Testimony of
David McCraw
on behalf of
The New York Times Company
Before the
Committee on Oversight and Government Reform
United States House of Representatives
on
the Freedom of Information Act
June 2, 2015

Chairman Chaffetz, Ranking Member Cummings, and members of the committee:

Thank you for the opportunity to testify today about the Freedom of Information Act. My name is David McCraw. I am an Assistant General Counsel at The New York Times Company, where I serve as legal counsel to The New York Times newsroom. Our journalists are regular users of FOIA, so we know first-hand the problems presented by agency delay.

Last year, I filed eight FOIA lawsuits on behalf of The Times. Much of that litigation was driven not by actual disagreement about legal issues but in response to unacceptable delay by agencies. In other words, we find ourselves compelled to initiate litigation simply to prompt agencies to act upon a request. Let me provide one recent example that shows how wasteful and inefficient all of that is and why reforms are needed.

Late last year The Times made a simple FOIA request to the Department of Justice. We wanted to know how much money the DOJ had spent paying the legal bills of FOIA requesters in the Southern District of New York. FOIA permits the courts to award attorneys' fees in FOIA cases where the requester wins. We simply wanted to know, in a single judicial district, how often that happened and in what amounts.

It was a straightforward request about a budgetary matter. No FOIA exemption could possibly apply. But weeks passed without a response. Over a four-month period, we repeatedly contacted the FOIA office handling the request. We called more than 10 times and left messages. Almost all of those calls went unreturned. Finally we filed a lawsuit out of frustration.

At that point, the U.S. Attorney's Office was required to become involved. An Assistant U.S. Attorney took on the task of finding out what was going on at the FOIA office, had our request moved along quickly with court deadlines looming, and succeeded in getting the documents released to us. In short, the Assistant U.S. Attorney ended up doing what the FOIA officer should have done in the first place.

Forcing requesters to litigate to get a response is a waste of government resources. But more than that, a citizen's right to get information released in a timely fashion should not turn on whether the citizen is fortunate enough to have the resources and know-how to sue.

There is much that needs to be done to fix FOIA, and I urge the House to move forward with the reform bill, which takes important steps toward empowering OGIS, limiting Exemption 5, and encouraging the use of technology.

But I want to focus today on something very basic: what can be done to get agencies to respond in the time frames dictated by law. Congress, in enacting FOIA, set a response deadline of 20 business days. While statistics show that response times have improved, we know from actual experience that responses from many agencies take months or years. In our written submission, we include a letter from an agency that has sat on a request for nearly four years and now wants to know whether we are still interested.

Our written submission documents some specific issues relating to delay. Let me briefly highlight three.

First, much of the delay appears to have little to do with the nature and complexity of the actual requests, but instead results from a culture of unresponsiveness. Some agencies are consistently good, while others show little sign of improvement year after year. As requesters, we are not in a position to know what the root causes of delay are, whether a lack of resources, poor work performance, inadequate training, or something else. But we do know two things: First, Congress, after weighing all the competing considerations, set specific deadlines in the law. Second, the leaders of many agencies are permitting those deadlines to be ignored by staff. In the end, this is a management issue, and those in charge of agencies should be held accountable for figuring out what the problem is and fixing it.

Second, delay frequently results because agencies decide to refer a request to another agency. This occurs when the second agency is a stakeholder in the information sought. Referral may make sense as a policy matter, but few rules govern the process. The referring agency lacks authority to demand a response from the second agency or set a deadline, and the requesters are left on the sidelines. Much clearer rules and deadlines are needed for the referral process.

Third, FOIA requests often seek information that has been submitted by companies to regulatory agencies. Disclosure of this information is vital to citizens so they can monitor whether regulators are doing their jobs and whether companies are being treated fairly. But in response to such FOIA requests, agencies frequently take the position that they need to consult with submitters. This process becomes a source of endless delay. In the documents we provided to the committee, we include an agency response letter saying that it would take 15 years to finish the consultation and respond to our request. Not surprisingly, when we sued, a federal judge found that was simply not the case and ordered release of the information.

In conclusion, there are a host of reforms worth pursuing, as we see in the House bill. But taking steps to ensure that agencies respond in the time periods that Congress saw fit to establish should be an essential part of any reform.

Thank you for inviting me to testify and for taking on this important issue.