

**Statement of**  
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Before the  
Subcommittee on Government Management, Finance, and Accountability  
of the House Committee on Government Reform  
On  
The Implementation of Executive Order 13392, *Improving Agency Disclosure of Information*  
July 26, 2006

Thank you, Mr. Chairman and Representative Towns, for the opportunity to speak today on the agencies' responses to Executive Order 13392 and to the broader issues you raised in your letter of invitation to participate in this hearing.

My name is Patrice McDermott. I am the Director of OpenTheGovernment.org, a coalition of journalists, consumer and good government groups, environmentalists, labor and others united to make the federal government a more open place in order to make us safer, strengthen public trust in government, and support our democratic principles.

As you and the members of the subcommittee are aware, July 4<sup>th</sup> was the fortieth anniversary of the Freedom of Information Act. The Act was created to “ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption, and to hold the governors accountable to the governed.”

In recognition of this important milestone in the history of disclosure of agency information, OpenTheGovernment.org, in collaboration with Access Reports, American Association of Law Libraries, Center for American Progress, Center for Financial Privacy and Human Rights, Center for Democracy and Technology, Coalition of Journalists for Open Government and the National Newspaper Association, Federation of American Scientists Project on Government Secrecy, National Security Archive, OMB Watch, Project on Government Oversight, Public Citizen, Sunshine in Government Initiative undertook a collaborative look at a sample of the plans submitted by 22 federal agencies in response to E.O. 13392, “Improving Agency Disclosure of Information,” issued on December 14, 2005. That report is titled, “*FOIA's 40th Anniversary: Agencies Respond to the President's Call for Improved Disclosure of Information.*”

The ratings (Table) and evaluations on which our report is based looked only at the plans

submitted by the agencies. In some cases, the reviewer may have had ongoing knowledge of the agency's FOIA efforts; in others, not. The ratings and evaluations are, necessarily, subjective as there was no objective benchmark against which to measure the responses. Due to this inherent subjectivity, comparisons among agencies should be drawn with caution.

Having said that, it is still surprising how many of the improvement areas were either not addressed or rated as poorly addressed, especially for the non-Cabinet agencies. Those of us collaborating in this report were particularly interested in improvement area # 21 – In-house training on “safeguarding label”/FOIA exemption distinctions (e.g., FOUO, SBU). Out of the 23 government entities reviewed, only 4 *responded* to an issue that is, avowedly, of great and deep concern to the federal government. Of those, 1 received a “Poor” rating.

For the purposes of this hearing, I want to focus on two of the “Improvement Areas” listed by the Department of Justice in its Implementation Guidance. These two are 1) **Affirmative Disclosure: Posting frequently requested records, policies, manuals and FAQs on website;** and 2) **Proactive Disclosure on Web of publicly available information.**

These Improvement Areas seem to me to be the ones that have the most impact on the ability of the general public to understand what an agency does and what kind of information it creates. They give us some opportunities to discuss the questions you raised in your letter:

- How important is the public's right to information about activities of the Federal agencies?
- Do you think the Federal government is currently providing requesters with the most responsible disclosure possible under FOIA?
- What impact do you believe the Executive Order will have on the Federal government's approach to providing information under FOIA?
- What other opportunities, if any, do you see for Congress to improve FOIA to fulfill its basic purpose to ensure an informed citizenry?

The Improvement Areas on Affirmative Disclosure and Proactive Disclosure also are very illustrative of an ongoing problem confounding efforts to institute procedural reforms to FOIA – the lack of enforcement and, thus, of ramifications for agency heads when the reforms are ignored.

My professional life for most of the last 16 years – at the National Archives, OMB Watch, the American Library Association and now at OpenTheGovernment.org – has been engaged in working to ensure and to strengthen public access to government information. So, in response to your first question, I would say that the public's right to know what its federal government is doing – and what is being done in the name of the public through the government and those to whom it delegates authority and responsibility – are fundamental to the proper functioning of our form of government. I agree with James Madison's famous statement that a people who intend to govern themselves must arm themselves with the power that knowledge gives. I fear that the

public is being disarmed by actions in the Executive Branch, some of them sanctioned by the Congress, that serve to restrict and diminish the public's access to information by and about our government. In response, then, to your second question, whether I think the Federal government is currently providing requesters with the most responsible disclosure possible under FOIA, I would say no, although I am not entirely sure what the phrase "responsible disclosure" means.

