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Hearing on “The Freedom of Information Act: Perspectives from Public Requesters”
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Chairman Grassley, Ranking Member Durbin, and members of the Committee,

Thank you for the opportunity to appear before you today to testify about the Freedom of Information Act from the perspective of public requesters. My name is Margaret Kwoka and I am on the faculty at Ohio State University’s Moritz College of Law. I am testifying in my individual capacity as a scholar whose research focus is government transparency and freedom of information laws.

Let me begin by thanking this Committee for their current interest in FOIA oversight as well as their longstanding commitment to engaging with the administration of FOIA. Through bipartisan efforts, Congress has continually conducted oversight hearings, identified areas ripe for improvement, and amended the law to keep it current with changes in society. The most recent amendments, the FOIA Improvement Act of 2016, made important strides in strengthening the public’s right to government information.

Still, much work remains to be done. In my testimony today, I will outline areas where my research reveals that legislative reform has the potential to make a meaningful difference in improving public access to government records. In short, the potential for affirmative disclosure measures to alleviate the burden on FOIA offices and better and more quickly deliver routine information to the public is one of the most promising avenues for systemic change. Strengthening judicial review and alternative dispute resolution methods through the Office of Government Information Services would provide requesters with more meaningful recourse. Clarifying the foreseeable harm standard would ensure that agencies live up to the goal of maximum transparency. And improvements to technology would facilitate a more efficient, effective administration of the law.

I. Strengthening FOIA is Imperative

To begin, I want to highlight for the Committee the importance of focusing on ways to strengthen FOIA and improve FOIA administration and operation. In short, FOIA is essential to a modern democracy; a citizenry cannot consent to be governed if it does not know, as the Supreme Court

has said, “what its government is up to.”¹ Indeed, the importance of having a well-informed citizenry was acknowledged at the founding, undergirding government institutions such as public education and the postal system.² When FOIA was enacted in 1966, the Senate Report explained that “[a]lthough the theory of an informed electorate is so vital to the proper operation of a democracy, there is nowhere in our present law a statute which affirmatively provides for a policy of disclosure.”³ That is, there was not, until FOIA.

FOIA revolutionized the public’s relationship with the federal government, opening up agency activities to public oversight and accountability. One way to understand FOIA’s impact is to look to how journalists use the law, as reporters are those who often have the ability to disseminate what they learn using FOIA to the public and, in so doing, inform the public about government activities. One researcher demonstrated how journalists whose reporting is based on public records requests are more likely to write stories that lead to tangible results such as law or policy changes.⁴ Another study showed how traditional news media have an outsized presence in litigation under FOIA, demonstrating how valuable the law can be in shaking free information necessary for the public interest.⁵

My own research has demonstrated the promise of FOIA and how that promise has been realized, particularly by reporters. Over a series of interviews with journalists who make frequent use of FOIA, I uncovered areas of particularly notable success. Three main areas stood out: the first area was uncovering government waste and misconduct, the second was understanding what kinds of influences may have impacted agency decision-making, and the third area was in understanding policies of law enforcement and security agencies.⁶ Given that any particular request may be the one that has the outsized impact in improving public health and safety, curbing government fraud or abuse, or informing the public so they may exercise their democratic rights at the ballot box, these findings support the continued vitality of the statute.

Yet, much room for improvement remains and the current state of FOIA administration demonstrates an imperative for Congress to shore up the fundamentals of the public’s right to government information. To take the most pervasive problem, despite the dedicated work of hundreds of FOIA professionals across the federal government, FOIA requesters still suffer from

¹ Nat’l Archives & Records Admin. v. Favish, 541 U.S. 157, 171-72 (2004).

² See MICHAEL SCHUDSON, THE RISE OF THE RIGHT TO KNOW: POLITICS AND THE CULTURE OF TRANSPARENCY 1945-1975, at 54 (2017).

³ S. Rep. No. 88-1219, at 8 (1964).

