

Statement of Lisa Rosenberg
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Before the Senate Judiciary Committee
On “The Freedom of Information Act: Improving Transparency and the American Public’s
Right to Know for the 21st Century”
March 29, 2022

Chairman Durbin, Ranking Member Grassley, and Members of the Committee, thank you for the opportunity to submit a statement for the record regarding the Freedom of Information Act (FOIA). My name is Lisa Rosenberg and I serve as the Executive Director at Open The Government. Open The Government is an inclusive, nonpartisan coalition that works to strengthen our democracy and empower the public by advancing policies that create a more open, accountable, and responsive government. Open The Government and many of our coalition partners have long worked with this Committee to monitor trends in government transparency and to respond to challenges with agency compliance with the FOIA statute.

We write you today to discuss three key issues for the Senate Judiciary Committee to investigate while providing oversight on the FOIA: Increasing agency resources to support FOIA operations; maximizing affirmative disclosure; and the Attorney General’s recent memo on FOIA.

I. Increasing Agency Resources to Support FOIA Operations

A central obstacle that plagues FOIA offices across the federal government is a lack of dedicated funding and resources. Advocates—both inside and outside of government—have long cited deficient resources as the primary reason agencies are unable to meet FOIA’s statutory timelines for completing requests. The Department of Justice’s Office of Information Policy (OIP), which is required to monitor compliance with FOIA across the federal government, noted this concern over a dozen years ago and to date Congress has failed to address the issue.¹

Congress must demonstrate its commitment to access to information by providing the necessary resources that will allow agencies to comply with the FOIA statute. First, rather than funding FOIA operations out of agencies’ general administrative budgets, Congress must provide specific “line-item” budgets for agencies’ FOIA operations, just as they do for Inspectors General offices. Second, Congress should ensure agencies are addressing their FOIA backlogs and increase funding if necessary to reduce the backlogs. When Congress

¹ Department of Justice. (1990, January 1). FOIA Update: FOIA Affected by Budget Restraints. <https://www.justice.gov/oip/blog/foia-update-foia-affected-budget-constraints>

increased funding to the Department of Interior to reduce its FOIA backlogs, it achieved an impressive 10% reduction in a single year. Similarly, the Appropriations Committee is working with the Department of Homeland Security to monitor its long-term compliance with a court-mandated requirement to keep its FOIA backlog clear and increase funding to the Department if needed.²

Finally, Congress should invest in new and emerging technology, such as e-discovery tools, to improve staff efficiencies and the public's user experience.³ This recommendation has been endorsed by the FOIA Advisory Committee and accepted by the Archivist of the United States.

II. Maximizing Affirmative Disclosure

In FY 2020, government agencies received nearly eight hundred thousand FOIA requests.⁴ In order to return records to the public within the statutorily mandated twenty business days, Congress requires agencies maximize “affirmative disclosure”—mandating the release of specific documents without the need for a FOIA request. For example, when the Environmental Protection Agency unveiled its “MyProperty” tool, which allows the public to find commonly requested records on an online portal, its FOIA volume decreased by 33%.⁵ Under the FOIA Improvement Act of 2016, Congress required agency officials to search their records and begin to proactively disclose large categories of records. Unfortunately, agencies have treated these new obligations as a mere recommendation instead of an actual obligation and as a consequence the volume of FOIA requests continues to increase.

Moreover, rather than shining a light on government actions, FOIA has instead become a tool for individuals seeking information about themselves which the government holds. For example, 81 percent of requests to the Department of Veterans Affairs come from veterans seeking their own medical records. Such “first-party” requests dominate the FOIA requests received by the majority of agencies which receive a high volume of FOIA requests. As Professor Margaret Kwoka wrote in her book, *Saving the Freedom of Information Act*, 67 percent of the FOIA requests reviewed across the federal government (387,625 of 577,982) were for persons seeking records for themselves and not for the purpose of government oversight.⁶

These statistics reveal that agencies are not taking seriously their obligations to find ways to proactively disclose records and are instead using FOIA for purposes for which it was not designed. Further, the public commonly requests records such as visitor logs, calendars for

² *Nightingale v USCIS*, No. 19-03512, 2020 WL 7640547 (N.D. Cal. Dec. 17, 2020)

³ National Archives. (2020, July 9). Report to the Archivist of the United States.

