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Americans for Less Secrecy, More Democracy



**Statement
Of
Patrice McDermott
Director
OpenTheGovernment.org**

**Information Policy, Census, and National Archives Subcommittee
Oversight and Government Reform Committee
On
“Implementation on the Office of Government Information Services”**

**Wednesday, September 17, 2008
2154 Rayburn HOB
2:00 P.M.**

Thank you, Chairman Clay, Mr. Turner, and Members of the Subcommittee, for the opportunity to speak today on the implementation of the new Office of Government Information Services created by the OPEN Government Act last year.

My name is Patrice McDermott. I am the Director of OpenTheGovernment.org, a coalition of consumer and good government groups, library associations, journalists, environmentalists, labor organizations 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. The more than 70 partners in this coalition believe that a transparent and open government is essential to holding government accountable and earning the trust of the American public.

Members of the coalition worked very hard to ensure the passage of the OPEN Government Act and the new Office of Government Information Services (OGIS) was considered a key component of that legislation. We are pleased that you are conducting this hearing on OGIS and appreciate the opportunity to share our thoughts with you.

As I anticipate you will hear about the mediation responsibilities of the new office from the representatives of the journalism community scheduled to present testimony to you today, I am focusing my comments on the responsibility of OGIS to review agencies' FOIA policies and procedures, their compliance with the Act, and to recommend policy changes to Congress and the President to improve the administration of the FOIA. I chose this focus because ensuring compliance with FOIA has not until now been any entity's clear responsibility or focus – with well-documented results.

The current situation with compliance

As you know, both the Office of Management and Budget (OMB) and the Department of Justice have statutory roles in the implementation of FOIA. Under various statutes, including the Paperwork Reduction Act, OMB has broad authority for coordinating and administering various aspects of governmentwide information policy. FOIA specifically requires OMB to issue guidelines to “provide for a uniform schedule of fees for all agencies.” OMB issued this guidance in April 1987.

One of the FOIA provisions added by the 1974 Amendments requires the Attorney General to include in the annual report “a description of the efforts undertaken by the Department of Justice to encourage agency compliance with this section.”¹ The Department meets its obligations for *encouraging* agencies’ compliance with the FOIA through policy guidance for agencies. It makes agencies’ annual FOIA reports available through a single electronic access point and notifies Congress as to their availability and, in consultation with OMB, develops guidelines for the required annual agency reports. It furnishes speakers and workshop instructors for seminars, conferences, individual agency training sessions, and similar programs conducted to “promote the proper administration of the FOIA within the Executive Branch.”² The Department submits an annual report on FOIA litigation and the efforts undertaken to encourage agency compliance – which generally identify guidance and training.

On December 14, 2005, the President issued Executive Order 13392, on “citizen-centered and results-oriented” FOIA administration. The Order directed that agency FOIA operations be results-oriented: i.e., agencies were to process requests efficiently, achieve measurable improvements in FOIA processing (including reducing backlog of overdue requests), and reform programs that do not produce appropriate results.

The order required, among other things, that agency heads designate Chief FOIA Officers to oversee their FOIA programs. The Chief FOIA Officers were directed to conduct reviews of the agencies’ FOIA operations and develop improvement plans to ensure that FOIA administration was in accordance with applicable law, as well as with the policy set out in the Order. By June 2006, agencies were to submit reports that included the results of their reviews and copies of their improvement plans.

Other than reporting back annually for a couple of years, though, there was no real accountability built in to the Order, nor was there any meaningful oversight of the agencies’ plans or the implementation thereof. Indeed, the 2008 Report to the President from the Attorney General obscured the overall failures of the agencies to accomplish much of significance. As reported in GovernmentExecutive.com, “The [2007] report stated that more than half of the 25 major agencies featured met their milestones and goals for fiscal 2006, and that 90 percent made meaningful progress. But the report’s graphics show that only 11 of those 25 agencies met all their milestones, and that three agencies did not meet a single target.” In the article, Meredith Fuchs, general counsel for the National Security Archive, noted that the Department of Justice’s report only describes progress at 25 agencies out of 90 that prepared FOIA

1 The Senate Report on the 1974 amendments says (page 33) that “In his testimony before the subcommittee, the Attorney General agreed that ‘there are some steps that the Justice Department can take immediately to encourage better administration of the act.’ [citing hearings] S. 2543 thus requires the Attorney General to include in his report ‘a description of the efforts.....’”

2 The 2007 report is here (<http://www.usdoj.gov/oip/07rep.htm>)

improvement plans, and "For those 25, it picks and chooses some examples of improvement. It ignores the fact that very little seems to have improved for FOIA requesters."³

The National Security Archive's 2008 survey⁴ on agency implementations of the Order found uneven progress and outright shortfalls on the problem of backlogs, because the Order lacked any enforcement mechanisms or funding, and left goal-setting up to the agencies themselves. Two years into implementation of the Order, the number of pending FOIA requests government-wide remained in the range of 200,000, with large variations among agencies. The Order also prompted only limited improvement in compliance with the 1996 E-FOIA amendments, which require federal agencies to post certain records and FOIA guidance online. Of the 12 worst agencies identified in an earlier Archive survey⁵ of agency Web sites, only one-third showed significant improvement, while 42% of these "e-delinquents" made no apparent changes to bring their deficient sites into compliance with the law.

In 2008, GAO⁶ found that "although both the Executive Order and Justice's implementing guidance put a major emphasis on backlog reduction, agencies were given flexibility in developing goals and metrics that they considered most appropriate in light of their current FOIA operations and individual circumstances. As a result, agencies' goals and metrics vary widely, and progress could not be assessed against a common metric. ... Justice's most recent guidance directs agencies to set goals for reducing backlogs of overdue requests in future fiscal years, which could lead to the development of a consistent metric; however, it does not direct agencies to monitor and report overdue requests or to develop plans for meeting the new goals."