⁴ James T. Hamilton, *FOIA and Investigative Reporting*, in TROUBLING TRANSPARENCY: THE HISTORY AND FUTURE OF FREEDOM OF INFORMATION 117 (David E. Pozen & Michael Schudson eds. 2018).

⁵ *News Reporters Drive Growth in Media FOIA Litigation*, FOIA PROJECT (Jan. 9, 2017).

⁶ The full account of these interviews and my findings can be located in my book, MARGARET B. KWOKA, SAVING THE FREEDOM OF INFORMATION ACT, at 37-49 (2021).

delays—sometimes extreme delays—in receiving responses to requests.⁷ Moreover, agencies also routinely withhold records that should be released under the law, citing exemptions that are too broadly applied or failing to apply the foreseeable harm standard that was introduced into the law in the 2016 amendments.⁸ Further, information the public wants and needs on a routine basis is often not published online so as to be readily accessible. Finally, at the end of the FOIA process, if requesters are dissatisfied, judicial review frequently is out of reach or fails to produce an adequate remedy.

At this current moment of massive transformations inside of government, it is more important than ever that the public understand what decisions are being made about how government operates, how those decisions are justified, and what effects those decisions will have on their lives and the lives of those in their communities. As such, Congress should consider improvements to the law that will reinforce FOIA's strengths and ensure it remains a tool of democratic participation and accountability.

II. Improving Affirmative Disclosure

Historically, FOIA's affirmative disclosure provisions, sometimes known as reading room provisions, have been relatively narrow. Originally these provisions required the affirmative availability of certain records documenting agency working law and general statements of policy.⁹ Expanding the reach of affirmative disclosure requirements is one area in which FOIA could be greatly strengthened to the benefit of the public.

a. Additional Records Categories

Over time, public demand has revealed additional categories of records that are routinely requested across federal agencies and which, as a result, Congress should consider adding to FOIA's affirmative disclosure requirements. In two different advisory bodies made up of government and non-government members, I have participated in drafting recommendations for additions to FOIA's affirmative disclosure requirements that would list additional categories of records. In 2018, the FOIA Advisory Committee adopted recommendations to affirmatively disclose materials related to Federal Advisory Committee Act (FACA) committees, unclassified reports to Congress, agency organizational charts and directories, proposed records schedules, documents related to lobbying activities, the calendars of top officials, high value contracts, and declassified material,

⁷ See DEPARTMENT OF JUSTICE, SUMMARY OF ANNUAL FOIA REPORTS FOR FISCAL YEAR 2023 (detailing the breakdown of response times).

⁸ See generally Katie Townsend & Adam A. Marshall, *Striking the Right Balance*, in TROUBLING TRANSPARENCY: THE HISTORY AND FUTURE OF FREEDOM OF INFORMATION 117 (David E. Pozen & Michael Schudson eds. 2018).

⁹ See Michael Herz, *Law Lags Behind: FOIA and Affirmative Disclosure of Information*, 7 CARDOZO PUBLIC LAW, POLICY, AND ETHICS JOURNAL 577, 586 (2009) (describing the disclosure requirements as covering only agency law).

among others.¹⁰ In 2023, the Administrative Conference of the United States adopted recommendations for additional categories of records that should be added to the affirmative disclosure provisions of FOIA, including additional records documenting agencies' individual adjudication decisions, agency settlements, and memoranda of understanding, among others.¹¹

These efforts only augment the many calls from civil society to make more robust the affirmative provisions of FOIA. The benefits are plain. The categories of records targeted for inclusion are those about which the public has displayed great interest and which provide particularly important information about government operations that enables greater accountability and public participation. Congress should consider additional categories from these recommendations for inclusion in the affirmative disclosure provisions to increase easy access to some of the most important government records and to reduce the burden on agencies to respond to these frequent requests one at a time.

b. Additional Requirements for Agency-Specific Affirmative Disclosure

Beyond adding categories of records subject to affirmative disclosure across all government agencies, Congress should consider provisions that require agencies to identify the records that are most frequently requested at that agency specifically and to affirmatively disclose those categories of records, where feasible.

