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March 13, 2019

U.S. House Committee on Oversight and Reform
2157 Rayburn House Office Building
Washington, DC 20515

RE: Hearing entitled “FOIA: Examining Transparency Under the Trump Administration”

Dear Chairman Cummings and Honorable Members of the Committee:

On behalf of Public Citizen’s members and supporters in all 50 states, we write to express our wholehearted support for examining how the Freedom of Information Act (FOIA), has fared in the Trump era and improvements that should be made to the landmark right-to-know law. As an organization that also litigates to enforce FOIA, Public Citizen has faced examples of alarming limitations on information disclosures that we have fought in the courts or opposed during the rulemaking process. So, we applaud this important move by the legislative branch to keep an eye on whether the executive branch has been properly been fulfilling its requirements under FOIA.

It is also fitting that this hearing is being held during Sunshine Week, when the media, civil society organizations and the government all join together to celebrate transparency and the power of open government. Named in reference to the famous quote from Supreme Court Justice Louis Brandeis, “sunlight is the best of disinfectants,” Sunshine Week is focused on highlighting how access to information allows watchdog groups like Public Citizen to hold government officials accountable and ensure they are acting in public’s best interest.

One of the most important open government tools in our arsenal is FOIA, which enables Americans to learn what the government is up to and hold it responsible for its actions. FOIA does that by giving the public an enforceable right to access government records, subject to nine narrow exemptions. Unfortunately, the government’s implementation of the law has never been uniform. Unsurprisingly, this trend looks to have worsened under the Trump administration.

The following are a few recent examples of how the government has not been properly implementing FOIA.

Not Proactively Posting Information

Under the Freedom of Information Act, certain types of information are supposed to be posted automatically by agencies in electronic format, without waiting for a FOIA request. These include final opinions and orders that resulted from FOIA disputes. Additionally, agencies must proactively provide copies of records that have already been released to someone else, requested three or more times, or

that the agency determines are likely to be requested again. Unfortunately, not all agencies have been implementing the proactive disclosure requirements of the law as they should.

For example, the Board of Immigration Appeals is an entity that hears appeals on immigration matters, but does not automatically make all of its decisions available in its online reading room. It has thousands of opinions that it has not published online. This hampers the work of immigration attorneys since they and their clients don't have the freedom to view these decisions, as is required by FOIA, but the government has access to those unpublished opinions. Represented by Public Citizen Litigation Group, New York Legal Assistance Group—one of the largest immigrant services providers in New York City and which represents clients in immigration cases—was forced to sue. The case is ongoing.

One additional twist to agencies' lack of proactive disclosure is that some courts have held that when a litigant wins a case regarding information that was not automatically disclosed publicly, the "remedy" in the case is simply to provide the information to the plaintiff, not to publically post the information as it should have been done in the first place. Therefore, Congress should address this bad caselaw by amending FOIA to make clear that courts can enforce FOIA's requirement of public posting of certain categories of information.

Overuse of Exemptions

Though the FOIA Improvement Act, signed into law in 2016 around FOIA's 50th birthday, did fix several problems with the government hiding behind the law's listed exemptions as a way to escape disclosing information, many problems still exist. Generally, Public Citizen believes that the nine specific limits on what is allowable for disclosure under FOIA should be weighed against what is best for society—a "public interest balancing test" in legal terms. Currently, courts only apply the test to a couple of the exemptions. But, should information regarding corporate commercial information or government deliberations actually outweigh providing information to watchdogs when it could save lives or otherwise significantly improve a harmful situation?

Additionally, some FOIA exemptions we don't think make any sense at all, like the complete carve-out the financial industry was able to score for itself, yet another unfortunate example of Wall Street's outsized influence on our nation's democracy. FOIA was enacted for the purpose of ensuring an informed citizenry and allowing the public to hold the government accountable for the actions it chooses to take and chooses not to take in light of the information available to it. It's time for Congress to recalibrate FOIA to undo the trend that has only worsened in the Trump administration that puts the wishes of corporations to shield their information ahead of the good of the nation.

In a recent example from our litigation department, Public Citizen requested information to see what FOIA requests had been submitted to the Department of Labor (DOL) about certain reports having to do with the U.S. Equal Employment Opportunity Commission's survey of employers about the number of women and minorities they employ. DOL tried to stretch the definition of "law enforcement records" (Exemption 7 of FOIA) to include whether or not there was a FOIA request open. We won that lawsuit.

