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On

"Advancing Freedom of Information
in the New Era of Responsibility"

Senate Judiciary Committee

September 30, 2009

Chairman Leahy, Ranking Member Sessions and Members of the Committee on the Judiciary, thank you for your invitation to appear before you today as you continue your good work on behalf of open government with this hearing on Freedom of Information.

As it turns out, the timing is excellent. Just two days ago, advocates of open government worldwide celebrated International Right to Know Day. According to the last count I saw, nearly 70 countries have access laws at least partly inspired by our own FOIA. We can be proud of that leadership. But it would be false pride if we don't also remain determined to make FOIA live up to the ideals and values that these laws defend.

I salute this Committee for staying focused on these issues in a year when some thought a time might have arrived when we could take things easier. Many were tempted to believe that eight months after the President committed his administration to transparency, we would be knocking on open doors at federal agencies. After all, we've seen the restoration of FOIA's presumption of disclosure, new tools to make agency data more accessible through Data.gov, and the opening of a conversation about how agencies could be more transparent.

These are certainly welcome signs of good intentions from the top of the executive branch. But it's clear the federal agencies won't be turned so quickly or so easily.

Administrations come and go. This is no time for friends of open government in Congress to relax their efforts to make sure every citizen has the necessary tools for finding out what government is up to.

A federal shield law remains as important as ever, and I'm glad to see the strong effort toward its passage continuing. And I applaud you, Mr. Chairman, and Senator Cornyn, for your re-introduction in March of the OPEN FOIA Act to provide greater scrutiny for FOIA exemptions under FOIA section b(3), about which I'll say more in a moment.

But we need to press on. There's more work to be done. The secrecy reflex at some agencies remains firmly in place, and FOIA still contains relatively weak penalties for those that don't meet their disclosure obligations. Such penalties as there are don't even come into play unless a disappointed requester takes the agency to court, with all the delay and expense that this entails. Meanwhile, powerful interests pressure agencies to say "no," even when the President and his attorney general both have said clearly that transparency is the new watchword.

An example I'm sure you all remember was the flap last spring over the FAA's bird strike database, that collection of reports from airports and air carriers on potentially dangerous collisions between airplanes and birds.

AP reporters and many others started chasing that information in January after a flock of Canada geese near LaGuardia Airport forced an airliner to land in the Hudson River. The

journalists figured that a lot of people who fly in planes might want to know whether that kind of thing happens at airports near them. So they called the Federal Aviation Administration (FAA) and asked for the database. The agency stalled the reporters while it looked for a way to put all the information beyond the reach of FOIA by imposing a special regulation.

The FAA claimed to have two concerns about letting the public see where bird strikes have occurred. The first was that some locations and some airlines are better about reporting than others, so any safety comparisons between airports based on this data would be unreliable. The second was that since the reporting is voluntary, disclosing the data would punish the conscientious airports and might discourage them from reporting diligently in the future.

An agency accountable to the public for fostering safe, efficient air travel, was worrying instead that airline and airport executives might get mad if it started sharing safety information of deep and obvious interest to air travelers.

You may recall that in the end, the Transportation Secretary stepped in under public pressure and put a stop to the nonsense. We finally got the full picture from the bird strike database, and, as far as I can tell, the FAA's world is still spinning on its axis.

I wish I could say that it's now clear the agency is on board with the Obama administration's instructions not to play games in order to avoid disclosing even information that causes no harm except maybe some official embarrassment.

But such is not the case.

After the wraps came off the bird strike database, AP was interested in learning more about why the agency had been so determined to put it beyond the reach of FOIA requests. So we asked in April for correspondence on the subject among the top FAA executives who were involved. It's nearly October, and we're still asking.

The agency claims FOIA exemption b(5) – the one that says agencies don't have to release certain internal pre-decisional documents – allows it to keep the exchanges secret. The FAA is ignoring new Justice Department policy that says this argument should only be used when disclosure would cause *significant and specific* harm.

Why would FAA do this? I submit that this is what agencies are wired to do with requests for public information they consider too sensitive for the public.

As we see from the FAA example and others like it in recent months, notwithstanding the best intentions of the new administration, this Committee's ongoing vigilance is not only appropriate but essential. A FOIA advocate's work is never done.

So, turning to some of that work, I would like to highlight a few areas where FOIA needs our help, starting with the Office of Government Information Services which is only now taking shape in the National Archives and Records Administration, nearly two years after Congress approved its creation.