In the 1996 E-FOIA amendments, Congress first attempted to expand the reach of affirmative disclosure by adding what is known as the “frequently requested records” provision, which required agencies to disclose records that were or were likely to become the subject of multiple FOIA requests.¹² Still, the provision was vague and, in the 2016 amendments, Congress clarified that the requirement attached to any record that had been or was likely to be requested three or more times.¹³ This provision is the first affirmative disclosure provision specifically aimed at reducing the need for one-at-a-time FOIA requests to improve both efficiency and transparency.

While this provision has been an important advancement in FOIA, it has not gone far enough. Over nearly a decade, I undertook the most comprehensive study to date of FOIA requests and FOIA requesters, collecting data from some sixty federal agencies to which more than three-

¹⁰ FREEDOM OF INFORMATION ACT FEDERAL ADVISORY COMMITTEE, FINAL REPORT AND RECOMMENDATIONS, 2016-2018 TERM, available at <https://www.archives.gov/files/final-report-and-recommendations-of-2016-2018-foia-advisory-committee.pdf>

¹¹ Administrative Conference of the United States, *Administrative Conference Recommendation 2023-1, Proactive Disclosure of Agency Legal Materials* (Adopted June 15, 2023), available at <https://www.acus.gov/sites/default/files/documents/2023-1%20Proactive%20Disclosure%20of%20Agency%20Legal%20Materials.pdf>

¹² Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, 110 Stat. 3048, 3048-49, 3053 (1996).

¹³ FOIA Improvement Act of 2016, Pub. L. No. 114-185, § 2, 130 Stat. 538 (2016).

quarters of requests are submitted annually.¹⁴ What I found revealed significant opportunities for additional affirmative disclosure policies to address frequent information needs without requiring individuals to submit FOIA requests and agencies to process those requests one at a time.

For example, at many agencies, a majority or sometimes even supermajority of requests are submitted by commercial requesters, or businesses who are using information obtained under FOIA as part of their profit-making enterprise. Businesses have a range of reasons for turning to FOIA, including conducting due diligence before business deals, learning about competitors, feeding consulting or advising ventures, and learning about the regulatory process. Commercial requesters particularly dominate FOIA offices at large regulatory agencies, such as the SEC, EPA, and FDA, as well as agencies that oversee vast swaths of government contracting, such as the Defense Logistics Agency.

There is nothing wrong with this use of FOIA and indeed it may produce many public benefits that stem from increased commercial competition. What is most striking about the requests that come from commercial requesters, though, is that they tend to seek the same type of document by the hundreds, or sometimes thousands. While each individual requested document is different, the category of record is the same; examples include FDA facilities inspection reports, defense contract bids and bid abstracts, and records of environmental hazards on commercial properties. Knowing that individual records in these categories are routinely requested, one at a time, sometimes thousands of times a year, reveals opportunities for agencies to affirmatively publish the whole category of these records, obviating the need for individual requests and request processing. The result would be immediate and complete access for the public to these important government documents.

Yet, the records that are most frequently requested vary widely by agency. For this reason, Congress should require agencies to publish standardized versions of their FOIA logs so that the public can see what records are most often requested. Moreover, agencies should have to identify the top categories of most frequently requested records in their annual FOIA reports and either detail how those records will be made affirmatively available going forward or justify why affirmative publication is not feasible.¹⁵

Measures such as these have the potential to radically reduce the number of requests that the public must make to access government information by ensuring that those categories the public most wants are readily available. Because the kinds of records vary agency by agency, however, this

¹⁴ The full results of this study can be found in my book published by Cambridge University Press. See MARGARET B. KWOKA, *SAVING THE FREEDOM OF INFORMATION ACT* (2021).