<https://www.archives.gov/files/ogis/assets/foiaac-final-report-and-recs-2020-07-09.pdf>

⁴ Department of Justice, Office of Information Policy. Summary of Annual FOIA Reports for Fiscal Year 2020.

<https://www.justice.gov/oip/page/file/1393381/download>

⁵ Kwoka, M. *Saving the Freedom of Information Act*. Cambridge University Press, 2021 (page 181)

⁶ *Id.*

agency heads, and reports submitted to Congress which are also not affirmatively disclosed by agencies. At the same time, the Department of Justice’s Office of Information Policy provides agencies some training and guidance but does not have strong oversight on compliance. For example, when OIP found the Department of Housing and Urban Development (HUD) made zero proactive disclosures for two years, it only asked HUD if its numbers were accurate but didn’t provide oversight on *why* HUD was not proactively disclosing documents.⁷

By all these measures, it is clear that FOIA’s affirmative disclosure requirements are being ignored by agencies across the federal government.

III. The Attorney General’s Recent Memo on FOIA

For well over a year, members of civil society raised serious concerns about the slow pace at which the Department of Justice (DOJ) was issuing its FOIA guidelines. These concerns caused the Senate Judiciary Committee to send a bipartisan letter to the DOJ to inquire why the guidelines were so delayed.⁸ It was only after numerous inquiries by Congress that DOJ released the current guidelines which should be viewed with deep skepticism as there are few substantive changes from prior FOIA memos. The new guidelines are, at best, a mere recitation of what agencies should already be doing under existing legislation. For example, Attorney General Garland’s guidelines state that agencies should apply a “presumption of openness” to records, which has been DOJ’s FOIA policy since 1993.⁹ Similarly, the FOIA memo states agencies should avoid using exemptions merely because information could *technically* be withheld. This position was articulated by Attorney General Holder in 2014 and has been largely unimplemented by agencies. Finally, the Garland memo directs agencies to maximize proactive disclosure, which, as noted above, is already mandated yet is not being implemented.

Another major deficiency of the Garland FOIA memo is its lack of any creative, new policy initiatives. Attorney General Janet Reno issued FOIA guidance that included a “presumption of openness,” a novel approach by the Department of Justice that embraced the public’s right-to-know. The Garland memo offers no new ways to improve agency compliance with FOIA and seems to have been an exercise in “checking the box” rather than a meaningful attempt to improve access to information.

⁷ Government Accountability Office. (2021). Freedom of Information: Actions Needed to Improve Agency Compliance with Proactive Disclosure. (GAO Publication No. 21-254). Washington, D.C.: U.S. Government Printing Office. <https://www.gao.gov/assets/gao-21-254.pdf>

⁸ Mattela, T. (2022, February 23). *Lawmakers Press Garland on Access to Documents for Public, Congress*, Wall Street Journal. <https://www.wsj.com/articles/lawmakers-press-garland-on-access-to-documents-for-public-congress-11645649962>

⁹ Department of Justice. (1993). FOIA Update: Attorney General Reno’s FOIA Memorandum. <https://www.justice.gov/oip/blog/foia-update-attorney-general-renos-foia-memorandum>

When Congress enacted the Freedom of Information Act, it embarked on a bold experiment in government transparency and accountability. The statute has been effective in exposing malfeasance, waste, fraud, and abuse by bad actors. However, FOIA operations are strained due to neglect, particularly with funding and technology. Agencies are inundated with requests and struggle to process them because of a large volume of “first-party” requests which are not being affirmatively disclosed. And the Office of Information Policy, which ostensibly monitors compliance with FOIA, has abdicated its responsibilities with inaction.

Congress has the ability to address many of the obstacles to creating a more open government. We appreciate the commitment of this Committee to strengthening the public’s right to know and are committed to working with you to reform FOIA to fulfill its original mission.

We thank the Committee for allowing us the opportunity to provide this testimony.