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Before the United States Senate Committee on the Judiciary

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

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Chairman Grassley, Ranking Member Leahy, and members of the Committee,

Thank you for the opportunity to testify today about the state of the Freedom of Information Act at this fiftieth anniversary of its enactment. My name is Margaret Kwoka and I am on the faculty at the University of Denver Sturm College of Law. I am testifying in my individual capacity as a researcher who has devoted many years of work to studying open government and FOIA.

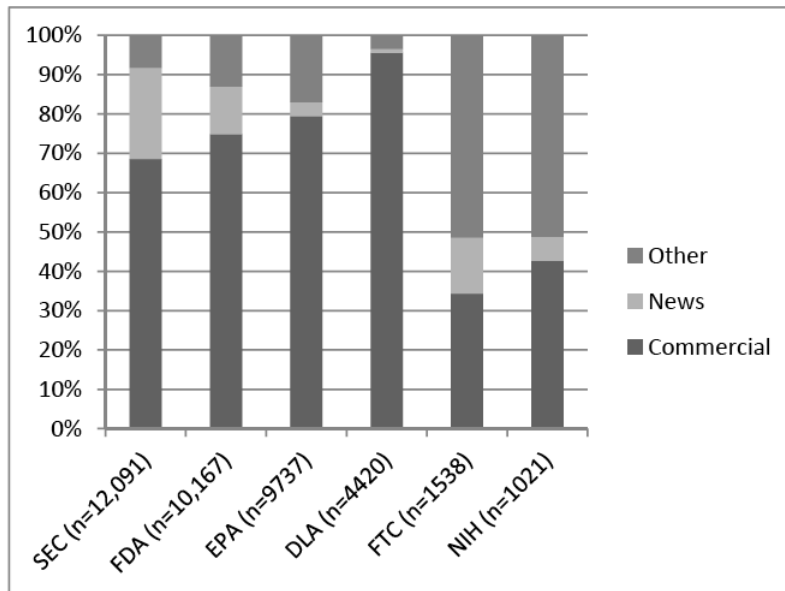
I want to begin by commending the members of this Committee for their longstanding leadership on issues of open government, and in particular with respect to the recent FOIA Improvement Act of 2016. This most recent amendment, signed into law by President Obama on June 30, 2016, promises to make meaningful strides toward improving executive branch processing of requests, streamlining dispute resolution for requesters, and curbing excessive claims of exemption under the law.

In FOIA’s first fifty years, many remarkable victories for openness and government accountability can be attributed to the law. Journalists, watchdog groups, and concerned citizens alike have harnessed the power of mandatory disclosure to shed light on government operations, potential misconduct, and matters of public policy. These sorts of requests exemplify precisely how FOIA was imagined to operate.

While we should celebrate the countless instances in which FOIA has worked exactly as envisioned, it remains true that the news media, prime intended users of the law, make up a tiny fraction of requesters – in the single digit percentages at most agencies. Journalists find the law slow in operation and the fight for access to be resource intensive, decreasing its utility in reporting the news. Yet, on the other side of the ledger, the executive branch rightfully notes the increasing workload of FOIA offices. Government-wide, agencies are now receiving in excess of 700,000 requests a year.

As we move into FOIA’s next fifty years, I believe we should be asking who makes up the bulk of these requesters if it is not the news media, and whether FOIA is the best way of meeting these other requesters’ information needs. Accordingly, today I will focus my testimony on the findings of my recent research, just published this year in the *Duke Law Journal*, on one large subset of FOIA requesters whose use of the law was, by all accounts, not fully anticipated: commercial requesters.

Commercial requesting has previously been poorly or only anecdotally understood, and I thus seek in my paper to document an in-depth account of how commercial interests are served by FOIA. To that end, I conducted case studies of particular agencies with significant numbers of commercial requesters whose data on FOIA usage I obtained by filing my own FOIA requests. The agencies I ended up studying were the Securities and Exchange Commission, the Food and Drug Administration, the Environmental Protection Agency, the Defense Logistics Agency, the Federal Trade Commission, and the National Institutes of Health.



As depicted in the figure above, at each of these agencies, the amount of commercial requesting is very significant. In fact, at four of the six agencies, commercial requesters are a majority of requesters, and at some, an overwhelming majority. These agencies are, starting on the left, the SEC with 69% commercial requesting, FDA with 75%, EPA with 79%, and DLA with 96%.