¹⁵ I have called for these measures previously. See Statement of Margaret B. Kwoka, Before the United States Senate Committee on the Judiciary, Hearing on “FOIA at Fifty: Has the Sunshine Law’s Promise Been Fulfilled?” (July 12, 2016), available at <https://www.judiciary.senate.gov/imo/media/doc/07-12-16%20Kwoka%20Testimony.pdf>

incentive structure will allow agencies to customize their affirmative disclosure programs to meet the needs of their requester populations.

c. Addressing First-Person Requesting

A final set of measures Congress should consider would address another category of frequent requesters, first-person requesters. These requesters are individuals or their representatives who are seeking records about themselves, whether it is their own medical records, their own case files, their own genealogy information, their own immigration records, or their own personnel files.

In many of these instances, alternative ways to provide access to first-person materials may better serve the individuals and be more efficient for the agency. For example, in some instances members of the public are requesting government records only to turn around and submit those same records back to the government in conjunction with an application for benefits. Agencies could be incentivized to create back-end processes for retrieving those records that would eliminate the need for the request, as well as potentially shorten the wait and lower the burden for the benefits applicant. In other instances, portal access would make retrieving one's own file much easier; for example, electronic medical records are now the industry standard across the private sector and are growing among agencies as well. And finally, for some agency proceedings, allowing the private party dealing with the agency to use discovery in the proceeding itself to retrieve their own file would consolidate what is now two (or more) processes into one. None of these strategies is "affirmative disclosure" in the traditional sense of publication for the world to see, nor should it be given the nature of the files as implicating personal privacy concerns. But all of these methods are more "affirmative" ways to ensure people have automatic access to their files, rather than having to submit a request and wait for the lengthy FOIA process to unfold.

Some agencies have explored alternatives to FOIA for first-person information needs. For example, the VA has developed some portal access to medical records, the IRS has a separate process to allow people fast-track access to their tax records, and CBP has an online portal for border entry and exit data that individuals can immediately access. Another strategy highlighted in a recent DHS report was to design files to be "FOIA ready," that is, to have any exempt information maintained separately or in an automatically segregable location.¹⁶ Such front-end design measures would vastly increase the feasibility of automatic portal access to individual records because it would eliminate the need for individual review of each record.

My own research has called for consideration of first-person requesting and the various ways those information needs could be addressed outside of the FOIA process,¹⁷ and the FOIA Advisory

¹⁶ DEPARTMENT OF HOMELAND SECURITY, FINAL DHS FIRST-PARTY FOIA FEASIBILITY ASSESSMENT (April 25, 2024).

¹⁷ See Margaret B. Kwoka, *First-Person FOIA*, 127 YALE L.J. 2204 (2018).

Committee has studied the issue and concluded the same.¹⁸ Congress should consider incentivizing and resourcing agencies to develop alternative delivery mechanisms for first-person requesting in instances where such processes would be more effective for the requester and efficient for the agency.

III. Strengthening FOIA Enforcement

When a requester is dissatisfied with an agency’s response to their request, whether that is because of delay, withholding, or other matter, the requester’s basic remedies are to file an administrative appeal within the agency or to go to federal court. Yet only a vanishingly small number of requesters avail themselves of these remedies. Around two percent of decisions under FOIA are administratively appealed, and only about 0.1 percent of decisions are challenged in court.¹⁹ These numbers are so small in large part because litigation is expensive, time consuming, and requires expertise. It is not a remedy easily accessible by ordinary citizens. Worse, as to agency failures under FOIA’s affirmative provision, there remains ambiguity as to whether the courts have the power to order agency compliance. Congress could improve enforcement of FOIA to make judicial remedies clearly available and increase opportunities for alternatives to litigation that are more easily accessible to the public and more efficient for government.

a. Judicial Review

FOIA’s judicial review provision specifies that a district court has jurisdiction “to enjoin the agency from withholding agency records and to order production of any agency records improperly withheld from the complainant.”²⁰ In a 2017 decision, the D.C. Circuit held that this provision does not empower a district court to order compliance with the affirmative obligations of FOIA listed in subsections (a)(1) (which requires publication of certain records in the Federal Register) and (a)(2) (which requires publication of certain records online in “reading rooms”), only to order production of records to the individual plaintiff.²¹ Subsequently, the Ninth Circuit and Second Circuit disagreed, holding that district courts can order agencies to publish records required to be made affirmatively available under FOIA.²² This ongoing circuit split has created uncertainty in the enforceability of FOIA’s affirmative disclosure obligations.

