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Thank you, Chairman Chaffetz, Ranking Member Cummings, for allowing me to share with you some of my experiences helping lawmakers, journalists, and nonprofit organizations quickly and cost-effectively obtain the executive agency records they most need. It is a privilege to lend my expertise to this committee's important work ensuring the administration's compliance with our nation's laws.

And that's really why we are here: because even as technology has put every record just a click away, the Obama administration has grown increasingly defiant of the Freedom of Information Act (FOIA). Indeed, this administration's unparalleled intransigence is what prompted me to found the FOIA Resource Center, a no-frills consulting firm, in July 2013. But for agencies' chronic failure to release records in accordance with scheduled rates, my firm based here in DC -- but serving the world at large via social media -- would not exist.

Unlike the federal judiciary, FOIA Resource Center does not define substantially prevailing in a FOIA matter as forcing release of public records by compulsion of the court following a two-year wait and cost-prohibitive lawsuit. Rather, FOIA Resource Center defines success as bringing agencies into prompt compliance with all applicable disclosure laws without having to go to court.

Many areas of FOIA can and have been reviewed by others as benefiting from reform. Today I bring you evidence of a more nuanced issue not previously addressed by any formal body, but which poses the single greatest barrier between the American people and their records. The issue I raise is one of fees -- specifically: how FOIA fees are imposed, why they are so high, what constitutional implications the current protocol raises, and how to get fees back under control. While FOIA Resource Center's supporting examples may not appear as extreme as others you have been asked to consider, these are all the more telling of a systemic problem for the amount of defense they demonstrate the agencies earnestly leveling at such modest and narrowly-tailored requests. Fortunately, the tools for reversing this trend are already at the Committee's disposal, without the need for further legislation.

I. Background

When FOIA was launched from its nest in section three of the Administrative Procedure Act, agencies were granted authority to recover the cost of searching for records and reviewing them for redaction. The agencies could come up with their own fee regulations so long as the rates charged did not exceed caps set by the Office of Management & Budget (OMB). The agencies were also barred from imposing fees totaling less than they would cost to collect. Exemptions from full or total payment were also made for news outlets and academics. While new media has turned the definition of journalism -- and, with it, this exempt class on its head -- that exemption is not our primary focus here today.

II. Ten-Day Administrative Closure Device

Instead, I'd like to draw your attention to another novel aspect of FOIA fee application -- namely, the ten-day administrative closure procedure. It was a practice I first encountered several years ago in pursuing a request with the Federal Reserve Board of Governors for proof of salary

packages exceeding $225,000. The 10-day closure procedure has since gained widespread acceptance among agencies looking to chop mounting backlogs by any means necessary.

A. 10-day Closure Protocols

Prior to conducting any search whatsoever, an agency issues a general guesstimate of what locating and redacting responsive records would cost -- even if none were ultimately released or even found. The guesstimate letter warns that, without payment or a promise to pay the quoted fee within 10 days of the date of the letter (usually sent surface post), the request will be "administratively closed." The guesstimate letter further warns that fees owed by the requester may prove much higher upon conclusion of an actual search. It emphasizes that the fees charged will be due and owing regardless of whether the agency ultimately finds responsive records, or chooses not to release any responsive record it happens to find. (Failure to pay a final bill results in refusal to accept any future FOIA requests.)

While the guesstimate letter stops short of seeking collateral to support a pledge, I need not tell you that the prospect of owing the U.S. government $2,000 or more for records an agency may ultimately choose to withhold is not a reasonable risk for a midsize news outlet or single-issue nonprofit to incur in conducting an investigation into any topic from the million-dollar art collection under lock and key at the Fed to the distribution of bullet-proof vests along the U.S.-Mexico border.

B. Bifurcating Payment from Fee Waiver

Now, if a fee waiver petition accompanied the substantive request, the guesstimate letter typically also says one of two more things:

> your request for a fee waiver is being considered (while going on to enumerate factors that demand further evidence in order to be decided); or, your request for a fee waiver has been denied in whole or in part, a decision you may appeal within -- depending on the agency -- anywhere from 10 to 65 days.

As you can see, bifurcating the pledge to pay from its attendant fee waiver determination is coercive. In the first scenario, the requester agrees to pay an impossibly large and unbounded fee with no guarantee of return. In the second, the requester decides not to promise to pay and his fee appeal is rendered moot by the agency's "administrative closure" of the underlying request. Either result is unconscionable and constitutionally untenable.

