



**Statement
Of
Terry Mutchler
Executive Director, Pennsylvania Office of Open Records**

***Information Policy, Census, and National Archives Subcommittee
Oversight and Government Reform Committee***

*2154 Rayburn House Office Building
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2:00 p.m.*

Good Afternoon Chairman Clay, Ranking Minority Member Turner and Members of the Committee:

My name is Terry Mutchler and I serve as the Executive Director of Pennsylvania's Office of Open Records. Thank you for the opportunity to speak with you today about the *Openness Promotes Effectiveness in National Government Act of 2007*, and to offer some recommendations on creating a strong Office of Government Information Services to ensure that the nation's Freedom of Information Act is both effective and enforced.

Good government and secrecy cannot co-exist. Ensuring open and honest government is the cornerstone of democracy and is the bedrock principle of the Freedom of Information Act. In my opinion, open and honest government can only be attained through the unfettered exchange of information between citizens and their government. A citizen's right-to-know, granted through the Freedom of Information Act, fosters accountability, prevents abuses of power and promotes trust in government. I believe that creating a strong OGIS within the National Archives and Records Administration will help ensure that citizens receive government documents to which they are entitled.

I have worked with the Freedom of Information Act as an investigative journalist, a lawyer and as a government official trying to mediate the release of public records between government agencies. I have started two offices similar to the Office of Government Information Services – in Illinois and in Pennsylvania.

I am here today to offer recommendations in creating the Office of Government Information Services within the National Archives. In short, I want to share with you my

experience of what worked and what didn't work in establishing these critical open government offices.

By way of background, I am a former journalist for *The Associated Press* in Pennsylvania, New Jersey, Illinois and Alaska. I traded my press pass for a law license and clerked for a Chief Justice of the Supreme Court of Illinois as well as for the Executive Office of the President during the Clinton Administration. I later worked in private practice in a large Chicago law firm and also ran successful state Senate political campaigns. A common thread in everything I have done is FOIA.

Because of the many problems of obtaining documents from government, Illinois created one of the first ombudsman-like offices in the nation within an Attorney General's Office. I was appointed by Attorney General Lisa Madigan to serve as the state's first Public Access Counselor. Very similar to the federal Office of Government Information Services, the purpose of that office was to enforce the state Freedom of Information Act – often through mediation – to serve as a resource for citizens, officials and members of the media and to train all of these groups about the law.

We started this position from scratch. We didn't have a similar model within an Attorneys General Office to guide us. And so I took a very basic, practical approach: identify the problems with FOIA – both real and perceived - and set up the most logical and easy system to solve them. I quickly identified that the key problems with FOIA stemmed from officials ignoring requests or misapplying exceptions in the law – and from citizens not recognizing that public bodies did in fact have the authority to properly withhold certain documents from the public under the law.

To that end, the most critical knowledge I gained in my experience - that I am certain will come into play in Pennsylvania and here at the federal level – is that there are extreme and irrational people on both sides of the open-government equation. On one hand, some citizens and members of the media are convinced that every public official is a criminal, and they know that every document to which they are denied access is tantamount to Watergate. On the flip side, public officials routinely hide the ball from the public, deny access under the misguided belief that the government documents “were none of their business” or find other ways to block access - such as charging copy fees of \$100 per page.

Of course, neither of these approaches to government access is correct. But as Public Access Counselor I often battled both extremes. The key to my success in Illinois was to establish a middle-of-the-road, common sense approach to open-government by applying the law fairly and evenly regardless of who made the request and regardless of which agency or political powerhouse held the documents.

The Illinois system worked in facilitating access, but ironically it actually is a weak law. [*The Freedom of Information Act*, 5 ILCS 140, *et. seq.*] The law is weak for several reasons: the opinions of the Public Access Counselor are advisory, no penalties exist for failure to comply, and copy fees were among the most abused and complained

about components of the law. One public body attempted to charge over \$14,000 for documents by charging a dime a line. Illinois had 66 exceptions to the law – compared with only nine exceptions at the federal level. Many local and state government agencies were creative in finding ways to use these 66 exceptions to block the free flow in information – and used the law as a shield to succeed in keeping citizens in the dark.

And yet, despite those obviously flawed components of the Illinois law, the Office of Public Access Counselor was able to negotiate release of public records which were initially denied by public officials. Some of the key examples included our success in obtaining the release of a list of convicted criminals teaching in the Chicago Public School system. The list included sex offenders, drug dealers and teachers convicted of attempted murder. The School District initially denied the release of records as an unwarranted invasion of privacy – of the criminals. Other examples included obtaining release of contracts of school superintendents, copies of federal grand jury subpoenas issued to the Governor’s office, a tape recording involving a Mayor who had been stopped for driving under the influence of alcohol, a list outlining how much a local government spent in overtime and bonuses, and the budget of a school district. All had been initially denied but later released through informal mediation with the Public Access Counselor.

How did we do this? And more importantly, drawing on that experience in Illinois, how should the new Office of Government Information Systems create its office to accomplish these types of compliance with FOIA?

First, I recommend that OGIS identify a Director who is committed to ensuring open and honest government; a person who will use the Act as a tool to permit citizens to access government, not as a shield to block access to government records. Choosing the right person is paramount to the successful implementation of this Office. Second, OGIS should adopt a mission to enforce the Act, and to serve as a resource for citizens, agencies and members of the media in obtaining information about their government. Third, I recommend that the Office of Government Information Services create the Office using the following structure.

