.

<sup>10</sup> See the study reviewing congressional testimony for the past 60 years of commercial lobbyists influencing FOIA, Jeannine E. Relly and Carol B. Schwalbe, “How business lobby networks shaped the U.S. Freedom of Information Act: An examination of 60 years of congressional testimony,” *Government Information Quarterly*, July 6, 2016, <http://www.sciencedirect.com/science/article/pii/S0740624X1630048X>

4. **Make electronic proactive disclosure work.** Despite the passage of the e-FOIA 20 years ago, the transition to proactive digital disclosure has been slow. Additional staff and resources are needed to create a single FOIA online portal and develop digital systems that automatically post documents easy for the average person to find and retrieve. Congress has a long tradition of requiring the publication and distribution of government documents for free, such as creation of the federal depository library system. Freedom of information isn't free; It's the cost of doing business for a democracy.
5. **Reign in statutory exemptions.** Agencies frequently use statutory exemptions to end-run FOIA, making them one of the most frustrating parts of the process. Congress should restrain the abuse of Exemption b(3) and continue to reign in abuses of exemption 5. The privacy exemption, as well, has been twisted, going far beyond its intent. Over-classification is out of control. Congress should clarify the limitations for the use of these secrecy tactics.

These are just some of the ways, along with the excellent recommendations of the other panelists, that Congress can align FOIA with its original intent and begin creating a culture of transparency, not secrecy, throughout out government. Perhaps looking at the best elements of other FOIA laws – in other nations and in the states – we can find new ways of enhancing freedom of information. Or better yet, go beyond what exists today and think of tomorrow, of the amazing power and potential that technology offers to enlighten the population.

While journalists are extremely frustrated and see first-hand how FOIA's flaws are preventing important information from being released, I want to emphasize that this is not a press issue. Journalists are merely proxies for the public. This is about our citizenry and the very nature of what we aspire to be as a nation. If we do not act now then I fear the trend toward secrecy will continue, and this country will look very different in the next 50 years.

Thank you for your dedication to reinvigorating FOIA and the opportunity to testify today. I look forward to answering your questions.