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Before the
U.S. House of Representatives
Committee on Oversight and Government Reform
Subcommittee on Technology, Information Policy, Intergovernmental Relations and
Procurement Reform

On
FOIA in the 21st Century: Using Technology to Improve Transparency in Government

March 21, 2012

Chairman Lankford, Ranking Member Connolly, members of the subcommittee: My name is
Sean Moulton and I am the Director of Federal Information Policy at OMB Watch – an
independent, nonpartisan organization that advocates for more open, accountable government.
Improving citizen access to public information has been an important part of our work for almost
30 years. Mr. Chairman, Mr. Connolly, thank you for your continuing interest and commitment
to this issue, and thank you for inviting me to testify today on the important topic of how
technology can improve implementation of the Freedom of Information Act (FOIA).

OMB Watch has long advocated for better implementation of the Freedom of Information Act –
for greater online disclosure on agency websites, for enforcement mechanisms if agencies fail to
honor FOIA requests, and for robust congressional oversight. We also have experience using
technology to help make public information more accessible. In 1989, before widespread public
and commercial use of the Internet, we began operating the Right-To-Know Network (RTK
NET), an electronic service providing public access to data collected by the Environmental
Protection Agency. In recent years, we played a leadership role in encouraging the policies
incorporated in the Federal Funding Accountability and Transparency Act of 2006 (FFATA),
which mandated that federal spending data be displayed on a website, with searchable and
downloadable data. In 2006, we developed FedSpending.org, a website that implemented so
many of the legislation's goals, that it was licensed to the federal government and became the
starting point for USAspending.gov, which was launched at the end of 2007.

We believe that in a democracy, citizens should have easy access to the information that their
government gathers – all but the most sensitive information. Without information, citizens
cannot engage with their representatives and their public officials as equal partners. This was the
logic behind the passage of FOIA in 1966 and remains the driving force for transparency. But
too often, requesting government information is a confusing, slow, and frustrating process. We

believe technology can and should streamline and speed up citizen requests for public information and expand proactive disclosure.

1. The Goals of FOIA Implementation

OMB Watch has long been advocating for more investments in FOIA technology and improved processing systems. The passage of the Electronic FOIA Amendments in 1996[1] was a major step in laying out that technology should be used to improve the FOIA process. While the last three administrations tried to implement these requirements, the open government community has been disappointed by the results.

In 2007-2008, OMB Watch convened more than 100 leaders and experts from the open government community and developed numerous recommendations on how to improve government openness. Several recommendations focused on using technology to improve FOIA processing. Our recommendations today build on and expand those recommendations.

We recommend the development of a robust E-FOIA system that would allow the public to submit and track requests at a centralized site and to receive responses electronically. Such a system would:

- Allow the public to submit electronic requests either by e-mail or through an agency website (This would require posting an e-mail address on each agency website and in each agency's FOIA regulations, as well as establishing a web form for FOIA requests);
- Include an easy-to-understand explanation of how to submit a FOIA request, how the agency will process the request, and the individual's rights and responsibilities under the agency's FOIA procedures (Agencies should also include links to more detailed information, such as the agency's FOIA regulations, the Office of Government Information Services (OGIS) website, and FOIA.gov);
- Ensure that FOIA requesters can communicate easily with the agency by widely publicizing the contact information, including telephone and e-mail address, of the FOIA office;
- Establish an online service to allow FOIA requesters to automatically check the status of their request or appeal by entering the tracking number on a website;
- Establish categories of the records that can be proactively posted online regularly; and
- Post online, in a searchable system, all significant documents released under any FOIA request – without waiting for a second FOIA request.

2. Progress in Improving FOIA Implementation

Over the years, there have many efforts to improve the functioning of FOIA. For instance:

- President George W. Bush issued Executive Order 13392 in December 2005 to help improve the processing of FOIA requests. The order required agencies to conduct internal assessments of FOIA service problems and develop workplans to make

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[1] P.L. 104-231.

improvements. It established new positions within the agencies, such as FOIA Request Service Centers and Public Liaison officials, to work with requestors. The order seemed to deliver some results: the number of requests awaiting processing reached its peak in 2006. Backlogs then shrank each year in 2007, 2008, and 2009.

- The OPEN Government Act of 2007[2] required agencies to create a FOIA tracking system that allows requestors to monitor the progress of requests on the Internet or by telephone. In addition, the law created the Office of Government Information Services (OGIS) within the National Archives and Records Administration to serve as an ombudsman for the FOIA system. The law also penalizes agencies that fail to respond to FOIA requests within the required 20 days by barring them from collecting search and duplication fees. Moreover, the law required agencies to clearly state the amount of information deleted in its redactions and the exemption invoked for making each individual redaction.
- The OPEN FOIA Act of 2009[3] increased the transparency of proposed new exemptions to FOIA.