More than simply numbers, however, my study of the agency data reveals exactly how businesses are using FOIA. As I describe in detail in the paper, there is a large range of uses. And let me be clear from the outset that none of these uses are illegitimate, much less unlawful. In fact, it is entirely likely that some commercial requests do advance FOIA's underlying democratic goals. But my study demonstrates that commercial interests largely advance primarily private interests, rather than promoting the public's knowledge about governance.

For example, companies use FOIA to get information about their competitors, private attorneys use FOIA both to get information useful to their current clients but also to obtain information useful to recruiting clients (for example, potential drug and medical device claims), and businesses use FOIA to get information they then use for their various consulting, advising, and publishing ventures.

Companies that provide due diligence services are another group of frequent commercial requesters. For example, at EPA, almost all of the most frequent commercial requesters are companies that evaluate environmental risks for business clients prior to real estate transactions. Likewise, at SEC, many of the most frequent requesters are due diligence firms that provide

reports prior to initial public offerings, mergers and acquisitions, and other business deals, for which they seek any information that might suggest a regulatory risk or investigation of the target company.

And finally, there is a group of frequent commercial requesters that most interested and in some ways surprised me, and that was the proliferation of a category of businesses I classify as information-resellers; these are businesses who request large volumes of records from the federal government and resell them—at a considerable profit—to private parties. Let me provide a couple of examples focusing on FDA:

- The single highest-volume requester at this agency is a company called FOI Services, Inc., which submitted 571 requests in 2013. In turn, its sole business model is to request, under FOIA, FDA records and to resell them. It maintains a database, individual records within which can be purchased, and also offers the service of making custom FOIA requests for users based on their interests.
- Another misleadingly named company, FDA News, maintains a library of FDA Form 483s, which are inspection reports, for which it sells an annual subscription for nearly a thousand dollars or individual reports for more than one hundred dollars each. It obtains these reports by submitting hundreds of FOIA requests a year.
- A third company, Washington Information Source, does essentially the same; it sells access to a database of FDA inspection records, which it in turn requests en masse under FOIA.

And these three information resellers at FDA are not alone. Resellers are present among top requesters at five of the six studied agencies, and at two agencies—FDA and SEC—multiple resellers compete against one another. Here are other examples:

- The single biggest commercial requester at NIH is the FOIA Group, an information reseller that makes requests on behalf of clients.
- One of the biggest commercial requesters at the DLA is Day & Day, an information reseller that maintains various databases of defense contracts and bids for contracts, access to which costs \$1,800 a year.
- And at the SEC, one of the biggest requesters is Bioscience Advisors, which maintains a database of licensing and development contracts that have been filed with the SEC, an annual subscription to which is nearly \$10,000.
- Another of the largest requesters at SEC is RoyaltyStat, which markets various database products, including a licensing agreement database which it advertises come from SEC filings.

- Even SEC’s biggest requester, SEC Probes, which was classified as a news media requester, should probably be considered a commercial reseller, as it maintains a database of SEC investigation materials that its founder has been collecting and reselling for decades under other business auspices. At the time of my study, it was not charging for access, but it does do so now. As an aside, if this single requester were reclassified, it would put the SEC at 89% commercial requests and only 3% news media.
- At EPA, one of the top requesters there is also a reseller. EDR, Inc., is a company that offers, in its words, a “comprehensive look at current government environmental filings.” And its database collection is evident in the requests it makes; it requests entire categories of records, rather than records about a specific property like other commercial requesters at EPA.

As these examples suggest, resellers have cropped up to fill a wide variety of niches. Based on the various commercial requesting practices that this study documented, I want to talk a bit about the implications of commercial requesting for FOIA more broadly.

First, government is massively subsidizing corporate requesting. My estimates suggest that agencies are often recouping only between one and five percent of the cost of processing commercial requests by charging fees to those commercial requesters. And the raw numbers are not small. For instance, in the year for which I collected data, FDA spent about \$33 million in a year on FOIA processing, and if three quarters of its requests are commercial, that would translate to approximately \$26 million on commercial requesters. By contrast, it recouped only \$327,000 in fees from commercial requesters. As we saw, commercial requesters are making huge profits off of the government’s giveaway of essentially free or extremely low-cost federal records, making this simply a form of unintended corporate subsidy.

