

Testimony of Jason Leopold, Investigative Reporter, VICE News  
Before the House Committee on Oversight & Government Reform  
Ensuring Transparency through the Freedom of Information Act (FOIA)

June 2, 2015

Chairman Chaffetz, Ranking Member Cummings, and Members of the Committee:

Thank you for inviting me to testify before the Committee today. My name is Jason Leopold and I am an investigative reporter at VICE News. As part of my job, I regularly submit Freedom of Information Act, or FOIA requests and file lawsuits against government agencies in order to obtain documents about previously unknown government programs, operations, and investigations; and to find out what is generally taking place behind the scenes within the federal government. I write longform investigative news reports, many of which showcase the documents I have obtained through FOIA. I also maintain a FOIA blog at VICE News called "Primary Sources."<sup>1</sup>

Having worked as an investigative reporter for more than a decade, I look forward to talking to you today about the need to ensure transparency through the Freedom of Information Act.

I. Use of FOIA by Investigative Journalists

Information obtained through FOIA is critical to our democracy because it helps citizens learn what their government is up to. Since FOIA went into effect in 1967, investigative journalists have made effective use of the law to expose government wrongdoing, corruption, and waste. For example, FOIA requests by Mark Feldstein, *The Washington Post*, and the Associated Press revealed that the Nixon Administration had been spying on influential journalist Jack Anderson.<sup>2</sup> Through documents it obtained under FOIA, the Associated Press published an article in 2005 detailing how a significant portion of the \$5 billion designated for a post-September 11 recovery program to help small businesses was used to give low-interest loans to companies that did not need terrorism relief, including a dog boutique in Utah and an Oregon winery.<sup>3</sup> The National Security Archive at The George Washington University has

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<sup>1</sup> Primary Sources. Available at <https://news.vice.com/topic/primary-sources>

<sup>2</sup> "The Good, The Bad, The Ugly of Using FOIA." Available at <http://ajr.org/2014/10/08/foia-request-challenges/>

<sup>3</sup> "Many who got Sept. 11 loans didn't need them; some loan recipients had no idea their funds came from terror-relief program," Richmond Times Dispatch (Virginia), September 9, 2005, at A-1.

compiled a list of more than 100 significant news articles that were made possible because of FOIA.<sup>4</sup>

Over the last five years, I have made extensive use of FOIA in my work as an investigative journalist. Notable stories that I have written as a result of documents obtained under FOIA include:<sup>5</sup>

- “A Justice Department Memo Provides the CIA's Legal Justification to Kill a US Citizen”
- “Gitmo Spent \$300,000 on Liquid Supplements While Denying a 'Mass Hunger Strike'”
- “The White House Emails at the Center of Washington's Brewing Net Neutrality Storm”

## II. Current FOIA-Related Problems Experienced by Investigative Journalists

In 1996, when Congress passed the E-FOIA Amendments, Representative Steven Horn, who was a member of this committee, stated: “Most importantly, the bill would tackle the mother of all complaints lodged against the Freedom of Information Act: that is, the often ludicrous amount of time it takes some agencies to respond, if they respond at all, to freedom of information requests.”<sup>6</sup> At least among investigative journalists, delay unfortunately remains the “mother of all complaints.”

As you know, FOIA requires an agency to make a determination on releasing records within 20 business days. An extension of 10 business days is available in “unusual circumstances.” I have submitted thousands of FOIA requests to dozens of different agencies, and in my experience, fewer than one percent of my requests have been decided within the timeframe required by FOIA. My colleagues have had similar experiences.

I routinely experience delays of several years. The agencies that have consistently been slowest to respond to my FOIA requests have been the FBI, the Department of Justice, and United States Southern Command. In the past two years, I have also begun to experience extremely lengthy delays in receiving responses from the NSA.

Delayed responses to FOIA requests are a significant problem for investigative journalists for several reasons.

First, information may become less valuable over time. Information about a candidate is less newsworthy after the election is over, and information about a war is less newsworthy after the conflict is over. Often, information delayed is information denied.

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<sup>4</sup> “FOIA in the News 2004-2006.” Available at <http://nsarchive.gwu.edu/nsa/foia/stories.htm>

<sup>5</sup> A copy of each of these stories is attached as Exhibit A.

<sup>6</sup> 142 CONG. REC. 10,451 (Sept. 17, 1996) (statement of Rep. Steven Horn, Chairman, Subcomm. On Gov't Management, Info. and Tech. of the House Comm. On Gov't Reform and Oversight).

Second, delays in agency responses to FOIA requests have led to a perception among most investigative journalists that FOIA is not a useful tool. As a result, many of my colleagues do not submit FOIA requests at all.