For a more positive view, I would refer you to "40 Noteworthy Headlines Made Possible by FOIA, 2004-2006," compiled by the National Security Archives (a founding partner of OpenTheGovernment.org). It can be found at <http://www.gwu.edu/~nsarchiv/nsa/foia/stories.htm> and is included with my submitted testimony. These illustrate disclosures that were used to uncover important stories across a variety of topics.

### **Lack of Compliance with the 1996 E-FOIA Amendments**

The Freedom of Information Act is a key component in the public's right to have access to such information, but it has traditionally been primarily a reactive component. The 1996 E-FOIA Amendments were, in part, intended by Congress as step toward changing the passive stance of federal agencies when it comes to disclosing records – and information about records. These Amendments required – among other provisions – that a new category of records be made available to the public online. "Repeatedly Requested" records (created on or after November 1, 1996) that have been processed and released in response to a FOIA request that "the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records" must be made available online.

This requirement represented a significant expansion of the responsibilities of federal agencies to make information available online. Importantly, it is not up to the agency to decide if it is interested in disseminating the information; it depends solely on whether outsiders submit multiple requests for this information. The "repeatedly requested" records need not be formal or authoritative agency pronouncements: any memoranda, reports, studies, lists, tables, correspondence and other information that is of sufficient interest to the public to spark two or more request must be placed in the agency's reading room and, if created since November 1, 1996, must be made available electronically and in such a way that anyone with online access will enjoy the same informational access.

Agencies are also required by the 1996 Amendments to make an index of all previously released records -- both those recently created that are available electronically and those that may be only in paper format -- that have been or are likely to be the subject of additional requests. This index was to be available online by December 31, 1999.

The 1996 amendments created a further new set of agency requirements to aid the public in accessing federal government information. By March 31, 1997, each agency was to provide, in its reading room and through an electronic site, reference material or a guide on how to request

records from the agency. This reference guide must include: an index of all major information systems of the agency; a description of major information and record locator systems maintained by the agency; and a handbook for obtaining various types and categories of public information from the agency, both through FOIA requests and through non-FOIA means.

In June 1998 and 2000, I testified Before the subcommittee on Government Management, Information and Technology of the House Committee on Government Reform and Oversight on the Implementation of the Electronic Freedom of Information Amendments of 1996. In late 1997 (and again in 1999), OMB Watch had conducted a study of agencies' implementation of some of the requirements of the E-FOIA Amendments. OMB Watch found then that, while agencies were putting up all sorts of information, it was mostly not information required by the 1996 Amendments and that information was disorganized and hard to find. At that time, OMB Watch recommended that

- **The goal of EFOIA should be to make so much information publicly available online that Freedom of Information Act requests become an avenue of last resort.** In this same vein, the goal should be to provide the information directly online to as great an extent as feasible.
- **Congress must allocate appropriate levels of funding for ongoing implementation of the EFOIA amendments.** It is difficult for agencies to make EFOIA a priority when monies must be diverted from other important projects.
- **Congress must search for new ways to ensure implementation of these amendments through an enforcement mechanism.** Currently, agencies that are not in compliance are not penalized.

In December 2000, the General Accounting Office (GAO) briefed Senators Fred Thompson and Patrick Leahy and Representative Stephen Horn on its review of the progress made at 25 major federal departments and agencies in implementing the 1996 Electronic Freedom of Information Act Amendments. GAO found that all 25 agencies reviewed had established electronic reading rooms, but agencies had not made all required documents electronically available.

A 2002 follow-on by GAO found that although agencies were continuing to make progress in making material required by e-FOIA available on line, not all of the required materials were yet available. They found that materials were sometimes difficult to find, and Web site links were not always functioning properly. According to GAO, the situation "appears to reflect a lack of adequate attention and continuing review by agency officials to ensure that these materials are available."

We can see from this brief history that implementation of the *statutory* mandate to improve public disclosure has been an ongoing concern. Having this background at hand, I want to turn to the responses of the reviewed agencies to the Affirmative Disclosure and the Proactive Dissemination improvement areas. You can see the ratings that the agencies received by the reviewers in the table at the end of this testimony. I am going to focus on the narrative commentary the reviewers provided from the agency responses. It is, I believe, more revelatory

of the attitudes and intentions of the agencies.