OGIS is potentially one of the most valuable FOIA amendments ever. A FOIA denial in the past left the requester with only one recourse -- an expensive federal lawsuit. Now citizens and other requesters can look forward to another choice -- advice and an opinion from an unbiased mediator who knows the law.

Some have wondered aloud why we need OGIS when the Justice Department's Office of Information Policy already has the job of helping agencies comply with FOIA. The answer should be obvious. OIP's job is to help agencies. And OIP answers to the Justice Department, which must defend agency decisions to deny disclosures under FOIA. OGIS, on the other hand, will be there to help requesters, a crucial difference.

The first year of OGIS operations is bound to contain some disappointments. In fact, it may take several tries to get OGIS right, and I urge the Committee to oversee its development closely and provide support wherever it can.

Miriam Nisbet's appointment as director strikes us as a strong first step. She appears to have a clear vision of what OGIS can be, along with the passion and energy it will take to realize those ambitions.

But she will be starting the journey with a staff of only six or seven, which makes OGIS smaller than some state open records offices. Pennsylvania's has 10, for example. Connecticut's has more than 20.

And the current OGIS budget of \$1 million is much smaller than what the Congressional Budget Office said the office would need to be effective.

But even with greater resources, success for OGIS would still depend in large part on its ability to engage agencies in mediation and identify improvements that lawmakers and agencies can put into practice. That will require cooperation from the Justice Department. If Justice as a whole doesn't help promote respect for FOIA among federal agencies, OGIS will have a much harder time persuading agencies to engage meaningfully in mediation discussions.

With patience and persistence, the office presents a huge opportunity to deliver more of the benefits of FOIA to the public. I salute the Committee for its continuing support of OGIS implementation.

There are other such opportunities of course, and I referred earlier to one that is already on your radar, the problem of the so-called b(3) exemptions.

As you know, these are provisions embedded in other laws that put certain very specific kinds of information beyond FOIA's reach. They are often inserted with little or no discussion and no public notice, and they now constitute a very large black hole in our open records law. The Sunshine in Government Initiative found about 250 b(3)'s on the books, and about 140 of these show up in agency denial letters in any given year.

In many cases these special exemptions protect information already covered under one or more of the other exemptions in FOIA's section (b). In other cases they are creating whole new categories of information not subject to disclosure.

But the real problem with these exemptions is that writing them into statute forecloses any chance for an impartial determination that a valid reason applies to all the information that's been effectively roped off. Whether or not a general FOIA exemption covers a particular information request is subject to court review. But a statutory exemption for particular information is not.

So, for example, the FAA has a b(3) exemption that lets it withhold information voluntarily submitted to aviation regulators regarding the safety and security of air travel. Yes, this is the b(3) exemption the FAA was planning to use as basis for its proposed new regulation that would have sealed up the bird strike data I mentioned earlier.

Also secret, in similar fashion, are the identities of watermelon growers, the identities of people who handle honey, and the ingredients in cigarettes. B(3) exemptions hide the

private sector advice that government trade representatives and congressional committees use to shape trade policy, and also the studies that chemical plants conduct to determine the impact of any worst-case accident on neighboring communities and the environment.

There may be valid arguments for putting a secrecy label on some of this stuff, although I'd sure like to hear what the watermelon growers and honey handlers have to say for themselves and their need to conceal their activities.

But the point is that whatever valid arguments there may be for secrecy in these areas have not been tested or challenged, or even discussed, in any public forum. And the b(3) exemptions mean that a disappointed FOIA requester will find it nearly impossible to challenge them in court.

Nobody knows exactly how many of these exemptions there are, but agencies use them all the time to stiff-arm our reporters. We're dealing with a couple of them right now that may lead to litigation, although we'll be limited to trying to prove the exemption doesn't actually apply to the particular information we're after. If the court says it does, we're out of luck.

We regarded the OPEN FOIA Act which you, Mr. Chairman, and Senator Cornyn introduced earlier this year as a good and much-needed first step toward reining in this alarming trend. Your proposed statute would make it possible for anyone who is

watching for b(3) exemptions in proposed legislation to spot them easily, since they would have to include a citation to paragraph b(3) of FOIA.

I hope you can keep the OPEN FOIA Act on track toward passage, and I hope Congress will then build on it with some additional steps.

One idea I've heard that's worth considering is legislation you might call a Secrecy Reduction Act, similar in concept to the Paperwork Reduction Act. Such a law would contain three major sections.

First, it would require anyone introducing a statute containing a b(3) exemption to declare it openly, much as earmarks are disclosed. Any b(3) would automatically sunset after a fixed term and be renewed if an extension were warranted. Committees with jurisdiction over FOIA would be given an opportunity to comment on the proposed exemption.

