Department of Justice

Testimony
Of
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Department of Justice

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

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"Administration of the Freedom of Information Act: Current Trends"

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As the Director of the Office of Information Policy of the Department of Justice, I am pleased to be here this afternoon to address the subject of the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2006), amended by OPEN Government Act of 2007, Pub. L. No. 110-175, 121 Stat. 2524, further amended by Open FOIA Act of 2009, Pub. L. No. 11-83, 123 Stat. 2142, 2184, and the efforts of the Department of Justice to implement the President's January 21, 2009 Memorandum on the FOIA, as well as the Attorney General's March 19, 2009 FOIA Guidelines. As the lead federal agency responsible for implementation of the FOIA across the government, we at the Department of Justice are especially committed to encouraging compliance with the Act by all agencies and to fulfilling President Obama's goal of making his Administration the most open and transparent in history.

As you know, in a historic first, President Obama issued a memorandum to the heads of all departments and agencies on the Freedom of Information Act on his first full day in office. In and of itself, this action sent a powerful message to agencies and the public alike about his commitment to transparency. In doing so, the President called on agencies to "usher in a new era of open Government." He directed agencies to administer the FOIA "with a clear presumption: In the face of doubt, openness prevails." Moreover, the President instructed agencies that information should not be withheld merely because

"public officials might be embarrassed by disclosure, because errors and failures might be revealed, or because of speculative or abstract fears."

Agencies were directed to apply the presumption of disclosure "to all decisions involving FOIA." The President also emphasized that this presumption "means that agencies should take affirmative steps to make information public" and should utilize "modern technology to inform citizens about what is known and done by their Government." He stressed that disclosures should be timely. Lastly, the President directed the Attorney General to issue new FOIA guidelines to the heads of all executive departments and agencies which reaffirm the government's commitment to accountability and transparency.

The Attorney General issued those FOIA Guidelines one year ago, on March 19, 2009, during Sunshine Week. The new FOIA Guidelines address the presumption of openness that the President called for in his FOIA Memorandum, the necessity for agencies to create and maintain an effective system for responding to requests, and the need for agencies to proactively and promptly make information available to the public.

First, as to the presumption of openness, the Attorney General's FOIA Guidelines strongly encourage agencies to make discretionary releases of records. They also direct agencies not to withhold records simply because a FOIA exemption may technically apply. Moreover, whenever full disclosure of a record is not possible, agencies are directed to consider whether a partial disclosure can be made.

At the same time, the Attorney General recognized that the "disclosure obligation under the FOIA is not absolute." The statute provides exemptions from mandatory disclosure to protect, for example, national security interests, personal privacy, privileged

records, and law enforcement interests. Still, the Guidelines stress that the President has directed agencies not to withhold information merely to prevent embarrassment to public officials, or because "errors and failures might be revealed, or because of speculative or abstract fears."

A key element of the Attorney General's FOIA Guidelines is the creation of a new defensibility standard to be applied by the Department of Justice whenever agency FOIA determinations are challenged in court. Attorney General Holder formally rescinded the October 12, 2001 Attorney General Memorandum on the FOIA and established a new standard for defending agency decisions to withhold information. A denial of a FOIA request is now defended by the Department of Justice "only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law."

Second, the Attorney General emphasized that utilizing the "proper disclosure standard is only one part of ensuring transparency." Achieving open Government also requires "an effective system for responding to FOIA requests." He stressed that the responsibility for effective FOIA administration belongs to all agency personnel, not just FOIA professionals. He highlighted two key impediments cited by agency personnel in the past as negatively impacting their ability to administer the FOIA, specifically, competing agency priorities and lack of sufficient technological support. He called on agencies to "address the key roles played by a broad spectrum of agency personnel who work with agency FOIA professionals in responding to requests."

The Attorney General also emphasized the need for agencies to work cooperatively with requesters, to utilize technology to make information available to the

public proactively, and to make timely responses to requests a priority. He declared that "[l]ong delays should not be viewed as an inevitable and insurmountable consequence of high demand."

Lastly, the Guidelines discuss the critical roles played by agency Chief FOIA Officers and stress that improving FOIA performance requires their active participation. The Attorney General called on agency Chief FOIA Officers to review their agencies' FOIA administration each year, with a focus on the concerns highlighted in his Guidelines, and to report to the Department of Justice on the steps taken to achieve improved transparency. These reports, which were just completed for the first time this month, will serve as the means by which each agency will be "fully accountable" for its FOIA administration as directed by the Attorney General.

The Department of Justice is fully committed to helping agencies achieve the "new era of open Government" that the President envisions. My Office, the Department's Office of Information Policy (OIP) has been actively engaged in a variety of initiatives to inform and educate agency personnel on the new commitment.