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**1) Affirmative Disclosure: Posting frequently requested records, policies, manuals and FAQs on website.**

USDA - will link to all of its agencies from the departmental website by December. It will create reading rooms on agency sites where there are none and establish new guidelines for posting additional information by next June.

ED - The Department will develop protocols to determine, in advance, what information would be of interest to the public. Increase use of electronic info technology to make it more readily accessible to the public.

HHS - FDA to make its FOI Handbook available to requestor community through it's website; FDA to assess posting frequently requested records; SAMHSA to update its FOIA Guide Book and post on its webpage; HRSA to assess possibility of releasing electronic copies of grant documents (most frequently requested); HRSA to identify most frequently requested documents and provide them in the Electronic Reading Room.

DOJ - Hard to evaluate this early. While many components reviewed their website content and chose this area for improvement, it is unclear how much more information is going to be available affirmatively.

DOL - They post the policies and contact information as well as a FOIA guide. They will make a review of the additional steps needed at each agency website and draft a plan by the middle of 2007.

DOS - Agency recognizes need for improvement and updates and has targeted this as one of the areas for improvement.

DOT - No immediate problems identified. Most of steps involve conducting initial reviews, preparing memoranda, and posting memoranda to agency's website, with implementation as far as 18 months away.

Treasury - Good; completed goal, straightforward web site.

CEQ - The improvements needed suggest that they are currently deficient in 1 - accurate contact information on website; 2 - instruction on submitting FOIA requests; 3 - scope of CEQ records; 4 - CEQ handbook on FOIA; 5 - Records Management for CEQ staff.

CIA - Difficult to monitor.

EPA - FOIA site does the legal minimum in this regard. Very little in area of "frequently requested records."

OMB - Plans to post top 2 requested databases online. Mentioned a vague commitment (under simple requests section) to identify additional requested documents that are likely to be requested and post them – no detail to the process.

NARA - Posting of frequently requested FOIA records. Posted links to various holdings of staff offices.

NSF - This improvement area is somewhat difficult to assess. Although the NSF Management

Plan and Report for Improving Agency Disclosure of Information Under E.O. 13392 (the "Report") identifies "review and revise NSF's FOIA web page" as an area for review and proposes to implement the improvement by December 31, 2006, the Report does not mention adding an electronic reading room to the website. Reviewing the "web posting of policy statements and copies of frequently requested documents" is an area for review as a general part of the agency's FOIA Improvement Processes. This area needs to be more specifically addressed by NSF. [More detail can be found in the report.]

NRC - Doesn't mention data about frequently requested materials, but it does have a lot of that information on its web site and library.

SEC - The SEC plans to increase uploading of filing correspondence. These efforts seem very limited. Posting more correspondence is also listed as an improvement to reduce backlog, and it seems more consonant with that goal than a goal of actively making useful information available.

SBA - Plans to review frequently requested materials, develop an update schedule, and post them on website. Implementation schedule is relatively proactive, with periodic reviews through 12.31.07. Lack of specifics makes this section only adequate. Thorough review would have been more useful prior to submission of plan.

## **2) Proactive Disclosure on Web of publicly available information.**

USDA - Will link to all of its agencies from the departmental website by December. It will create reading rooms on agency sites where there are none and establish new guidelines for posting additional information by next June.

ED - List several ideas for being proactive: identify grants/contract awards that are likely to be requested, identify records that the media would want and release them through public affairs channels, increase intra-agency communication, and track records requests and trends to know what to post in Reading Room.

HHS - FDA to assess proactive posting.

DOJ - Many components mentioned the need to comply with affirmative disclosure requirements & planned to conduct minimal reviews, such as reviewing the reading room section of the website on a quarterly or semi-annual basis. So much could be done in this area that it is hard to evaluate whether this is a minimalist approach or something more substantial.

DOL - They do not post frequently requested materials. They request that agencies identify frequently requested document types, draft a plan by the end of 2006 to make these documents publicly available and implement the plan in 2007.

DOS - Agency recognizes need for improvement and updates and has targeted this as one of the areas for improvement.

DOT - No immediate problems identified. Most of steps involve conducting initial reviews, preparing memoranda, and posting memoranda to agency's website, with implementation as far as 18 months away.