¹⁸ FEDERAL FOIA ADVISORY COMMITTEE, RECOMMENDATION NO. 2022-13, FINAL REPORT AND RECOMMENDATIONS 2020-2022 TERM, *available at* <https://www.archives.gov/files/ogis/assets/foiaac-final-report-and-recs-2022-07-05.pdf#page=24>

¹⁹ Margaret B. Kwoka, *An Information Commission*, 112 GEORGETOWN L.J. 841, 866 (2024).

²⁰ 5 U.S.C. § 552(a)(4)(B).

²¹ *Citizens for Resp. & Ethics in Washington v. United States Dep’t of Just.*, 846 F.3d 1235 (D.C. Cir. 2017).

²² *New York Legal Assistance Grp. v. Bd. of Immigr. Appeals*, 987 F.3d 207 (2d Cir. 2021); *Animal Legal Def. Fund v. United States Dep’t of Agric.*, 935 F.3d 858 (9th Cir. 2019).

If district courts cannot enforce the affirmative disclosure obligations under FOIA, those obligations become essentially advisory. Especially given that affirmative disclosure has the potential to vastly improve FOIA administration, it is critical that affirmative disclosure obligations be meaningful and agency compliance remain accountable. The Administrative Conference of the United States has made a similar recommendation,²³ as have civil society groups²⁴ and academics.²⁵ Congress should amend the law to clarify that the district courts enjoy all the remedial powers to enforce FOIA, including the power to order an agency to publish records required to be made affirmatively available under FOIA.

b. Office of Government Information Services

In 2007 Congress constituted the Office of Government Information Services with an eye toward providing, among other things, alternative remedial options for dissatisfied requesters apart from litigation.²⁶ Over the years, OGIS has helped thousands of requesters a year through their dedicated staff, expertise, and outreach. Yet, many have called for OGIS to be strengthened by granting it additional authority and budgetary resources. For example, in 2022, the FOIA Advisory Committee adopted a series of recommendations that were designed to strengthen OGIS.²⁷ These recommendations would give OGIS the power to issue binding determinations and to view requested documents *in camera*, as well as to increase OGIS's dedicated funding. While Congress did, in the 2016 amendments, add to OGIS's authority, OGIS is still unable to fully realize its potential.

Congress should continue to seek ways to increase the resources for OGIS to resolve disputes between requesters and agencies, to compel agencies to engage in the OGIS mediation process in good faith, and to bring to bear the expertise of the OGIS staff in matters of FOIA administration to improve agency processing government-wide.²⁸ Alternatives to judicial review are critical to ensuring that the public has meaningful recourse when faced with an agency's potential violation of its transparency obligations.

²³ ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, RECOMMENDATION 2023-1(7).

²⁴ OPEN THE GOVERNMENT, ACCOUNTABILITY 2021: RECOMMENDATIONS FOR RESTORING ACCOUNTABILITY IN THE FEDERAL GOVERNMENT (2021).

²⁵ Delcianna Winders, *Fulfilling the Promise of EFOIA's Affirmative Disclosure Mandate*, 95 DENVER L. REV. 909 (2018).

²⁶ Openness Promotes Effectiveness in Our National Government Act of 2007 (OPEN Government Act of 2007), Pub. L. No. 110-175, § 10(a), 121 Stat. 2524, 2529 (2007).