We were pleased that President Obama's January 2009 FOIA memo, the attorney general's March 2009 FOIA memo, and the Open Government Directive of December 2009 all instructed agencies to proactively disseminate information online to reduce the necessity of filing FOIA requests.

Some agencies' Open Government Plans, which were required under the Open Government Directive, included developing, improving, or maintaining the agency's FOIA tracking system. However, progress across executive agencies in implementing these plans has been lurching and uneven.

In Nov. 2010 OGIS issued a best FOIA practices document[4] that is periodically updated. The list of practices include recommendations that agencies "develop an online or e-mail system for filing FOIA requests" and "establish [an] online procedure for tracking appeal status." Some agencies have made progress in establishing such systems. For example, the Treasury Department launched an online request form in April 2011. However, few have any online tracking system in place.

In addition, OGIS specifically encourages agencies to "post online significant documents that have been released under FOIA without waiting for a second FOIA request." Some agencies frequently post requested documents online. For instance, the Department of Energy posted all of its responses to FOIA requests from January to May 2009. Other agencies reported using past FOIA requests as the means to identify their high-value datasets to be posted on Data.gov. In addition, the Federal Communications Commission's National Broadband Plan, released in March 2010, recommended that agencies post online all responses to FOIA requests.

There are also some agencies that post logs of FOIA requests. For instance, predating the Obama administration, some parts of the Department of Defense (DOD) have posted their FOIA logs on an annual basis. DOD has subsequently added these FOIA logs as datasets on Data.gov. The

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[2] P.L. 110-175.
[3] P.L. 111-83, Sec. 564.
[4] https://ogis.archives.gov/Assets/Best+Practices+Chart+Agencies.pdf.

Department of Homeland Security began posting its FOIA logs on a monthly basis during the Obama administration.

3. FOIA Performance: The Current Situation

Currently, requesting and receiving information under FOIA is a highly particular process. Agencies responded to more than half a million requests last year, which presents plenty of opportunities to disagree with an agency decision or to criticize its customer service in a particular case. At a systemic level, there are three primary indicators that can be used to gauge the functioning of FOIA: processing, granting, and use of exemptions.

Earlier this month, OMB Watch updated our assessment and analyzed the fiscal year (FY) 2011 FOIA reports from 25 federal agencies, including most cabinet-level departments, and evaluated performance on processing requests, rates of requests granted, and the use of exemptions. OMB Watch reviewed the data from the latest FOIA reports along with similar data collected from FY 1998 to the present. This approach allows us to evaluate current performance in the context of historical performance.

Processing FOIA Requests

In FY 2011, the Obama administration processed more FOIA requests than in either of the two previous years of the administration. The 25 agencies tracked in the analysis processed more than 473,000 FOIA requests, an increase of more than 25,000 over the number processed in 2010, and ***the highest number of requests processed since 2005.***

However, the number of requests received increased by almost 39,000, leaving 15,000 requests unprocessed at the end of the year. As a result, nearly one in five requests received in 2011 was not processed.

The Department of Homeland Security (DHS) is primarily responsible. In 2011, it received 36 percent of all FOIA requests. The number of FOIA requests DHS received rose to 175,656 in FY 2011 from 130,098 the previous year, an increase of 35 percent. Even though DHS increased the absolute number of requests it processed, the department was unable to keep up with the increased number of FOIA requests coming in.

The Obama administration placed a high priority on reducing backlogs of FOIA requests and in the Open Government Directive called on agencies with significant backlogs to reduce them by 10 percent per year.[5] Fourteen of the 25 agencies examined had fewer than 1,000 FOIA requests awaiting processing at the end of FY 2010. Of the 11 agencies with more than 1,000 requests backlogged in FY 2010, five have reduced the number of unprocessed requests by more than 10 percent from the previous years (the State Department, Environmental Protection Agency, Department of Agriculture, Department of Defense, and Department of the Interior). The State Department slashed its backlog by almost 60 percent in one year, dropping from just over 21,000 requests pending in FY 2010 to around 8,700 unprocessed requests in FY 2011. Two more

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[5] Peter R. Orszag, "Open Government Directive," Office of Management and Budget, Dec. 8, 2009, http://www.whitehouse.gov/sites/default/files/omb/assets/memoranda_2010/m10-06.pdf.

agencies reduced their backlogs but by less than 10 percent – the Department of Justice and Department of Transportation. In the remaining four agencies with more than 1,000 unprocessed requests in 2010, the backlog rose in 2011 – the Department of Homeland Security (35 percent), the Department of the Treasury (eight percent), the National Archives and Records Administration (13 percent), and the Equal Employment Opportunity Commission (16 percent).