CEQ - Said they need to increase reliance on the dissemination of records that can be made available to the public through website or other means so public doesn't have to FOIA, and have better instruction on available information, contact information on website.

EPA - EPA satisfied with its Web disclosure -- with some reason. In recent years, however, its achievements as a fed-wide leader in electronic disclosure have been degraded.

OMB - While getting more information available on the web is explored, it is all info that either qualifies as frequently requested (above) or FOIA process and guides (below). No plan to quickly put up electronic copies of new data as it comes in, even before requests are made.

NARA - Besides posting recently requested federal and Presidential records, NARA makes available "finding aids" and access to various databases.

NSF - This area is not directly addressed as an area for improvement. The NSF online FOIA page states that: "Most NSF documents are readily available to the public... Please check our link to Documents Online to browse, search, and retrieve electronic copies of available NSF publications. ..." It is not clear from searching the database what the dates of coverage are for each type of document, but it is very easy to search. However, "publicly available information" and "frequently requested FOIA documents" are not the same thing. According to a close reading of the Handbook and the web page, NSF tries to make everything publicly available except the full text of funded grant applications. These would appear to be the bulk of FOIA requests, according to the Handbook. The database could easily be expanded to include a field for "frequently requested documents." Although the NSF Management Plan and Report for Improving Agency Disclosure of Information Under E.O. 13392 (the "Report") identifies "review and revise NSF's FOIA web page" as an area for review and proposes to implement the improvement by December 31, 2006, the Report does not mention making access to FOIA documents (versus access to non-FOIA documents) a part of the new web page.

NRC - NRC brags that it provides "millions" of record available without a FOIA, although 70% of FOIAs are for non-public information, which seems to be a high number.

SBA - Plans to review frequently requested materials, develop an update schedule, and post them on website. Implementation schedule is relatively proactive, with periodic reviews through 12.31.07. Lack of specifics makes this section only adequate. Thorough review would have been more useful prior to submission of plan.

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### **Agency Plans Indicate Continued Failure to Comply**

What is most striking to me is the future-oriented language used to describe what most of the agencies *plan* to do in these areas. Bear in mind that we are almost 10 years out from the passage of the 1996 Amendments and over 9 years beyond the point at which most of the requirements set out therein were supposed to have been met. And yet, repeatedly, in the narratives we find that said agency *will* meet these statutory requirements – with the promised date often being mid-2007.

Indeed, the two entities one would hope would provide exemplary models for others – the Department of Justice and the Office of Management and Budget – fail to do so. As for Affirmative Disclosure in the Justice Department, our reviewer noted: "Hard to evaluate this early. While many components reviewed their website content and chose this area for improvement, it is unclear how much more information is going to be available affirmatively."

And OMB? Our reviewer said: “ OMB plans to post top two requested databases online. Mentioned a vague commitment (under simple requests section) to identify additional requested documents that are likely to be requested and post them – no detail to the process.”

Proactive Dissemination – Our reviewer for the Justice Department found that “Many components mentioned the need to comply with affirmative disclosure requirements & planned to conduct minimal reviews, such as reviewing the reading room section of the website on a quarterly or semi-annual basis. So much could be done in this area that it is hard to evaluate whether this is a minimalist approach or something more substantial.” Our OMB reviewer noted, “While getting more information available on the web is explored, it is all information that either qualifies as frequently requested or FOIA process and guides. No plan to quickly put up electronic copies of new data as it comes in, even before requests are made.”

The lack of serious implementation of 10-year-old amendments to FOIA exemplified here is indicative of one of the serious problems with any procedural reforms to FOIA: there is no enforcement mechanism provided and no repercussions for ignoring these requirements. Even the Department of Justice, which Congress arguably intended to have oversight responsibility in the Executive Branch for the implementation of these amendments, has not fully implemented them (according to their own report). Nor has the Office of Management and Budget which has oversight responsibilities for information policy across the Executive Branch. What hope is there that other agencies – given other pressing mandates for which they *are* held responsible (at least in some budget negotiations and sometimes in the pages of the Washington Post) – are going to devote much attention to such things as improving the public’s access to the information and, especially, the records of their agencies?