²⁷ FREEDOM OF INFORMATION ACT FEDERAL ADVISORY COMMITTEE, 2020-2022 COMMITTEE TERM FINAL REPORT AND RECOMMENDATIONS, available at <https://www.archives.gov/files/ogis/documents/final-report-and-recommendations-of-the-2020-2022-foia-advisory-committee-5-july-2022.pdf>

²⁸ I have written in greater detail how OGIS lacks some of the power of oversight bodies in other systems that see greater results. See Michael Karanicolas & Margaret B., Kwoka, *Overseeing Oversight*, 54 CONN. LAW REVIEW 655 (2022).

IV. Foreseeable Harm Standard and Public Interest Balancing

FOIA was always designed to balance the public's right to know against the legitimate needs for government secrecy that are embodied in the nine enumerated exemptions to disclosure. The exemptions, however, were meant to be permissive, not mandatory, allowing agencies to disclose records when the public interest so dictates. Yet, the problem of over-withholding persists, with nearly three quarters of all requests being denied in part or in full in recent years.

In the FOIA Improvement Act of 2016, Congress enacted a foreseeable harm requirement to curb unnecessary secrecy by requiring agencies to determine if release would in fact harm an interest meant to be protected by the relevant exemption. Without doubt, adding the foreseeable harm standard was a meaningful improvement to FOIA. It requires agencies to articulate precisely why information should not be released.

Yet, in practice, this analysis has proven incomplete. What is missing is weighing any potential harm that is articulated against the public interest in disclosure. Most exemptions do not require consideration of the public interest, and if information falls within an exemption and an agency can articulate a foreseeable harm, the agency need not consider the magnitude of the public's interest in, for example, public health or safety or democratic accountability. Notably, agencies and courts are perfectly capable of applying such a test because they already perform it under the privacy exemptions, Exemptions 6 and 7(C), which require agencies to balance an individual's privacy interest against the public interest in disclosure. Moreover, a public interest balancing test would not affect the application of any statute prohibiting disclosure in particular circumstances, as those statutes are mandatory in nature.

Congress should amend FOIA to include a public interest balancing test to allow agency FOIA offices to fulfill their mission to release maximum information in service of the public interest and likewise give courts the ability to enforce FOIA to its maximum potential benefit.

V. Technological Advancement

Investments in technology have the potential to greatly enhance FOIA administration. Most technological developments require significant up-front investment but promise to pay dividends in efficiency moving forward. Moreover, these technologies can improve the experience for requesters, reduce administrative burdens on the public associated with transparency, and assist in realizing the goal of a more efficient, accountable government.

One area Congress should consider is to fund the development of a universal FOIA portal for requesters to make requests through a single system across the government. Such a portal would also allow integrated tracking and communication with the requester, including providing agency

responses, releasing records, and submitting appeals. Currently, FOIA is decentralized and agencies can design their own submissions and response processes. Ultimately, decentralization places more burdens on the public to engage with many different systems and fails to capitalize on efficiencies that could be gained from using a single portal across the federal government. A single portal would also, ideally, house a document repository for all records affirmatively disclosed pursuant to FOIA's provisions, enabling one-stop shopping for members of the public who are seeking government information.

In addition to producing government efficiencies and improving the requester experience, a single FOIA portal would enable better monitoring of agency performance, more standardized reporting, implementation of a release-to-one-release-to-all policy,²⁹ standardized FOIA log publication, and more. In short, having a single portal and the concomitant structured data it would hold would allow, for example, the Office of Information Policy or the Office of Government Information Services to more quickly identify performance gaps in agency FOIA programs and analyze how they might be solved.³⁰

Another area ripe for government innovation is in the use of artificial intelligence to improve the functioning of FOIA. The sheer volume of records the federal government now holds electronically was unimaginable at FOIA's enactment. Real challenges with records search and review stem from questions of volume. It will be imperative going forward to bring the best technological tools to bear on solving FOIA delay and backlog.

