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**“Ensuring Transparency and Accountability in the Digital
Age”**

On behalf of the Sunshine In Government Initiative

Senate Judiciary Committee

March 15, 2011

Chairman Leahy, Ranking Member Grassley and the members of the Senate Judiciary Committee, I would like to thank you for the invitation to discuss recent developments in the administration of the Freedom of Information Act and the need to improve it in the digital age. I appreciate your longstanding commitment to accountability and open records.

After nearly 20 years as a reporter and editor, much of that time working in investigative teams at The Washington Post, I joined Duke University's Sanford School of Public Policy in 2009. I also serve on the board of directors of Investigative Reporters and Editors, a 4,500-member educational association that works to improve public affairs reporting, partly through training in the use of FOIA and state public records laws. I am speaking today on behalf of the Sunshine in Government Initiative, a coalition of media associations promoting open government.

In my own career, obtaining records using the Freedom of Information Act was critical to stories ranging from the quality of drinking water in Washington, D.C. to the use of federal homeland security grants. More recently, the law has been used by journalists reporting on possible Medicare fraud, sex discrimination in the Texas National Guard and human trafficking.

These stories and many others could not have been done without access to records locked inside technological and physical file cabinets throughout government. But the practice of open government requires constant vigilance and attention, and I appreciate this Committee's continued interest in preserving and improving this important tool.

President Obama's day-one initiative to embrace accountability through open government has resulted in some notable policy changes that are beginning to affect day-to-day practice.

The Labor Department's Open Government plan includes public access to an integrated enforcement database. The Consumer Product Safety Commission has issued final rules for access to a Congressionally mandated database of consumer complaints and Saferproducts.gov was slated to go online last week. Some agencies have intermittently released the desk calendars of senior officials and FOIA request logs. And the disclosure of subcontracts and sub-grants required in the 2006 Federal Funding Accountability and Transparency Act began in October.

President Obama has also initiated important policies to encourage more openness, although we have yet to see those changes fully implemented.

For example, Attorney General Holder loosened the guidelines for releasing internal documents and correspondence, requiring agencies to cite significant and specific harm rather than uniformly denying requests under the broad Exemption b(5), which covers information that would be protected from discovery in a civil lawsuit. That policy allowed more public scrutiny of the response to the Deepwater Horizon oil spill last year. Inter- and intra-agency e-mails and reports, even those that are less than flattering, are at least sometimes easier to obtain and contain fewer redactions under the new policy. The policy also gives reporters strong arguments to appeal redactions and denials under the b(5) exemption. The president also recently ordered regulatory agencies to post on their websites

enforcement databases, including identifiers that would help the public compare organizations across agencies.

However, administrations change, and these actions can be reversed as quickly as they began. The policies have so far reached the ground inconsistently and only in selected agencies. In addition, much of President Obama's Open Government Initiative has been geared at consumer data and collaborative government, especially through social media. These initiatives do little to improve the basic job of public affairs journalism to provide insight into the workings of our government. Reporters' requests usually delve into agency administrative records: correspondence, grant applications and audits, contracts, calendars of senior officials, compliance and inspection reports, and rosters of political appointees. They are seeking the artifacts of governing, not the products of well-planned public information efforts. For these records, the FOIA rather than a presidential initiative remains a vital tool.

That tool simply does not appear to work as intended – and hasn't for the generation in which I've been a reporter. The FOIA process remains exceedingly difficult to navigate and is useful only to the most patient and persistent journalists.

Certain problems described to this Committee in the past have not been resolved. Some agencies still redact all personally identifiable information without concern for the public interest in releasing it, not just information that would constitute an unwarranted invasion of privacy. State agencies often interpret privacy protections less broadly than their federal counterparts. After the widely reported death of a prominent state politician, the Federal Bureau of Investigations

invoked the Privacy Act in denying a reporter the files about the person even though the law does not apply to people after death. In addition, the proliferation of b(3) exemptions remains a concern – one that I know this Committee has worked hard to address. That work has surely made them less common than they might have been.