Granting FOIA Requests

Not all requests for information are actually granted. In terms of granting public information to those requesting it, the Obama administration's combined average (95 percent) is higher than the average of the Clinton administration (89 percent) and the Bush administration (93 percent). Our analysis excluded requests that have been denied for reasons other than exemptions, such as information requested from the wrong agency or requests for which no records were found. Thus, if a FOIA request is processed, the Obama administration is very likely to fulfill at least part of that request. However, the Obama administration is more likely to only partially grant the requested information (i.e., some portion of requested records are withheld) than the previous two administrations: the Obama administration partially granted information in 50 percent of FOIA requests, compared to 30 percent for the Bush administration and 17 percent for the Clinton administration.

Use of Exemptions

Under FOIA, there are nine reasons why agencies can deny a request. In FY 2011, total use of exemptions dropped by seven percent. The changes in the use of particular exemptions, however, tell a more complicated story. Although the exemptions are specified by law, agencies must use their judgment in whether to apply an exemption.

Two are seen as particularly open to discretion: exemption 2 (the interagency rule) and exemption 5 (the interagency memo). Under these exemptions, the agency claims that giving up information would "harm government functioning" but admits the information poses no risk to the safety or rights of American citizens. In FY 2011, the use of these exemptions dropped dramatically. Part of this was due to the March 2011 U.S. Supreme Court ruling in *Milner v. Navy*, which restricted the government's ability to invoke the interagency rule exemption.[6] As a result, use of this exemption fell by 63 percent. However, the decrease also appears to be the result of a deliberate policy change by the Obama administration. (The Bush Justice Department encouraged agencies to invoke these exemptions,[7] and their use ballooned.)

The "statutory" exemption was the fastest growing reason to deny information; its use increased by 64 percent, reaching the highest numbers on record. The bulk of this increase is due to a surge in usage at the State Department (for information relating to visa applications), as well as at the Equal Employment Opportunity Commission (for information relating to unlawful employment practices under the Americans with Disabilities Act).

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[6] *Milner v. Navy*, 131 S.Ct. 1259 (2011), http://www.supremecourt.gov/opinions/10pdf/09-1163.pdf.
[7] U.S. Department of Justice Office of Information Policy, "New Attorney General FOIA Memorandum Issued," FOIA Post, Oct. 15, 2001, http://www.justice.gov/archive/oip/foiapost/2001foiapost19.htm.

Exemptions for personal privacy and law enforcement personal privacy remained near record highs. After growing throughout the Bush administration, their usage spiked in FY 2009 and dipped in FY 2010, but usage increased again in FY 2011. DHS is again the driving force behind the high use of privacy exemptions. It is unclear why privacy exemptions have grown so much over the years. It may be due to a significant change in the information being requested. However, some openness advocates are concerned that agencies may be stretching the scope of the exemptions to include records not previously considered to be covered by privacy laws.

OMB Watch believes that proper use of technology can significantly improve FOIA processing, bringing down backlogs, keep the level of granting requests high, and help establish consistent application of exemptions.

4. FOIA Portal: Spreading Innovation, Moving Toward a Centralized System

A key effort to use technology to improve transparency is the FOIA portal project being led by the Environmental Protection Agency (EPA). Although the project is still in an early stage, it deserves Congress' support. The project would scale up innovative technologies, already in use at some agencies, in order to significantly improve transparency and efficiency.

The FOIA portal project hopes to provide a single interface through which the public could submit requests to any participating agency, eliminating the need to find contact information for multiple agencies. EPA is heading up the project, in partnership with the Commerce Department and the National Archives and Records Administration. Other agencies are also welcome to join the project. The partners hope to launch the initial system this fall.

When completed, several aspects of the project would improve customer service and increase efficiency. The system would automatically assign tracking numbers to requests, which the requester could use to instantly view the status of a request, obviating the need to wait for manual replies from agencies. Agencies could also generate e-mails to requesters through the system to seek clarifying information or send invoices for fees, reducing mail delays and postage costs.