Academics,³¹ the FOIA Advisory Committee,³² and the senior government officials³³ have all acknowledged the potential for artificial intelligence to improve FOIA processing. One area ripe for AI use is to improve the search for electronic records, a use that some agencies have already begun testing.³⁴ Critical to any use of AI, however, is transparency around the use of AI itself. Agencies should disclose the AI tools they use, document how those tools are trained and

²⁹ Department of Justice, *Request for Public Comment on Draft "Release to One, Release to All" Presumption*, <https://www.justice.gov/oip/blog/request-public-comment-draft-release-one-release-all-presumption>

³⁰ I have written about the benefits of a single portal that I observed when I studied Mexico's transparency system. See Margaret B. Kwoka, *Transparency Guardians*, -- GEORGE WASHINGTON INTERN'L L. REV. -- (forthcoming 2024), available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4969852

³¹ Jason Baron, *The Case For Applying AI to FOIA Processing: How Does Access To Government Records Work When An Agency Holds Hundreds of Millions of Emails?*, Americans for Prosperity 2023 Sunshine Week Essay Series (Mar. 15, 2023), <https://americansforprosperity.org/blog/applying-ai-to-foia/>.

³² FREEDOM OF INFORMATION ACT FEDERAL ADVISORY COMMITTEE, 2018-2020 COMMITTEE TERM FINAL REPORT AND RECOMMENDATIONS (July 9, 2020), available at <https://www.archives.gov/files/ogis/assets/foiaac-final-report-and-reccs-2020-07-09.pdf>

³³ Department of Justice, *Chief FOIA Officers Council Meeting Showcases the Use of Advanced Technologies in FOIA* (Dec. 14, 2023), <https://www.justice.gov/oip/blog/chief-foia-officers-council-meeting-showcases-use-advanced-technologies-foia>

³⁴ Lewis Kamb, *Some U.S. government agencies are testing out AI to help fulfill public records requests*, NBC News (Aug. 1, 2023), <https://www.nbcnews.com/news/us-news/federal-agencies-testing-ai-foia-concerns-rcna97313>

implemented, and explain to the requester why this method is “reasonably calculated to uncover all relevant documents” as it is required to do under the law.³⁵

Eventually, AI may also assist FOIA officers by suggesting redactions for human review. The State Department has piloted an AI tool to assist in declassification, with the agency reporting that for the pilot group “of more than 78,000 cables, the model performed the same as human reviewers 97% to 99% of the time and reduced staff hours by at least 60%.”³⁶ Investing in technologies that can produce this kind of efficiency will be critical to agency performance improvements going forward.

Some commercial products on the market are making claims in this regard.³⁷ Still, as agencies experiment with these new technologies, they ensure that the tools are not simply trained on a body of responses the agency has already produced, since over-redaction and unlawful denial of access to information remains routine. As a result, careful design and full disclosure to the public about that process will be critical to ensuring success, especially in implementing newer requirements such as the foreseeable harm standard to ensure maximum disclosure.

VI. Emerging Issues

The issues addressed in the previous section are longstanding issues. But I would be remiss if I did not flag for this committee that there are new challenges to FOIA administration that have emerged out of the recent rapidly changing landscape of federal government reorganization. Many of these matters are so new that it is impossible to evaluate them fully. Still, this collection of concerns suggests that now is the time to strengthen FOIA fundamentals in the ways aforementioned. A robust protection of transparency under the law is necessary to ensure democratic accountability moving forward in nearly unprecedented government upheaval.

One current concern is the applicability of FOIA to the newly constituted U.S. Department of Government Efficiency (DOGE). While FOIA covers all agencies, defined as “any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President),”³⁸ it excludes the President himself and any unit with a “sole function [] to advise

³⁵ Valencia-Lucena v. United States Coast Guard, FOIA/PA Records Mgmt., 180 F.3d 321, 325 (D.C. Cir. 1999)

³⁶ Scoop News Group, *How the State Department used AI and machine learning to revolutionize records management*, FEDSCOOP (May 16, 2024), <https://fedscoop.com/how-the-state-department-used-ai-and-machine-learning-to-revolutionize-records-management/>

³⁷ MITRE Independent Research & Development, *Freedom of Information Act Assistant*, https://www.mitre.org/sites/default/files/2023-09/PR-23-1605-Freedom-of-Information-Act-Assistant_factsheet.pdf; OPEXUS, FOIAXpress, *FOIA software with full control on a single platform*, <https://www.opexustech.com/product/foiexpress/> (offering “AI-assisted redaction and processing”).