Some subsidies are of course justified because they promote a public good, such as subsidies that incentivize job creation, urban renewal, or infrastructure investments. But in the case of commercial uses for FOIA, my study demonstrates that the overwhelming objective of those requests is simply to fuel private profits. In particular, these companies often profit in a way that can only be accomplished if the requester closely guards the information obtained. For example, commercial requesters using FOIA for due diligence are only able to profit from the information precisely because it is not widely available. Even more so, resellers can only profit from federal records because they guard those records closely and charge very high access fees. In this way, free and low cost provision of federal records is subsidizing corporate secret keeping, and not promoting FOIA’s democracy-enhancing mission.

Second, the volume of commercial requesting suggests that, at least at some agencies, news media and other requesters may be crowded out due to resource constraints. At the bigger agencies, some individual commercial requesters are filings hundreds and even thousands of requests per year. One requester at the SEC averages about one request an hour all day long every business day. Given that delay and administrative burden are frequently cited reasons journalists do not use FOIA, and given that at some agencies average response times can well exceed the twenty business day statutory deadline, it seems entirely likely that resources used to

fill commercial requests are taking away from the resources that could be used for requests that better serve FOIA's core mission.

Third, information resellers end up becoming the actual locus of access to federal records for whole industries of interested parties, thereby largely privatizing the transparency function itself.

There are two main reasons why industry prefers to access records through resellers rather than filing their own FOIA requests at a fraction of the price. The first is that it protects the identity of the interested party. If a business files a FOIA request, its identity and the records it requested become part of the agencies' FOIA logs, which are themselves generally available under FOIA. A company that is looking into a particular business venture may want its interest to remain secret. The second reason is that resellers warehouse information and make it available almost instantaneously for a fee. Thus, the delay of FOIA itself is a reason that businesses use resellers instead.

But as the reseller becomes the actual locus of access to federal records, the transparency function itself is largely privatized. A reseller may decide certain records are not economically viable to pursue, and those records may remain, as a practical matter, hidden in government files from all interested parties. While the government obviously has not contracted with these resellers to provide federal records services, information reselling remains a sort of de facto outsourcing of what is an inherently public function, the provision of federal records to the public.

I do not want my conclusions about these problems to suggest that I think businesses do not have legitimate information needs or that they should not be entitled to access government information. Rather, I simply think FOIA was not designed for this purpose and in fact is poorly suited to serve it.

One of the most interesting findings in the FOIA logs for me was that, as it turns out, commercial requesters tend to request the same type of records over and over again. This is true both of run-of-the-mill commercial requesters and also of the subset of commercial requesters I identify as information resellers. Here are some salient examples, again from FDA:

- One typical commercial requester, INC Research, requests, over and over and over again, Form 483s, which are facilities inspection reports, and other inspection-related records. Obviously, each record concerns a different facility and inspection that took place, but the type of record it requests is routine.
- There is a group of commercial requesters who do nothing but make tens or sometimes hundreds of requests for the FOIA logs themselves in different time chunks. (Incidentally, some evidence suggests that requesting the FOIA logs is merely a way of seeing what other people are requesting about you or your client. This is also, of course, how I obtained information about who is requesting what.)

In contrast to the commercial requesters at FDA, news media requests vary widely in subject matter.

- Bloomberg News made requests that ranged in subject matter from cybersecurity threats to correspondence between senior FDA officials to results of a survey and many more.

Commercial requesters at other agencies are similar in their practices. Here are examples:

- At DLA, essentially all of the commercial requesters are asking for bid information regarding a particular defense contract, identified by solicitation number.
- Biosciences Advisors, one of the SEC resellers, submits thousands of requests for particular exhibits to required SEC filings.
- Nearly all commercial requesters at EPA are asking repeatedly for environmental reports concerning particular properties.

Given that commercial FOIA users have information needs that are very routine, one-by-one FOIA requesting is a highly inefficient way of meeting those needs. By contrast, the example of the varied news media requests demonstrates the value of a one-by-one FOIA request model, which may well be the best way to serve journalists' need for access to government records.

