

**“Open Government and Freedom of Information:
Reinvigorating the Freedom of Information Act for the Digital Age”
Questions for the Record Submitted by
Ranking Member Charles E. Grassley**

Questions for Mr. Metcalfe

1. In your written testimony you discussed Attorney General Holder’s memorandum setting forth the “foreseeable harm” standard for withholding information. Based on your experience can you discuss:
 - a. The Department of Justice’s implementation, or lack thereof, of the foreseeable harm standard in avoiding litigation?

ANSWER: I certainly can discuss that, but first there is the fact that the implementation of the foreseeable harm standard only begins with using it to minimize litigation; more comprehensively, it is a matter of applying it to the breadth of FOIA decisionmaking at the administrative level. As for cases in litigation, my written testimony (at 2-3 & nn.5-6) documents the basis for concluding that the Department of Justice’s implementation of the foreseeable harm standard has been woefully deficient from the start. And it is quite telling that in the face of this acute criticism the Department of Justice just chose simply to ignore it publicly. Indeed, the Department issued two “Successes in FOIA Administration” blog communications in the wake of the Committee’s March 11 hearing, on March 20 (<http://blogs.justice.gov/oip/archives/1390>) and then on April 4 (<http://blogs.justice.gov/oip/archives/1396>), but amazingly neither one of them even mentions the foreseeable harm standard, let alone provides any current guidance on its implementation. Unfortunately, this is entirely characteristic of what has been the Department’s approach to the issuance of FOIA guidance in recent years. Anyone taking a hard look at the page of its FOIA Web site (entitled “OIP Guidance”) that contains its guidance issuances since 2007 (<http://www.justice.gov/oip/oip-guidance.html>) will find scant guidance on substantive policy issues and enormous amounts of procedural guidance on the preparation of various agency FOIA reports instead. With this, the key concept of the foreseeable harm standard -- which is the very thing that can make a big difference “down in the trenches” of FOIA decisionmaking at the administrative level -- is terribly ill-served.

Indeed, as for implementation of the foreseeable harm standard at the administrative level, the only guidance that the Department has issued was issued nearly five years ago (<http://www.justice.gov/oip/foiapost/2009foiapost8.htm>) and has not been updated since. Nor has it been reinforced with specific reference to the standard and its practical applications. What is more, the venerable “Justice Department Guide to the FOIA,” which contains a section devoted to discretionary disclosure under that standard (<http://www.justice.gov/oip/foia-guide.html>), has not seen that section updated since August of 2009. That alone speaks volumes about the emphasis that the Department has placed on the foreseeable harm standard, which is to say absolutely no emphasis at all. This is nothing less than a gross deficiency of FOIA policy implementation by any reasonable standard and it is even further exacerbated by the fact that OIP foolishly persists (even as recently as in the post-hearing March 20 blog cited above) in using the amorphous phrase “presumption of openness” instead.

- b. How did you encourage application of the foreseeable harm standard during your time as head of OIP and what lessons can be learned from that?

ANSWER: We did so in many ways. First, we announced the establishment of that new standard (http://www.justice.gov/oip/foia_updates/Vol_XIV_3/page1.htm) together with an immediate example of its use (http://www.justice.gov/oip/foia_updates/Vol_XIV_3/page12.htm) in an area that all agencies could readily recognize as a particularly “heavy-duty” one, Exemption 7(D). Then, as detailed in my written testimony (at 2 n.4) we applied it with a vengeance (so to speak) in the most extreme litigation case imaginable -- on in which the Justice Department’s invocation of an exemption had already been upheld in court, at the appellate level (see case description at http://www.justice.gov/oip/foia_updates/Vol_XV_2/page1.htm). Then we issued guidance specifically entitled “Applying the ‘Foreseeable Harm’ Standard Under Exemption 5” (http://www.justice.gov/oip/foia_updates/Vol_XV_2/page3.htm), added a new subsection on the foreseeable harm standard to the “Justice Department Guide to the FOIA,” elaborated further in a separate “Guide” section devoted to discretionary disclosure, and followed this up during the remainder of the Clinton Administration with explicit reference to “foreseeable harm” as the touchstone of FOIA decisionmaking at every turn. And even though the standard adopted by Attorney General Holder is the exact same standard used by federal agencies for all that time only eight years previously, one will look in vain for even the slightest useful acknowledgement of that or even the barest trace of all of this existing policy implementation guidance anywhere in what the Department has said or done in this Administration.

2. I’m concerned with this “do as I say, not as I do” behavior coming from the Department of Justice, with respect to FOIA. I fear it sends the wrong message to other agencies when the Department charged with encouraging and monitoring FOIA compliance behaves in this manner.

- a. In your experience, what effect does the Department of Justice’s action have on other agencies when it comes to FOIA compliance?