The current situation is, then, lack of enforcement mechanisms, lack of accountability, and lack of compliance with many aspects of law, particularly the 1996 E-FOIA Amendments. No entity has had clear responsibility for ensuring compliance – and none does so.

The OPEN Government Act

Now we have the provision (Section 11) in the OPEN Government Act that creates the Office of Government Information Services and gives it responsibility for reviewing the FOIA policies and procedures of administrative agencies, reviewing their FOIA compliance, and recommending policy changes to Congress and the President to improve the administration the Act.

The same Section 11 requires the agency Chief FOIA Officers, imported from Executive Order 13392, to

- o have agency-wide responsibility for efficient and appropriate compliance with the FOIA;

3 Daniel Pulliam. "Open government advocates slam report on FOIA reform." GovernmentExecutive.com, June 25, 2007. http://www.govexec.com/story_page.cfm?filepath=/dailyfed/0607/062507p1.htm

4 National Security Archive. "MIXED SIGNALS, MIXED RESULTS: How President Bush's Executive Order on FOIA Failed to Deliver," March 16, 2008. <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB246/index.htm>

5 National Security Archive, "File Not Found: 10 Years After E-FOIA, Most Federal Agencies Are Delinquent," March 12, 2007. <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB216/index.htm>

6 Report to the Chairman, Subcommittee on Information Policy, Census, and National Archives, Committee on Oversight and Government Reform, House of Representatives, March 2008 "FREEDOM OF INFORMATION ACT: Agencies Are Making Progress in Reducing Backlog, but Additional Guidance Is Needed. GAO-08-344 <http://www.gao.gov/new.items/d08344.pdf>

- monitor FOIA implementation throughout the agency and keep the head of the agency, the chief legal officer of the agency, and the Attorney General appropriately informed of the agency's performance in implementing the FOIA;
- recommend to the head of the agency such adjustments to agency practices, policies, personnel, and funding as may be necessary to improve its implementation of the FOIA; and
- review and report to the Attorney General, through the head of the agency, at such times and in such formats as the Attorney General may direct, on the agency's performance in implementing the FOIA.

Thus, we have two distinct and separate avenues for ensuring compliance with the FOIA: the OGIS responsibilities, and the Chief FOIA Officers (CFOs) reporting to the Attorney General. There may be a simple fix for this – perhaps by requiring the reports to be publicly available as they are issued, perhaps by setting up a CFO Council headed by the Archivist and chaired by the head of OGIS – but, as it stands now, there is no required communication with OGIS from the Chief FOIA Officers or about their findings and recommendations.

We think that, as the statute clearly intends this responsibility and authority to lie with OGIS, and as the Department of Justice has over the years abjured any responsibility for *ensuring* compliance with the FOIA, there needs to be some more direct line of communication between the Chief FOIA Officers and the head of OGIS. This need is all the clearer in light of the absence of any statutory requirement for the Attorney General to *do* anything with the reports received: not to follow up with the agencies; not to report to Congress; and not to make recommendations for policy changes to Congress and the President to improve the administration of the Act. Leaving the divided reporting as it is now will vitiate the intent of Congress in creating this office.

The statute gives the Government Accountability Office ongoing responsibility to conduct audits of administrative agencies on the implementation of section 552 and issue reports detailing the results of such audits. The GAO has a commendable history in this regard and well-informed and well-trained staff. We think that, given the at least initial staffing of OGIS, it is appropriate for GAO to perform these audits and we presume these reports will be used by OGIS in fulfilling its responsibilities. Simply receiving reports is not sufficient, however. Congress needs to consider what is required to meaningfully ensure compliance and make the necessary resources available. OGIS does not have the necessary resources at this point to fully meet the statutory obligations in this regard.

We also believe it is essential that there be a robust and transparent mechanism for public input on agency compliance and needed changes. It is not enough to look just at agency reports and talk with agency personnel. Nor should the focus of such public input be limited to the items in the annual reports that agencies are required to complete and the recommendations of the Chief FOIA officers.

Given the limited resources of this new office, some hard decisions are going to have to be made about the use of staff and funding. The public access community believes strongly in both ensuring compliance and in the mediation services and advisory opinions obligations of OGIS. The balancing of resources required of the Office argues strongly for adequate funding and for meaningful support within the National Archives. It will also require the ongoing oversight of Congress.

The full and proper implementation of the Freedom of Information Act is essential to the public and to the work of the partners in OpenTheGovernment.org. We look forward to working with you to ensure that the new Office of Government Information Services at the National Archives is effective and helps

to advance Congress' intent in the original Freedom of Information Act and with the OPEN Government Act of 2007.

Thank you for this opportunity to discuss this important issue. I will be pleased to answer any questions you may have.

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OpenTheGovernment.org is a coalition of consumer and good government groups, environmentalists, journalists, library groups, 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. Our coalition transcends partisan lines and includes progressives, libertarians, and conservatives.

OpenTheGovernment.org Statement of Values

To protect the safety and well-being of our families, homes, and communities; to hold our government accountable; and to defend the freedoms upon which our democracy depends; we, the undersigned individuals and organizations, believe the public has a right to information held by our government.

The American way of life demands that government operate in the open to be responsive to the public, to foster trust and confidence in government, and to encourage public participation in civic and government institutions.

The public's right to know promotes equal and equitable access to government, encourages integrity in official conduct, and prevents undisclosed and undue influence from special interests.

OpenTheGovernment.org seeks to advance the public's right to know and to reduce secrecy in government.

We invite both organizations and individuals to sign. **To add your organization or name, please email us at [info at openthegovernment.org](mailto:info@openthegovernment.org)**

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