To address the fact that FOIA is a poorly suited vehicle to meet most commercial information needs, and in line with many of the recent transparency initiatives, I propose a relatively targeted but aggressive affirmative disclosure regime. Under this regime, agencies would be incentivized to or even required to identify routinely requested categories of records in their FOIA logs, and disclose them by publishing searchable, downloadable, indexed databases.

This differs from the current regime under which agencies only have to affirmatively disclose frequently requested records once they are actually requested, and only when the particular record, rather than the category of record, is likely to be the subject of multiple requests. So under my regime, for example, the FDA would identify its inspection related records as the subject of vast numbers of FOIA requests and design an affirmative disclosure system that does not wait for the requests to be made, but rather publishes those records proactively.

As to some of the examples I cite in my paper, the data also support the notion that routine disclosure is likely to be possible. As to the inspection-related records I just mentioned, for example, of the 1,978 such requests made in 2013 that were fully processed, 93% were granted in full. An even easier example is found with the hundreds of requests made for FDA's FOIA logs, all of which are releasable in full.

There are a variety of potential benefits to an affirmative disclosure regime of the type I am describing. For the agencies, affirmative disclosure would certainly cost money, but it would also save them from having to respond to thousands of individualized requests at the costs of potentially millions of dollars. This would have the secondary effect of freeing up agency FOIA offices' resources to service the requests that go to the heart of FOIA, potentially making FOIA faster and more useful for journalists and watchdog groups.

Affirmative disclosure also takes back a traditionally public function and eliminates a private subsidy. Once the records are published, information resellers who do nothing more than warehouse free or low-cost federal records and sell them at a profit would no longer be able to trade in what should be public commodities.

In a telling statement made by one of the information resellers to the New York Times in response to my research proposal, Day & Day's Vice President said that "a good part of our business would go away," and he thus thinks it is a bad idea. But I am not convinced that such a move would be bad for the business community writ large. It would level the playing field of information access, thus promoting fair competition and possibly helping small businesses that could not afford to buy public information in the past. It would also force resellers to add more value to their services by bringing to bear their expertise, possibly pushing innovation.

Publishing databases of these kinds of records also lays the groundwork for unanticipated benefits, including from researchers or news media finding uses for the data in the production of knowledge or citizen engagement. Once the agency has gone to the trouble of searching for, reviewing, and making ready to distribute these records, the public should reap the maximum possible benefit from the agency's efforts.

Certainly, there is nothing stopping agencies from taking this approach on their own or the executive branch adopting this approach as a matter of internal policy. Indeed, I know of at least one instance in which an agency has done so; my understanding is that EPA is currently working to release My Property 2.0, an online tool designed to eliminate the need for the public to submit FOIA requests for site-specific records, almost all of which are currently requested under FOIA by due diligence companies. However, voluntary efforts of this nature are rare.

I urge this Committee to consider Congress's role in encouraging or requiring agencies to take such steps. Congress could legislate the following requirements:

- Agencies must publish their FOIA logs for the public to better evaluate how FOIA resources are spent.
- Agencies must evaluate, annually, their FOIA logs and identify the most frequently requested categories of records. This evaluation must be included in the annual FOIA reports submitted to the Department of Justice.
- Agencies must evaluate, annually, the feasibility of preempting the need for individual FOIA requests for those categories by affirmatively disclosing the whole category. Feasibility analysis should include not only costs of affirmative disclosure, but potential cost savings in FOIA processing, the need for review for redactions or withholdings, and whether the records could be created in a way that facilitates automatic release to the public database. This evaluation must be included in the annual FOIA reports submitted to the Department of Justice.
- Agencies must undertake to affirmatively disclose whole categories of records frequently requested under FOIA where feasible.

In addition to these mandates, Congress could provide for enforcement, either by requiring review of the agencies' decisions regarding affirmative disclosure within the executive branch (for example, by the Office of Government Information Services) or a private cause of action against agencies in non-compliance.

With these suggestions I will conclude my remarks and thank this Committee once again for your commitment to government transparency and for the opportunity to testify today. The full version of my study can be found at: *FOIA, Inc.*, 65 DUKE LAW JOURNAL 1361 (2016), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2685402. I look forward to your questions.