ANSWER: In my experience -- providing FOIA policy guidance and implementation leadership throughout the executive branch for more than 25 years -- the Department of Justice’s actions can and should have an enormous effect on proper agency compliance with the FOIA. Indeed, that was precisely the objective of everything that we did of a governmentwide nature at the Office of Information and Privacy (OIP). The statutory basis for the Justice Department’s governmentwide policy jurisdiction under the FOIA is subsection (e) of the Act, which (in contrast to the more explicit comparable authority given to the Office of Management and Budget for Privacy Act guidance under subsection (v) of that Act) calls upon the Department to report its “efforts . . . to encourage agency compliance with” the FOIA. 5 U.S.C. § 552(e)(5), as amended. From the mid-1970s through early 2007 (the time period of which I can speak from first-hand experience), the Justice Department took great pains to develop and disseminate an enormous amount of guidance -- *substantive* policy guidance -- as the touchstone of all agency FOIA decisionmaking. And when it came time to implement Congress’s intent in amending the Act -- in 1974, 1986, 1996, and 2002 -- the Department through OIP told agencies what they needed to know to achieve faithful implementation throughout the executive branch. This established a

firm pattern in which all agencies simply looked to OIP for the full range of implementation steps required -- and I can say without fear of contradiction that they were not once disappointed. Put most simply, what FOIA requesters experienced at federal agencies across the executive branch was the product of OIP's strong, high-quality efforts -- on substantive as well as procedural issues -- more than anything else. This contrasts greatly with what has been the case in recent years. (See Answer to Question 1.a. immediately above.)

- b. What does Congress need to do, if anything, to address this problem and ensure that actions match rhetoric?

ANSWER: In my judgment, Congress can do several things to address the current problem. First, it can resolve to hold regular FOIA oversight hearings, in each body, at which sufficient time and sustained attention can be devoted to a close examination of: (a) what the Justice Department has not done and should now be doing in order to provide solid, substantive guidance to the 99 other federal agencies on FOIA administration; (b) exactly what the Justice Department has not done and should now be doing to implement both current policy standards and the provisions of all amendments of the Act, as a model for other agencies; and (c) the best and worst practices of other federal agencies in their current FOIA activities. In other words, each federal agency -- especially the Department of Justice -- should know that it will be accountable to congressional oversight in both bodies of Congress each year (if not even more frequently, as the need arises), without any doubt. (And there now would be a particular advantage in doing so at this point in that OIG is very well positioned to advise Committee staff toward that end.)

Second, as it has done in the past (though not recently), Congress should employ Government Accountability Office reviews as an accompaniment to its oversight hearings, either immediately beforehand or immediate afterward, or both. During the closing months of the Clinton Administration in 2000, the House subcommittee with jurisdiction over FOIA matters held a potent oversight hearing that led to a series of highly useful GAO studies over the course of the next several years. OIP closely collaborated with GAO in these FOIA-administration reviews, even to the point of using the issuance of successive GAO reports as the basis for government-wide FOIA Officers Conferences held by OIP to emphasize "lessons learned" toward improved governmentwide administration of the Act. This began with the subject of further "E-FOIA implementation" (<http://www.justice.gov/archive/oip/foiapost/2001foiapost2.htm>), which was addressed pointedly and comprehensively by OIP (in very close coordination with GAO) in March 2001 (<http://www.justice.gov/archive/oip/foiapost/2001foiapost3.htm>). After the success of this first GAO/OIP collaboration, Congress promptly commissioned a follow-up GAO study (<http://www.justice.gov/archive/oip/foiapost/2002foiapost9.htm>) that led to a follow-up FOIA Officers Conference (<http://www.justice.gov/archive/oip/foiapost/2002foiapost21.htm>) that in turn served to "roll out" (and strongly reinforce) the results of GAO's supplemental study in 2002 (<http://www.justice.gov/archive/oip/foiapost/2002foiapost23.htm>). Thus was born, in the trans-administration years of 2000-2001, a uniquely effective collaboration between Congress (though GAO) and the executive branch (through OIP) on improving governmentwide FOIA implementation (<http://www.justice.gov/archive/oip/foiapost/2002foiapost31.htm>).

This led to Congress's use of GAO reviews for purposes of its further FOIA oversight hearings in 2005 (<http://www.justice.gov/archive/oip/foiapost/2005foiapost12.htm>) and in 2006 (http://www.justice.gov/archive/oip/metcalfe_foia_testimony07252006.pdf), as well as to the comprehensive implementation of a governmentwide executive order (Exec. Order No. 13,392) on the subjects of FOIA backlog reduction in particular and a wide range of FOIA administration improvements more generally (<http://www.justice.gov/archive/oip/foiapost/2006foiapost6.htm>). Having been the principal executive branch official responsible for coordinating these activities, I can strongly commend them to this Committee's attention, based upon first-hand knowledge of their effectiveness. Bluntly put, this approach proved to be far superior to the intermittent congressional oversight attention and the inexplicably deficient executive branch responsiveness to Congress, inter alia, that sadly has been the norm in recent years.