FOIA does provide for expedited processing in certain circumstances, but I have found that agencies take a narrow view of what circumstances merit expedition. For example, the Defense Intelligence Agency denied my request for expedited processing for documents related to the harm to national security caused by Edward Snowden.

Even when expedited processing is granted, the process still moves slowly. For example, I submitted a FOIA request to the Department of Justice on September 5, 2014 for records relating to the Department's investigation of allegations that the CIA had accessed SSCI computers without authorization. Expedited processing was granted, but the agency has decided that it will not release any records until January 29, 2016.

My request to the Executive Office of the United States Attorneys for records about Loretta Lynch illustrates the problems that investigative journalists face in using FOIA. I submitted my request the day that Loretta Lynch's nomination was announced by President Obama. I sought expedited processing because the records I was requesting relate to Lynch's performance of her duties as United States Attorney for the Eastern District of New York. When the agency did not rule on my request for expedited processing within the time period allowed by FOIA, I immediately filed suit. The agency conceded that the topic of my request is a "matter of widespread and exceptional interest," but insisted that it should not have to even begin releasing records for several months. My attorney filed several emergency motions requesting that the Department of Justice process my request and produce records before Lynch's confirmation hearing, but the judge presiding over the case indicated that he would not have time to rule on the motions for more than a month. After Lynch was confirmed, my request for expedited treatment became moot. To date, the agency has still not processed the documents I requested.

My experience requesting records about Loretta Lynch illustrates one of the major problems for investigative journalists using FOIA. Even when a journalist acts with the utmost diligence in filing a FOIA request and pursuing his or her rights in court, agency feet-dragging can frustrate a journalist's attempt to obtain records at the time when they are needed most.

It is often the case that the filing of a lawsuit against an agency catalyzes the release of documents. I am fortunate to have a prominent FOIA attorney, Jeffrey L. Light, representing me and VICE News in over a dozen lawsuits against various agencies. However, not all investigative journalists are in a position to expend the substantial resources necessary to bring FOIA lawsuits, and even large media outlets may find the cost of litigation to outweigh the benefits.

Investigative journalists should be spending their time and resources investigating, not litigating. Unfortunately, some agencies refuse to conduct adequate searches and fail to properly apply FOIA's exemption provisions until a lawsuit has been filed.

One specific and recurring problem I have experienced is with the FBI's invocation of Exemption 7(A). Under Exemption 7(A), an agency may withhold "records or information"

compiled for law enforcement purposes which “could reasonably be expected to interfere with enforcement proceedings.” This exemption comes up frequently in my work because I am often requesting records or information about recent events.

Congress deliberately chose the words “records or information” when it amended Exemption 7 in 1974. Prior to that time, investigatory *files* compiled for law enforcement purposes were exempt. The problem was that agencies could simply place documents that they wanted to withhold from disclosure inside an investigatory file, and then treat the document as exempted simply because of its location. The 1974 amendment was designed to fix this problem by eliminating the blanket exemption for government records simply because they were found in investigatory files compiled for law enforcement purposes.

Notwithstanding Congress’s clear intention and the plain language of FOIA after the 1974 amendment, the FBI continues to withhold information where the record requested “is located in an investigative *file* which is exempt from disclosure pursuant to 5 U.S.C. 552(b)(7)(A)” (emphasis added). I have received dozens of denial letters from the FBI based on this erroneous interpretation of FOIA, and the Department of Justice’s Office of Information Policy has affirmed the FBI’s decision in every administrative appeal I have filed. The FBI has not defended its position in court, but instead conducts a new review applying the proper standard once litigation has commenced. As a result, the issue becomes moot.

In a recent decision, a federal court held that “because the Court has doubts about whether the FBI conducted the required review at the administrative stage in this case, it will remind the Bureau of its obligation to perform such reviews in the future. See *Crooker*, 789 F.2d at 66 (holding that Congress eliminated ‘blanket exemptions for Government records simply because they were found in investigatory files compiled for law enforcement purposes’ (quoting *Robbins Tire*, 437 U.S. at 236, 229–30)).” That decision was issued March 18, 2015 in the case *Tipograph v. Department of Justice*, No. 1:13-cv-239-CRC. Despite being reminded of its obligations, the FBI has continued to deny my requests because the records requested are “located in an investigative *file* which is exempt from disclosure pursuant to 5 U.S.C. 552(b)(7)(A)”. The FBI’s continued practice of asserting Exemption 7(A) directly violates Congress’s command and the federal court’s “reminder.”

### III. Conclusion

FOIA is a valuable tool for ensuring transparency in government. It has been used effectively by investigative journalists since it went into effect. Unfortunately, lengthy delays and agency feet-dragging can turn off investigative journalists to FOIA. While litigation helps, it can be costly and is not consistently effective at securing the release of records in a timely fashion.

Thank you for your attention to this important matter.