In addition, the project would aid agencies in improving processing in order to increase compliance with FOIA's statutory time limits. When an agency identifies records responsive to a request, it could add them to the system, making them easier to retrieve if needed again later. Consultations and referrals to other agencies could occur within the system, reducing the need to send documents around. The current consultation and referral process is a frequent source of delays and dead-ends for FOIA requests, so improvements in timeliness here would be very welcome.

The project would also bolster proactive disclosure, a key goal for E-FOIA reform. Released documents would be uploaded to a public website, and the requester would be notified of their availability. This critical feature would improve transparency by making released documents fully available to the general public, rather than delivered only to the requester. Withheld documents would remain in the system, restricted from public access but quickly available for agency review in the event of an appeal.

The project partners estimate the cost to build the system at about $1.3 million dollars, with an estimated annual operating cost of $500,000 to $750,000. To minimize development costs, the project will leverage the existing technological infrastructure of Regulations.gov, which already provides a common multi-agency interface to facilitate communication between agencies and the public. With full participation across the government, the agencies estimate the FOIA system would save a whopping $200 million over five years from improved efficiencies. In other words, a first-year investment of $1.3 million, followed by $3 million over the next four years (a total of $4.3 million over five years), could save the government an estimated $40 million a year in FOIA processing costs.

Congress has an important role to play in ensuring that these improvements to transparency and efficiency are realized. The portal's full benefits will only be realized when all agencies participate, and Congress should make clear that it expects every agency to allow requesters to use the system to interact with them.

While EPA and the partners are busy developing the system's core, the next step is preparing agencies to adopt the technology. In a time of budget contraction, a key factor will be to ensure that agencies have the necessary funding to cover the switching costs of adopting the system, such as training staff to use the new technology. Although we expect significant savings to be quickly realized from the new system, it will require a modest upfront investment from the adopting agencies.

Congress could also play a helpful oversight role in ensuring that the system maintains high standards of usability for the public. As with all e-government investments, the lead partners should continue to develop the system after its initial release, iteratively adding improvements to provide the best service to the American people. Through engaged oversight, Congress can support the best functioning for the system.

The administration also has an important role in ensuring the project's success. For instance, once the system is fully operational, the administration should direct agencies to utilize the multi-agency portal, as the Office of Management and Budget (OMB) did in 2004 in a memo directing agencies to use Regulations.gov.[8]

5. Additional Ways to Use Technology to Maximize Government Disclosure

In addition to the FOIA portal, several key reforms would strengthen the use of technology to improve transparency.

The Electronic Freedom of Information Act Amendments of 1996 (E-FOIA) was a key law for modernizing FOIA and increasing transparency. However, after 15 years of rapid technological progress, E-FOIA is showing its age. Updating E-FOIA for the 21st century could pay large dividends in improving government transparency, accountability, and efficiency.

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[8] Karen S. Evans and John D. Graham, "Regulations.Gov," Office of Management and Budget, March 1, 2004, http://www.whitehouse.gov/sites/default/files/omb/assets/regulatory_matters_pdf/memo_pmc_egov.pdf.

Congress should strengthen the standard for publishing released FOIA documents online. Under E-FOIA, agencies must post released records that "the agency determines have become or are likely to become the subject of subsequent requests."[9] The current standard is vague and misses a key opportunity to expand online disclosure. Instead, agencies should be required to promptly publish *all* released documents, other than from requests made jointly under the Privacy Act.[10] Updating this standard would efficiently broaden public access to information.

In addition, Congress should expand the required types of information that all agencies must consistently post on their websites. Such requirements help reduce the number of FOIA requests by posting the information proactively. E-FOIA established some standards in this area,[11] but the categories of information need to be significantly expanded. The new list of categories should draw from the recommendations of the open government community's "transparency floor" and create a standard for transparency and accountability across agencies. [12] The information should shine a light on fundamental agency activities and strengthen public trust in government through disclosure. For example, agencies should:

- Post their FOIA logs and update them weekly;
- Post the calendars of department heads (i.e. Secretary and equivalent) and update them weekly; and
- Post their visitor logs at least monthly.

Additionally, Congress should consider setting a government-wide document proactive online disclosure goal (e.g., a total of 1 million new high-value documents online by the end of 2013). The Paperwork Reduction Act of 1995 established goals for eliminating unnecessary forms[13] and a similar approach could greatly benefit government transparency and FOIA. Such a goal would encourage agencies to think creatively about which documents represent the highest value. In the process, agencies should engage stakeholders, including FOIA requestors and website visitors, to gather input on which documents are the most sought after. The effort to meet such a goal would also force agencies to address many of the underlying technological issues such as electronic records management and document organization.