Just two days after the President issued his FOIA Memorandum, on January 23, 2009, OIP sent initial guidance to agencies informing them of the significance of the President's Memorandum and advising them to begin applying the presumption of disclosure immediately to all decisions involving the FOIA. OIP also added a new training session on the President's Memorandum at its FOIA training seminar for attorneys and access professionals held on Feb. 24, 2009.

On March 20, 2009, the day after the Attorney General issued his FOIA Guidelines, OIP highlighted their key features for agencies in an article posted on *FOIA*

Post, the Department's online publication featuring FOIA guidance and news. That same day OIP also announced that it would hold a training session to provide guidance to agencies on the new directives. The following week, on March 26, 2009, OIP held a governmentwide training conference which was filled to capacity with over five hundred agency personnel attending. At that conference I thoroughly discussed the President's FOIA Memorandum and the Attorney General's FOIA Guidelines and provided guidance to agencies on implementing them. In keeping with the new focus on proactive disclosures and increased use of technology, I posted on the Department's website the slides used in that presentation so that they would be readily available to the public.

To assist agencies in implementing the new FOIA Guidelines, on April 17, 2009, OIP issued extensive written guidance to all agencies which it posted on *FOIA Post*. This guidance discussed the new approaches for responding to requests and working with requesters; the new, more limited standards for defending agencies when they deny a FOIA request; the new requirements to maximize the use of technology to disclose information; the new requirement to post information online proactively; the new focus on the broad array of agency personnel whose actions impact the FOIA; and also the new accountability requirements for agency Chief FOIA Officers.

Significantly, OIP provided agencies with concrete steps to use and approaches to follow in applying the presumption of openness. OIP described ways to apply the foreseeable harm standard and discussed the factors to consider in making discretionary releases.

Beyond these principles applicable to responding to individual FOIA requests, OIP also provided guidance to agencies on achieving transparency in new ways. Further,

OIP emphasized the need to work cooperatively with requesters and to make timely disclosures of information. Lastly, OIP discussed the key role to be played by agency Chief FOIA Officers and encouraged FOIA professionals to work closely with those officials.

OIP has also included a discussion of the President's and Attorney General's FOIA Memoranda in the 2009 edition of the Department of Justice Guide to the Freedom of Information Act. The FOIA Guide is a comprehensive reference volume on the FOIA that is compiled by OIP every two years. It serves as the principal resource manual for agency personnel working with the FOIA.

In addition to issuing written guidance to agencies, since the issuance of the Attorney General's FOIA Guidelines, OIP has conducted numerous additional, agency-specific training sessions specifically focused on the President's and Attorney General's transparency initiative. Training sessions have been held at the Departments of the Army, Commerce, Navy, Energy, Treasury, Labor, Transportation, as well as the SEC, EPA, GSA, and the United States Trade Representative, and the United States Postal Service. OIP has also conducted a special training session for the litigators in the United States Attorneys Office for the District of Columbia and has reached out to each of the remaining United States Attorneys Offices to ensure that they are fully apprised of the new Attorney General FOIA Guidelines.

In addition, OIP has added new sessions on the Attorney General's FOIA Guidelines to its existing FOIA training programs. OIP regularly provides training to agency personnel on all aspects of the FOIA, including the law's procedural

requirements, the nine exemptions, the fee and fee waiver provisions, and the requirements to make proactive disclosures.

OIP has also reached out to the public and the requester community. I am a regular speaker at events sponsored by the American Society of Access Professionals, an association of public and private sector officials and individuals interested in issues relating to transparency. OIP hosted a Requester Roundtable over the summer where we invited any interested members of the FOIA requester community to meet with OIP and to share their ideas for improving FOIA administration. There have been numerous follow-up sessions and continued dialogue with the requester community, which has been very productive.

For example, in direct response to concerns raised by the requester community concerning difficulties in reaching agency personnel, just this month, on March 4th, OIP issued guidance to all agency personnel emphasizing the need for good communication with FOIA requesters and requiring agencies to provide an agency point of contact to all requesters, as well as to take a number of other steps to improve communication with requesters. These simple steps have the potential to go a long way to imbuing a "spirit of cooperation" into the FOIA process, as the President has called for. These training programs and requester outreach activities will be on-going in the months and years ahead.

I am pleased to be testifying today with Miriam Nisbet, the Director of the Office of Government Information Services. Our two offices began collaborating immediately. Our partnership will bring benefits both within government and to the citizens who seek information about how their government works. Resolution of disputes, before they

reach litigation, is a goal shared by both OGIS and the Department of Justice. Given that shared interest, OIP has teamed with OGIS to help educate agency personnel on methods they can employ to resolve disputes. In December of 2009, and again just last week, OGIS's Director joined OIP's Director and OIP's Chief of Staff at a training program on the roles of FOIA Public Liaisons. Later this month we will team again at conflict-resolution training seminar designed to give FOIA Public Liaisons exposure to mediation skills.