Third, Congress should not so lightly accept any executive branch rhetoric on claimed accomplishments in implementing the provisions of the 2007 FOIA Amendments or the lofty policy goals of the current Administration. I know first-hand the difference between rhetoric and reality in this particular regard, and frankly I have been surprised to see a variety of Justice Department claims -- ranging from the blithe to the flatly inaccurate to the seemingly deceptive -- so readily accepted without the degree of skepticism and sustained scrutiny that they deserve. Indeed, my academic center has now conducted a series of four progressive annual program assessments of "Obama Administration Transparency" (see program agendas and Webcasts available at this link: <http://www.wcl.american.edu/lawandgov/cgs/about.cfm#obamatransp>) that together stand as strong testament to this. And CGS's most recent program, conducted in the immediate wake of this Committee's abbreviated oversight hearing, addresses this as well (<http://media.wcl.american.edu/Mediasite/Play/6bc996c7-d6dd-4399-9f78-7decc8603acb>).

Frankly, there simply is no substitute for sustained, uninterrupted questioning of the Justice Department's positions on FOIA issues. Had that occurred at the March 11 hearing, for example, the Committee might have learned that, contrary to what its Chairman was defensively told, the attorney work-product privilege is indeed an appropriate area for discretionary disclosure in implementation of the foreseeable harm standard; in fact, it actually is the second-biggest area for that (http://www.justice.gov/oip/foia_updates/Vol_XV_2/page3.htm). And the Department's transparently self-serving notion that updated regulations are not required by any provision of the 2007 FOIA Amendments likewise would not withstand close scrutiny. See "Sunshine Not So Bright: FOIA Implementation Lags Behind," 34 Admin. & Reg. L. News 5, 6 (Summer 2009), available at <http://www.wcl.american.edu/faculty/metcalfe/sunshinenotsobright.pdf>.

3. As your testimony pointed out, it's been three years since the Supreme Court's decision in *Milner v. Department of the Navy*. You note that many agencies are in a quandary over how to handle sensitive information that in the past would have been withheld under Exemption 2. We've been told, from Director Pustay, that this is a critical issue for Congress to address. In your view, has the government simply decided that the *Milner* decision is not a problem that requires action? Do you also believe that failure to address this decision threatens or impacts national security?

ANSWER: No, I do not believe that the government has simply decided that *Milner* is not a problem that requires action. Such a decision would be antithetical to the formal (i.e., OMB-

cleared) position explicitly taken by the Department before this Committee in March 2012, and it would be an irrational one given that *Milner* unquestionably leaves a swath of sensitive information (e.g., computer security vulnerability assessments prepared under the Computer Security Act of 1988) utterly unprotected in the face of a targeted FOIA request. Rather, the only conclusion that can be drawn from outside the Department (i.e., without betraying any inside knowledge) is that, for one reason or another, the Department (in concert with OMB) just “has not gotten around to” completing and submitting a formal legislative proposal on *Milner*. While it of course is easy to say this from “outside” of OIP, I must reiterate that this is truly unfathomable. I began working on FOIA-amendment legislation in 1979 during the Carter Administration and (except for the “midnight” House activity on the 2002 FOIA Amendment) was the principal executive branch point person on every amendment proposal from then until my retirement nearly 28 years later, and I know that during that time the Department never would have allowed *Milner* to be unaddressed by a legislative proposal for more than a matter of days or weeks at most. In fact, when the Supreme Court granted certiorari in the case on June 28, 2010, several former government colleagues and I (not anyone in OIP) discussed the need for anticipatory preparation of what then would have been denominated the “FOIA Amendments of 2011.” And now it is more than three years later.

As to the impact of this failure, I have to delineate carefully between matters of “national security” and those of “homeland security.” As to the former, the protection afforded by FOIA Exemption 1 should be entirely unaffected by the Supreme Court’s *Milner* decision. The only impact that *Milner* can have within this realm (as mentioned in my written testimony) is the post-*Milner* tendency to classify something in desperation in order to protect it in the absence of the protections that had been provided by Exemption 2. Such “overclassification,” of course, is a poor result.

But in what since 9/11 has become known as the “homeland security” realm, the answer is very different. Truth be known, OIP after 9/11 specifically encouraged all federal agencies to view much FOIA-requested information through a new “post-9/11 lens,” by which they might reach a new judgment to withhold some types of information (the blueprints and schematics for federal buildings, for example) on the basis of Exemption 2’s “anti-circumvention” aspect, commonly known as “High 2.” This not only included information that could reasonably be expected to aid terrorist actions against both federal facilities and items of private-sector “critical infrastructure,” it also encompassed information that could be used to target such facilities for terrorist attacks. The current unavailability of “High 2” for such needed protection is, to put it simply, a very bad thing.

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