STRUCTURING THE OFFICE OF GOVERNMENT INFORMATION SERVICES

Commitment and Independence

You must ensure that the Director of this new office is committed to open government. In my experience, I have seen attorneys and directors interpret the law with an eye toward denying information. I have had public officials tell me, personally, that their goal was to use FOIA to deny basic information because they did not believe that the operation of government should be of concerns to citizens. The National Archives must next give that Director independence to act without political or agency interference. The Director must have control over both hiring of staff and the budget. If the OGIS is established in a way that does not permit autonomy of its decisions, the federal FOIA

system will continue to experience more of the same – delaying, dodging and denying access to records of government.

Illinois' Public Access Counselor was created within the Office of Attorney General and while I had autonomy – that autonomy was a result of that particular Attorney General's approach and is not guaranteed in the future. I am currently implementing a very similar law and ombudsman-like office in Pennsylvania. I was appointed by Governor Ed Rendell as Executive Director of the newly created Office of Open Records. Instead of leaving the concept of independence and autonomy to the discretion of any particular Administration, the Pennsylvania Legislature established the Office as an independent office within an existing state agency. The law required the Governor to make a six-year appointment of the Executive Director. Further, the law provides that the Executive Director has hiring authority and also jurisdiction over the budget. This component of independence is critical in ensuring that the system isn't stacked in favor of government agencies, and more importantly so that the public knows and believes that it has an independent referee when battling bureaucracy to obtain records of government. Having an assured independence is the only way that OGIS will be able to fairly and evenly apply the law to ensure compliance.

Process

The Office of Government Information Services must have a strong intake process established before receiving its first case, particularly with regard to mediation process. In both Illinois and Pennsylvania, I have used the following components and recommend that OGIS adopt a similar process. Create the following:

1. **Uniform FOIA Request Form:** This will help requestors be as specific as possible in identifying their requests, and will help Agencies better identify and track FOIA information. Include on this form the name of the FOIA officer, date received, calculate and write down the due date and the disposition. If the agency is going to request an extension of time, cite the specific reason permitted by law and include this on this Form.
2. **Uniform FOIA Mediation Request Form:** This will help citizens access the appeal process, it will help the Office of Government Services readily identify the information requested, the Agency involved in the dispute, help obtain a copy of the history of the request, obtain any supporting materials necessary to make a decision and have appropriate contact information easily accessible if additional information is needed by OGIS.
3. **FOIA Database:** Create an OGIS Database to track FOIA requests, status and disposition. This will have a two-fold effect:

- i. To keep the mediation process running smoothly because it will enable the OGIS to input information about the request, any written responses and will alert the OGIS when a response is due;
 - ii. Obtain statistics and identify problem areas to make recommendations for possible FOIA amendments and policy changes within the agencies. It will further help identify the agencies that have troubled response times or issues and which successfully and timely comply; allow OGIS to provide specific tailored training to agencies with repeated compliance problems. This Database should also include the Legislative Districts of the requestor. This will enable OGIS to inform the Representative and Senator of the constituent issue and garner any applicable support in serving the citizen.
4. **Mediation Guidelines:** Establish plain-language Guidelines explaining the mediation process, and how to appeal a denial of information to the Office of Government Information Services. The Office could if it chooses have separate Guidelines written for attorneys, but I would make the Guidelines as basic as possible so that citizens of all educational backgrounds can benefit from the mediation process at OGIS.
5. **Create a Website for OGIS:** Include contact information, sample forms that can be downloaded, helpful links, a copy of the FOIA, a Message from the Director of OGIS outlining its mission, FOIA Guidelines, tracking capability and an explanation of how to obtain an advisory opinion from OGIS. This website should also include a list of every Agency Chief FOIA Officer and their contact information.
6. **Create a Yearly Report:** To fulfill the mission outlined in the law requiring reviewing compliance and making recommendations to Congress and the President, I would create an Access Report outlining what OGIS outlining its findings and accomplishments of the first year. An example of such a report that may be helpful for comparison can be found at www.illinoisattorneygeneral.gov, by clicking on Public Access Counselor's Report.

Educational Trainings

The single most successful component of ensuring compliance with a Freedom of Information Act is to conduct trainings on the law. The Office of Government Information Services should write training materials and conduct trainings for agencies, members of the public, government officials and the media. The training program should encompass a practical knowledge of the law providing information that would answer at least the following questions:

- a. What an agency must do to be in compliance?
- b. How a citizen can obtain information from a federal agency?
- c. How long does an agency have to respond?
- d. What information must be provided?
- e. What are the examples of information that can be denied?
- f. How much can an agency charge to reproduce documents?

I would recommend a 90-Minute training that would allow participants to ask specific questions and make this training available in a downloaded format on the website.

Advisory Opinions

A critical component to the success of OGIS will be its advisory opinions. I would recommend that OGIS consider issuing and putting on its website any advisory opinions about government access issues and also any letters that it writes outlining why a particular record is available or not available pursuant to FOIA as it resolves mediation disputes. This will provide both agencies and citizens a search tool to help them obtain information from Agencies or to have a clear understanding grounded in the law – from an independent OGIS – explaining why a particular record is not available. While these opinions are only advisory, they would probably be given great deference by the Courts as they have in other states with agencies that issues advisory opinions.

Conclusion

My key recommendation would be to create a strong, independent office to administer FOIA fairly and evenly, and to select a Director who is passionate about that mission of open government. The success of the Freedom of Information Act really comes down to a philosophy: public officials are either pro-open government or they are not. Public officials will either use this law to shed light on the actions of government, or it will use this law to shield access to government. As Executive Director of the Office of Open Records, I am very happy to assist the National Archives and the newly created Office of Government Information Services in any way possible. I am committed to citizen access to government because I believe that this government does not belong to me, or to any other public official, but rather this government belongs to its citizens.