³⁸ 5 U.S.C. § 552(f)(1).

and assist the President.”³⁹ The key question is therefore whether DOGE exercises “substantial authority” independent from the President.⁴⁰ The Administration has contended that FOIA does not apply to DOGE, but rather that the Presidential Records Act governs DOGE’s records.⁴¹

This question is currently the subject of pending litigation. In one case, a district judge has issued a preliminary injunction indicating that DOGE is likely subject to FOIA. That litigation, however, is ongoing, with a pending motion for discovery on the question of DOGE’s authority. There is no reason to think the courts are unable to fully enforce FOIA’s provisions, including as to DOGE, where applicable. Indeed, the development of a factual record in court about DOGE’s activities will likely aid in the public understanding of DOGE’s role.

Beyond the concern about access to DOGE records, there are public reports that federal government staffing reductions have affected, sometimes drastically, agency FOIA offices.⁴² It is too early for a systemic analysis or comprehensive data on the effects of recent changes on FOIA staffing, but reports that nearly all FOIA staff have been eliminated at certain agencies raises serious questions about how agencies will meet FOIA obligations going forward. Resources were already a serious concern in FOIA administration, and further cuts can only increase delays and backlogs. If anything, these emerging issues underscore the importance of bipartisan action to strengthen FOIA fundamentals to address longstanding and well-documented opportunities for improvement.

VII. Conclusion

FOIA remains a cornerstone of our democracy. It has enabled accountability, citizen engagement, and informed decision-making. Regular updates to the law to keep pace with the developments of technology, information delivery mechanisms, and government evolution have ensured FOIA stays strong. Today, we are again at a crossroads where congressional intervention could protect the public’s right to information into the next generation. I thank this Committee for your commitment to access to information and for the opportunity to testify today. I look forward to your questions.

³⁹ Kissinger v. Repts. Comm., 445 U.S. 136, 156 (1980).

⁴⁰ Citizens for Responsibility and Ethics in Washington v. Office of Admin., 566 F.3d 219, 222 (D.C. Cir. 2009).

⁴¹ Kathryn Watson, *Watchdog group sues for DOGE records, arguing they should be made available to public*, CBS NEWS (updated on Feb. 21, 2025), <https://www.cbsnews.com/news/watchdog-group-sues-for-doge-records/>

⁴² Zachary Cohen, Alayna Treene & Hadas Gold, ‘*Good luck with that.*’ *Trump administration terminates privacy officials at agency overseeing government hiring and firing*, CNN News (Feb. 18, 2025), https://www.cnn.com/2025/02/18/politics/opm-privacy-team-fired/index.html?cid=ios_app; Rachel Cohrs Zhang, *RFK Jr. Pushes Out Top Officials in Health Agency Overhaul*, Bloomberg (April 1, 2025), <https://www.bloomberg.com/news/articles/2025-04-01/us-health-agency-mass-firings-begin-as-kennedy-orders-10-000-cut?accessToken=eyJhbGciOiJIUzI1NiIsInR5cCI6IkpXVCJ9.eyJzY2YyY2U0IjoiJTdWJzY3JpYmVYR2lmdGVkQXJlOaWNsZSIsImhhdCI6MTc0MzUyOTc3NiwiZXhwIjojNzQ0MTM0NTc2LCJhcnRpY2xlSWQiOiJTVTAwOVBUmEFGQjUwMCI6ImJb25uZWN0SWQiOiIyQjE3NzFFOTIEODc0QzRDOTY1Njg1RTZBQkJGM0QwRCJ9.AXvTB4M8caK54SZOrD1ID4TjodxFwITdvl00A9iHITY&leadSource=uverify%20wall>