But today I would like to describe four other impediments to the effective use of FOIA among investigative and other public affairs reporters that have not changed in recent years: Delays and response times; fees; access to electronic records; and disclosure of frequently requested records. Each of these issues poses a particular problem in at least some agencies. Each also provides a different lens focusing on the same underlying problem: the widespread default position that records belong to the government, not to the public. The public must convince officials to release records instead of the government convincing the public that portions must be kept secret.

Delays and response times

Some agencies have reported substantial improvement in backlogs over the past two years.

However, my own experience and that of other journalists is not one of faster response to FOIA requests. Admittedly, reporters' requests tend to be difficult. They ask for entire databases or broad document collections that must be extracted from systems that were never designed for public access, even though they hold some publicly available information. The subjects are often, by nature, politically sensitive.

I have *never* received a final response to a FOIA within the required time frame. Some reporters joke about sending birthday cards to their FOIAs, as the response times are measured in years, not days. I spoke with a reporter last week whose request has languished four years during which she held six different beat assignments at two separate employers. Another requested records related to the treatment of soldiers' brain injuries and has not yet received access to documents he won on appeal about a year after the initial request. A third has been trying to agree to fees estimated by an agency, but cannot find anyone to take her call who can look up her case – she starts over each time she calls.

This ability to wait out a FOIA request until it is no longer relevant or the reporter is no longer employed at a shrinking news organization has been, and remains, the biggest power imbalance between agencies and journalists. The Office of Government Information Services has found some success prodding agencies to negotiate and respond, but thus far we have seen little in the way of effective recourse for long delays.

One consistent and growing source of delay has been the requirement to vet potential trade secrets and other confidential information contained in contracts, grant proposals and other federal documents such as airplane certifications. Agencies must send the documents back to the originator and provide an opportunity for them to strike confidential portions. The records are then held hostage to the priorities of the subject of the FOIA, who is permitted to request – and usually receives – b(4) exemptions. Reporters say that agency officials do not adequately challenge claims of harmful disclosures or demand timely response.

A reporter who covered Iraq contracting for three years for the Los Angeles Times told me he has never received a contract through the FOIA process, despite numerous attempts. A non-profit investigative reporting center in Washington has been negotiating for 18 months for grant applications for a Recovery Act program, but has been told it will take up to another year to fulfill his request once this review process begins.

Fees

Copying fees can also become barrier to access. Last year, when the Wall Street Journal and Center for Public Integrity attempted to acquire Medicare billing data historically used by health care consultants and researchers, they were told the cost would exceed \$90,000. After filing a lawsuit, the fee was negotiated to about \$12,000 – a level still far too high for all but the most financially healthy and committed news organizations.

The center that is awaiting Recovery Act grant materials was denied a waiver for more than \$10,000 in copying fees because, the agency said, the documents would not likely shed light on government operations. The reporter has been working with OGIS for about a year on the issue, but has not yet gotten confirmation that it's been resolved.

Electronic records

Almost 15 years ago, Congress recognized that records held in electronic form had become among the most vexing issues in FOIA. At the time, agencies refused to release electronic versions of their documents and instead printed out

boxes of listings and charged thousands of dollars for the paper. The reforms in the 1996 E-FOIA , we thought, had eliminated that problem.

However, agency records are *still* not held in a form capable of easy extraction or redaction, while some agencies go out of their way to ensure that the records will not be usable in electronic form. I have heard an increasing number of complaints from reporters that they have received databases printed onto static image files, rendering them nearly useless. The agencies say that providing the original format would allow for mischief and misuse. (One of these agencies was recently instructed by a U.S. District Court judge to release other records to a different requester in the original data form.) Most requests for correspondence and other documents are fulfilled by printing them, redacting, then re-scanning into unsearchable images.