Limiting Fee Waivers

Under the FOIA law, public interest groups who will use information to aid in the public's understanding of government are supposed to get a fee waiver for the costs of searching for and copying the information. However, recently, our lawyers have been getting more pushbacks from agencies trying to

still charge groups like ours fees. For example, we requested information about costs of travel and personal security for both U.S. Department of Housing and Urban Development (HUD) Secretary, Ben Carson, and former HUD Secretary Shaun Donovan. HUD denied our public interest fee waiver. We sued, and HUD produced the documents and did not charge us fees. Likewise the Consumer Financial Protection Bureau tried to deny us our public interest fee waiver and once tried to classify us as a “commercial” requestor, but in those instances the agency reversed the decision to charge fees when we appealed.

Shortchanging FOIA Staffing

Even though agencies are reportedly on pace to receive record numbers of FOIA requests¹, it’s not clear that agencies have taken necessary measures to ensure that they have adequate staff to comply with FOIA’s statutory deadlines. So, we hope that members of this committee inquire into staffing levels to ensure they are not dropping off. We also urge you to make sure that the Trump administration is not using FOIA implementation at agencies as some sort of political pay-back for federal workers who served under Obama as it is reported is happening at some agencies.² Considering the vital role the FOIA role plays in protecting the public interest, no one should be denigrating the important work these federal professionals provide by attempting to characterize the position as “punishment.”

Rulemaking That Would Violate FOIA

According to government research, some agencies not updated their internal guidance documents to implement the FOIA improvements from 3 years ago.³ Although there is sometimes a legitimate need for an agency to update its regulations regarding FOIA processing, such as to implement statutory changes to FOIA, the Department of the Interior (DOI), which is charged with overseeing the nation’s natural resources, including our National Parks, is going a huge step beyond that by proposing FOIA regulations that would actually violate the letter of the law. For example, under FOIA, agencies have a 20 work day deadline (30 work days in unusual circumstances) to make determinations about the request for information and must make records “promptly available” following that determination. But, the DOI is attempting to limit on the number of records that an individual or group will receive in response to its requests every month. Additionally, in its proposed rule, DOI tried to recast FOIA’s statutory deadlines for making a determination about the information request to a mushier “time frame” concept that is contrary to the response requirements clearly laid out in FOIA. And, though forwarding requests within agencies is addressed in both the language of FOIA and in guidance interpreting it, the DOI wants to remove this requirement so that a person who accidentally sends a FOIA request to the wrong part of the agency would be out of luck.

Another way the DOI looks to be trying to improperly limit its responsibilities through the newly proposed rule would be to not provide information when records would “require research.” But, courts have been clear over the years that records must only be “reasonably described,” not provide specifics

¹ Jory Heckman, *FOIA Request Volume in FY 18 “Well On-Pace” To Break New Records*, FEDERAL NEWS NETWORK (March 12, 2019), <https://bit.ly/2HsR57G>.

² Elise Laboott, *Exclusive: Frustrated State Department Employees Hire Attorneys, Charging “Political Retribution,”* CNN (Jan. 28, 2018), <https://cnn.it/2FkQjFF>.

³ U.S. GOVERNMENT ACCOUNTABILITY OFFICE, *FREEDOM OF INFORMATION ACT: AGENCIES ARE IMPLEMENTING BUT NEED TO TAKE ADDITIONAL ACTIONS* (March 13, 2018), <https://bit.ly/2u2TAWr>.

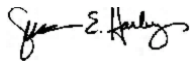
on discrete actions of the agency. It would violate FOIA if the agency's definition of "research" includes looking into which documents are responsive, a clear part of their job in administering FOIA.

Given what a radical departure this Department of Interior propose rule is from the spirit of open government laws, it's not surprising that a bipartisan group of lawmakers has weighed-in with the agency asking it to reconsider its proposed rule. We urge all members of this committee to do so as well.

Moreover, we urge this committee to commission government research to study issues like agencies' exemptions and other mechanisms used to get around disclosure requirements. In addition, government research should be done into what sorts of technology the most efficient agencies are using so as to use best practices to guide the future of FOIA implementation.

Unfortunately, ever since the law was passed, FOIA has needed champions to make sure it is not being ignored or wrongly applied. It's great to see this committee ardently taking on that task—which is desperately needed in our current overly corporate-influenced status quo. Thank you for your work protecting the public's right-to-know, especially during Sunshine Week.

Sincerely,

A handwritten signature in black ink, appearing to read "Susan E. Harley".

Susan Harley
Deputy Director
Public Citizen's Congress Watch division