### **Impact of the Executive Order**

These responses from Justice and OMB, taken with the other reviewed plans and the background provided above, inform my estimation that Executive Order will have minimal effect on the federal government’s approach to providing information under FOIA. Similar conclusions can be drawn from the table.

A colleague, analyzing the table that was created from the reviewers’ grades of the original 17 (six reports have been added in the interim) agency responses to the 27 Improvement Areas identified by DOJ in its guidance, notes that of the 459 possible scores assigned by the reviewers, only 14 were “good.” In only one of the 27 Improvement Areas (“Overall FOIA Web site improvement”) did a majority (14 of 27) of sampled agencies receive at least an “adequate” rating. “Adequate” ratings were concentrated in the following areas (listed in alphabetical order):

- Acknowledgment letters
- Additional training needed
- Automated tracking capabilities
- Backlog reduction /elimination
- Communications with requesters

- Electronic FOIA – automated processing
- Overall FOIA Web site improvement

He further noted areas more likely to *not* be addressed by agencies:

- Case-by-case problem identification
- Electronic FOIA /responding to receiving and responding to requests electronically
- Expedited processing
- Increased staffing
- In-house training on distinctions between “safeguarding label” and FOIA exemptions (e.g., “Sensitive But Unclassified,” “For Official Use Only”)
- Politeness /courtesy
- Recycling of improvement information gleaned from FOIA Requester Service Centers/FOIA Public Liaisons
- Troubleshooting of existing problems with existing tracking

We do get a sense from many of the agency plans that, despite a Chief FOIA Officer having been appointed in response to the Executive Order, the FOIA programs (and I would add the records management programs) are often treated like the proverbial step-child. Agencies tell in these plans of not having money for scanners or copiers. Some of this may be excuse-making, but from the work I have done over the years with FOIA officials through the American Society of Access Professionals (ASAP), I know that most of them are dedicated public servants who believe in public access and are proud of the role they play in our society. So, I am willing to take them at their word in these documents. The other thing that is striking is that only 2 agencies (DOD and DOJ) – out of 23 – are concerned about the grade level of their FOIA staff. Again, from my work with ASAP, I know this to be of concern to FOIA personnel across the government.

### **The Role for Congress**

What can Congress do? The easy – and hard – answer is to appropriate funds specifically targeted for promoting prompt public disclosure of government information that is appropriate for such disclosure. Many ideas have been floated in the access community as to how to do that and we would be pleased to meet to with you and your staffs to discuss them.

The second opportunity for Congress is to pass the bipartisan OPEN Government Act – H.R. 867, introduced by Rep. Lamar Smith, with 31 co-sponsors to date (S. 394 in the Senate). While it is not a panacea for all our concerns with the implementation of the Freedom of Information Act, it is a large step in the direction of meaningful and accountable procedural reforms. H.R. 1620 in the House (S. 589 in the Senate) and H.R. 2331 are examples of other legislation to advance the public’s right to know.

The third thing Congress can do is to conduct frequent oversight and to hold agencies – and those with oversight responsibility in the Executive Branch – accountable. We appreciate the attention of the House Government Reform Committee’s in this Congress – and this Subcommittee in particular – to FOIA and the difficulties encountered by the public in attempting to exercise its right to know and to gain access to information held by and for the federal government. Indeed, Mr. Chairman, the hearing you held in this committee in May of last year identified and documented many of those difficulties. More is needed, however. Until there is a clear, tangible reason to pay attention and meet obligations, it is a logical, if regrettable, use of resources to ignore those mandates that have no repercussions. There is no follow-up built into the Executive Order. It is up to Congress and it is appropriately your responsibility.

The staff and partners of OpenTheGovernment.org look forward to continuing to work with you to improve and strengthen the public’s access to federal government information.

Thank you. I will be happy to answer any questions you may have.

Attachments:

OpenTheGovernment.org, “FOIA's 40th Anniversary: Agencies Respond to the President's Call for Improved Disclosure of Information.” Also at

<http://www.openthegovernment.org/otg/FOIPlans.pdf>

National Security Archive, “40 Noteworthy Headlines Made Possible by FOIA, 2004-2006.”

Also at <http://www.gwu.edu/~nsarchiv/nsa/foia/stories.htm>

National Security Archive, “FOIA Legislative History.” Also at

<http://www.gwu.edu/~nsarchiv/nsa/foialeghistory/legistfoia.htm>