Information on agency websites

Proactive disclosure of documents and databases that was envisioned in the E-FOIA for posting on Internet websites is still inconsistent.

In 2009, the Department of Homeland Security's Chief FOIA Officer directed its components to post frequently requested records such as historical daily schedules of senior officials, executed awards, Congressional correspondence and FOIA logs. As of last week, only the FOIA logs had been consistently posted. The most recent contract posted on its FOIA website was from 2008 and Secretary Napolitano's schedule was last updated in July. This example shows that even when agencies attempt to institute proactive disclosures, it is difficult to sustain momentum.

Records that have been requested by multiple news organizations are not routinely posted on websites. Several reporters have requested and received correspondence related to the Deepwater Horizon oil spill, but that information is not readily available in voluminous electronic reading rooms related to the disaster. Reports required by Congress on Iraq and Afghanistan reconstruction efforts are not posted on Defense Department sites, and original nursing home inspections with reviewers' comments are unavailable on the Centers for Medicare and Medicaid website. These records could easily fall under a definition of "frequently requested records" under the law, but agencies have varying thresholds for posting them.

Failing to proactively release these documents means that citizen journalists, reporters in smaller, local news organizations across the country and public interest groups may not have access to the same information as their larger Washington-based cousins.

Even if these were posted, the chance that regular citizens or reporters without beat specialties would find them is slim. Most departments and agencies have no centralized location for their proactive disclosures or frequently requested records. In 2009, an Associated Press editor assigned a reporter to identify all of the major agency reading rooms so the wire service could set up system to monitor them. After a week of studying the websites of just four departments, the reporter had found 97 reading rooms. The editor decided the effort was futile.

What can Congress do to improve the implementation of FOIA? The biggest change would be to encourage the same commitment to releasing records as there is

to protecting classified information and privacy. I am convinced that, until transparency is built into each phase of governance, the culture of secrecy will prevail. Specifically, Congress could:

- Go even further than legislation enacted in recent years to enforce reasonable deadlines and appropriate use of FOIA exemptions, building the current policy of the presumption of openness into the law.
- Provide more authority for the Office of Government Information Services and require agencies to comply with its recommendations.
- Require agencies to review plans for new computer and information systems with the express purpose of extracting public portions, just as it certifies privacy and security capabilities now.
- Encourage the Executive Branch to make disclosure a routine part of Paperwork Reduction Act information collection reviews. In addition, the government could review its need for each piece of truly confidential information. If it's never reported, it doesn't have to be redacted.
- Require proactive disclosure in a central location by cabinet-level agency of common types of records such as correspondence logs, calendars, FOIA logs, grant audits, lists final awards of contracts and grants and political appointees along with frequently requested records.

It is possible that these measures could allow more efficient use of scarce FOIA funding to respond more quickly and accurately. Building transparency into new systems – e-mail and case management systems, for example -- would reduce the work required to extract their records.

Similarly, the effort that goes into justifying and defending each redaction is reduced when there are fewer to justify in the first place. Creating processes to produce small collections of electronic records on a regular schedule may end up costing less than responding to the inevitable intermittent large requests. Posting records proactively in an obvious virtual location might reduce the number and complexity of FOIA requests.

Mr. Chairman, you have called the public's access to records "a cornerstone of our democracy." I appreciate the efforts made by Congress and President Obama to open our government to scrutiny, even when that effort may reflect poorly on its performance. I worry, though, that recent changes cannot be seen as fully implemented or longstanding until the compliance with current policy and deadlines is more consistent, and a structure is erected to prevent this or the next president from reverting to secrecy.

There will be times when the need for records to hold government accountable conflicts with other, equally important values such as privacy and security. I believe journalists and their news organizations would be happy to negotiate and perhaps even litigate on these substantive matters if they could be assured that the law usually worked as it should.

Thank you for the opportunity to present these views on the state of the nation's FOIA.