In addition, as the Department works directly with agencies in FOIA litigation, OGIS will be mediating and resolving agency-requester disputes to avoid that litigation. As the Department fulfills its obligation to encourage agency compliance with the FOIA, we look forward to OGIS's reviews of where agency compliance currently stands. Indeed, the Department looks forward to working with OGIS on those compliance reviews, so that the President may provide recommendations to Congress in the future.

In the upcoming months OIP will be conducting an extensive review of agency Chief FOIA Officer Reports, which the Department now requires agencies to complete and which were due for the first time just this week. OIP issued guidance to agencies last fall concerning the content of these reports. The items required to be addressed by each Chief FOIA Officer are directly tied to the important transparency principles enunciated by the President and Attorney General in their FOIA Memoranda. In particular, each agency Chief FOIA Officer was required to describe the steps being taken at their agency: 1) to apply the presumption of disclosure, 2) to ensure that there is an effective and efficient system in place for responding to requests, 3) to increase proactive disclosures, 4) to increase utilization of technology, and 5) to reduce backlogs and

increase timeliness in responding to requests. OIP will conduct a comprehensive review of the information contained in these Chief FOIA Officer Reports in order to make an assessment of where agencies stand in terms of implementing the presumption of openness called for by the President and Attorney General. That review will specifically examine the issue of backlogs of FOIA requests.

Last year, the Department added several additional reporting requirements to agency Annual FOIA Reports, beyond those called for in the OPEN Government Act, in an effort to target more specifically the issue of backlogs of FOIA requests. In particular, the Department added a requirement that agencies report on their number of backlogged requests and backlogged administrative appeals, i.e., those requests or appeals that were pending at the agency at the end of the fiscal year and that are beyond the statutory time period for a response. Starting with the Annual FOIA Report for Fiscal Year 2009, agencies were required to give a comparison of the backlogged numbers from year to year. For any agency facing a backlog of requests, the Department required the Chief FOIA Officer Report to contain a description of the steps being taken by the agency to reduce the backlog.

In keeping with the President's and Attorney General's call for agencies to increase their use of technology, the Department also required Chief FOIA Officers to report on their agency's use of technology in the administration of the FOIA, including whether their agency currently receives FOIA requests electronically. This is the first time such data has been collected across the government. OIP intends to use this data as a baseline to determine how many agencies are taking advantage of technology to assist them in their administration of the FOIA and to determine what types of technological

solutions are being employed. For any agency not utilizing technology, they were required to explain in their Chief FOIA Officer Report what the impediments are to doing so. All this information will form the foundation for OIP's analysis, review, and subsequent outreach to agencies going forward.

Increasing proactive disclosures is a critical element of the Attorney General's FOIA Guidelines. We have asked agencies to provide examples of such disclosures in their Chief FOIA Officer Reports. Within OIP we are especially focused on making proactive disclosures of information about how the FOIA itself is working. For example, agencies are required to include in their Annual FOIA Reports a listing of all the Exemption 3 statutes that they relied on during the preceding fiscal year to withhold information. To increase transparency on that issue, OIP has compiled a comprehensive list of all the Exemption 3 statutes cited by agencies in their Annual FOIA Reports for Fiscal Year 2008 and is in the process of compiling such a list from the Fiscal Year 2009 reports. OIP has also created a chart of all statutes that have been recognized by the courts as proper Exemption 3 statutes and has posted that list on its webpage, along with descriptions of the material covered by the statutes, as well as the corresponding case citations.

Facilitating the public's ability to review and analyze agency data on FOIA is also a priority for OIP. In connection with the issuance of OMB's Open Government Directive, OIP made available, for the first time ever, on "data.gov," twenty agency Annual FOIA Reports which we had recompiled into an open format. All agency Annual FOIA Reports are now required to be prepared in an open format and for Fiscal Year

2009 OIP is posting all those reports on data.gov to facilitate public access to the information they contain.

Looking ahead, OIP plans to continue its outreach on the important issue of transparency. This will include additional training seminars and further guidance to agencies, specialized training sessions, as well as one-on-one assistance through OIP's FOIA Counselor service. As I've stated previously, the Department is committed to achieving the new era of open Government that the President envisions.

In closing, the Department of Justice looks forward to working together with the Committee on matters pertaining to the Governmentwide administration of the Freedom of Information Act. I would be pleased to address any question that you or any other Member of the Committee might have on this important subject.