Congress should also expand on the tracking numbers it created in the OPEN Government Act by requiring agencies to provide status information online. Congress should also make clear that all agencies must allow the public to make and receive requests online.

Recognizing that proper management of electronic records is critical to any effort to improve FOIA through technology, Congress should update the E-Government Act of 2002.[14] Many of the current shortcomings of electronic records management are due to a failure to plan for information saving and sharing across government when new IT systems are adopted. Congress

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[9] 5 U.S.C. § 552(a)(2)(D).
[10] 5 U.S.C. § 552a.
[11] 5 U.S.C. § 552(a)(2).
[12] The "transparency floor" or "openness floor" is a working proposal developed by the open government community for key types of accountability information that should be required on federal websites. See http://pogoblog.typepad.com/pogo/2010/08/new-item-in-openness-floor-ethics-program-reviews.html.
[13] P.L. 104-13.
[14] P.L. 107-347.

should direct agencies to consider full-circle transparency, including responding to FOIA requests, when making technology investments. Agencies need to ensure new IT systems will efficiently and effectively preserve and manage the public records they create, store, and transmit (and avoid acquiring proprietary systems that fail to address larger government record management needs). More thoughtful planning in the design of IT systems could save enormous amounts of staff time if systems were designed with a presumption of automatic disclosure. With a good, long-term IT strategy, the effectiveness and efficiency of the FOIA system could be transformed.

In addition to statutory reform, there are important steps that the administration could take to improve FOIA implementation and increase proactive disclosure. For instance, the administration is in the process of updating the policy for federal websites, which could embrace many of the important features for a modern FOIA system. The current guidance on federal websites, issued in 2004, does not articulate a vision of what agency websites are for or what agencies should seek to accomplish with their websites.[15] A new policy should explain that websites are a central method for agencies to offer information and services to citizens, broaden public understanding of what the agency does, and facilitate citizen participation with the federal governance structure. In particular, the new website policy should expand the information required on agency websites, including key information from the FOIA process and other types of information identified in the "transparency floor."

6. Conclusion

In conclusion, OMB Watch is fully committed to the Committee's goal of encouraging federal agencies to use the latest technology to comply more quickly and efficiently with FOIA requests and to proactively make government information easily available to the public. We believe that a common FOIA interface for the public, like the project being developed at EPA, has the best potential for achieving this result quickly. Recognizing the cost savings potential of such a system, as well as its democratic promise of a government more responsive to its citizens, we encourage the Committee to support the FOIA portal's success and broad adoption, including ensuring that agencies have sufficient funds to participate in a modern electronic FOIA system. In addition, other key statutory and administrative reforms could further strengthen the use of technology to improve transparency.

I sincerely thank you for the opportunity to address this Committee. Chairman and members of the Committee, I look forward to your questions.

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[15] Clay Johnson III, "Policies for Federal Agency Public Websites," Office of Management and Budget, December 17, 2004, http://www.whitehouse.gov/sites/default/files/omb/memoranda/fy2005/m05-04.pdf.

Sean Moulton
Director, Federal Information Policy at OMB Watch

Sean Moulton has worked on information policy at OMB Watch for over a decade, with special attention on environmental information and right-to-know issues.

Sean's recent priorities have included directing a two-year project to collaboratively develop government transparency recommendations for the Obama administration with input from more than 100 groups from across the political spectrum. The report, *Moving Toward a 21st Century Right-to-Know Agenda*, has been used by some government officials as a "blueprint" on transparency.

Sean also oversaw the development of FedSpending.org, a groundbreaking website that opens trillions of dollars in federal spending to public searches. The site has become a major resource for journalists and policymakers and facilitated more than 10 million searches in first two years. The website was at the forefront of the recent transformation of online government spending transparency.

In response to EPA's regulatory cutbacks to the Toxics Release Inventory in 2005, Sean helped organize nationwide opposition that mobilized more than 120,000 people to file comments with the agency, which eventually led to the restoration of the program.

Following the 9/11 attacks, agencies frantically pulled tremendous amounts of information off websites. Sean coordinated a government-wide FOIA campaign to identify the records removed by each agency and to urge the restoration of many documents.

Prior to joining OMB Watch, Sean served as the Tax Policy Analyst at Friends of the Earth. His work experience also includes several years as a research fellow with the U.S. Environmental Protection Agency in the Industry Sector Policy Division and as Environmental Researcher and Data Manager for the Council on Economic Priorities (CEP).

Sean received a Masters of Public Policy degree from the University of Maryland and has a BA in Economics and English.