Second, a Secrecy Reduction Act would require the Office of Management and Budget (OMB) to review proposals from federal agencies for b(3) exemptions and limit their use and scope. As you know, Mr. Chairman, b(3) exemptions are often tucked into budget bills that Congress must pass. Defense and intelligence authorization bills are especially likely to contain them. OMB would only allow an agency to propose a b(3) exemption that:

- is essential for achievement of an important agency objective,
- includes provisions for oversight of its use,
- sunsets in five years or less, and

- is publicly disclosed upon introduction.

Third, a Secrecy Reduction Act would require agencies to report regularly on their use of all b(3)'s in denying FOIA requests, so we can learn more about the ones that are already on the books. It appears that nobody has tried before now to figure out how many there are. I have attached SGI's compilation to this testimony.

If I haven't quite worn out my welcome yet, I would like to draw the committee's attention to one additional problem area of long standing, the flawed application by the courts of FOIA's privacy exemptions.

The privacy exemptions are designed to protect information in which an individual has a privacy interest substantial enough to outweigh the public interest in disclosure. Congress intended this balancing test to favor disclosure. The public interest would always trump unless the infringement on the individual's privacy interest was significant. For example, private health information or certain kinds of information from a personnel file might rise to the necessary level.

Unfortunately, starting with the 1989 Supreme Court case *Department of Justice v. Reporters Committee for Freedom of the Press*, the courts have put their thumb on the privacy side of the scale. The presence in a public record of an individual's name alone can be enough to satisfy a court that the privacy interest in that record is substantial.

Meanwhile, the public interest in seeing private information has somehow come to be considered not substantial at all unless the FOIA requester can show reason to believe that disclosure will reveal government misconduct. When information about individuals is involved, the courts are finding that the public has no interest in seeing what its government is up to unless the requester already knows the government has done something wrong. In other words, the public has no substantial interest in seeing how government works on the presumably normal days when it's not lying, cheating or stealing.

Even where the private information has already been available for viewing in public files, courts have found that an agency can deny a request that the data be plucked from its "practical obscurity" and disclosed. Perfect. If they know you can't get to it, they say you can have it. But if they know you can get to it, they say you can't have it. Somebody once wrote a book about "catches" like that.

Many, many FOIA requests have been wrongly denied on the strength of the Supreme Court ruling in *Reporters Committee* and other decisions that have followed its reasoning. Earlier this year, The Associated Press lost two FOIA appeals in the 2nd Circuit, back to back, because of this deeply misguided interpretation of the privacy exemptions.

In the first, AP had asked for reversal of a district court's refusal to order release to AP of the commutation petition of John Walker Lindt, the so-called "American Taliban."

In the second, the Department of Defense won reversal of a district court ruling that AP was entitled to see names and other identifying information about Guantanamo detainees involved in cases of detainee abuse, either as perpetrators or victims, and to disclosure of information from certain detainees' correspondence with their families.

In each instance, the 2nd Circuit panel found that the mere presence of personal information could bring a document within the scope of FOIA privacy protection, and then dismissed AP's arguments that whatever privacy interest Lindh or the detainees might have was easily outweighed by the public interest in disclosure.

In the Lindh case, the court's dismissal was especially striking. AP had argued among other things that contents of a commutation petition would certainly shed light on an agency's operation since it contained a petitioner's firsthand assessment of the fairness of the government's exercise of its clemency powers.

But the court said AP had offered nothing that overcame the government's declaration that Lindh had not based his commutation plea on any claim of government misconduct. That ended the court's search for public interest in government handling of Lindh's claims that his sentence ought to be cut short.

What all this appears to mean is that the public isn't entitled to know what government is up to unless the government is up to no good. And if the government just says it's not

doing anything wrong, that's good enough for the courts, at least where records containing the least bits of information about private individuals are concerned.

Privacy interests and the public interest are both important, and FOIA calls for balancing them carefully. I urge the Committee to examine this issue and consider appropriate amendments to FOIA sections b(6) and b(7). Any such amendment should make it crystal clear that the public interest in disclosure of government-held information is presumed always to be strong, with no special extra tests required for public records that contain information about individuals. And the law must also make it clear that to outweigh the strong public interest, the privacy interest must be truly substantial, involving intimate facts of the kind all reasonable people would recognize as a serious intrusion into personal matters.

Mr. Chairman, Senator Sessions, members of the Committee, thank you very much for allowing me this opportunity to speak to you about these important issues today. And thank you again for your commitment to FOIA and to the liberties it does so much to protect.