C. Due Process Denial in 10-Day Closure

The constitutional aspect of FOIA is not often discussed. But it is not a matter of largesse that causes the government to open its books. Rather, the founders knew what I often say which is that our democracy only operates well under the strictest supervision. How we verify that this is indeed a government of laws and not of men is by examination of the records generated by these civil servants in performance of official duties.

At bottom, every jot and tittle recorded in the performance of official duties belongs to the people of the United States. Federal workers are but trusted servants, safeguarding these records until their true owners -- the American people -- express a desire to see them. The desire may be speculative or it may be expressed in support of other rights, such as the First Amendment's right of redress. Without FOIA or something like it, it would be nearly impossible to establish when some protection has been unequal or provide the documentation necessary to mount a viable challenge to an abusive practice performed under color of law.

Due Process Minima: Notice & Response

That said, how do we enforce any property right that is entrusted to the government to disburse, apportion, or deny? Due process, at a minimum, entails adequate notice and a meaningful opportunity to respond. Adequacy of notice means a statement of sufficient clarity as to make its recipient aware of rights or benefits about to be lost through some action or inaction on the recipient's part within a certain timeframe or through particular means. Meanwhile, to be meaningful, the opportunity to respond must be capable of effecting a change in the outcome once the arbiters have afforded the recipient's challenge due consideration.

1. 10-Day Cutoff Denies Adequate Notice

Notice is not adequate when it reaches a FOIA requester after the opportunity to act has lapsed because -- despite the ubiquity of electronic correspondence -- an agency insists on using its fanciest paper letterhead and a forever stamp to order a 10-day drop dead cutoff but, through normal bureaucratic delays, that fancy letterhead doesn't wind up leaving the agency's mailroom for another five more days. Nor is notice adequate when it demands, on penalty of killing the underlying request, payment or a pledge to pay an unbounded, unfounded bill.

2. 10-Day Cutoff Renders Response Moot

Neither is the opportunity to respond meaningful when the response is rendered moot by the death of the underlying FOIA. As noted above, printed letters take time to leave the building and even more time to reach a requester by surface post. So common is this phenomenon that the Federal Reserve has written into its 10-day cutoff a safe harbor inviting requesters to make a compelling argument for an extension of time in which to consider the requester's fee appeal.

Long-Term Outlook

On the surface the Fed's safe harbor provision may seem like a sufficient corrective measure. I assure you it is not because it converts the constitutional guarantee of due process into a matter of agency discretion which a requester is presumptively denied and has the burden to overcome. Our concern at FOIA Resource Center is that just as the Fed's 10-day cutoff protocol has gained widespread acceptance across federal agencies, so may this constitutionally infirm burden-shifting safe harbor. FOIA has due process baked into its codified appeals process. Why allow agencies to circumvent these protections? Unfortunately, courts are loath to entertain APA-style challenges to FOIA procedures, making judicial review of this practice quite unlikely and ineffective.

III. FOIA Defense Dollars

Compounding the problem above is the phenomenon of skyscraper fees even as near-universal automation has dramatically decreased the cost of search and production. In quoting a dramatically high estimate, with no guarantee of responsive documents and a disclaimer that the ultimate search could indeed cost more, many requesters are forced to give up rather than fight. Those who do challenge an agency's initial fee determination face a formidable battle.

According to self-reported figures at FOIA.gov, agencies spend 15-25% of their FOIA budgets (including money spent on litigation) resisting production on various grounds. These FOIA defense dollars are not further subdivided to reflect how much is devoted to denying fee waivers per se. However, the attached examples indicate the inordinate effort expended in denying a public interest classification for records sought pro bono for the sole sake of investigating apparent agency violations of other laws. The agencies go to great pains at taxpayer expense to protect themselves from effective citizen oversight.

Problem: Overreliance on Contractors

Undoubtedly, as FOIA offices seek to improve and professionalize their performance, higher level employees are tasked with processing requests. Rightly or wrongly, this trend necessarily increases fees incurred, which has a severe chilling effect on every class of requester not in a position to spend the time or money that filing suit entails. This professionalization at many agencies has led to widespread outsourcing. While contractor support of FOIA functions is not necessarily barred, contractor performance of inherently governmental functions is expressly prohibited.

Withholding is Largely Discretionary

An endrun arises where a FOIA contractor makes a determination involving agency discretion. (Six of the nine exemptions enumerated in the statute, as well as all fee classifications, are permissive rather than mandatory, making these by definition discretionary.) To avoid running afoul of the Federal Acquisition Regulation, a full-time government employee must incur time reviewing a contractor's initial withholding recommendations. This mechanism in essence doubles a bill. Moreover, the contractor's relationship to the agency being more tenuous, the incentive to withhold or deny or abort a request altogether is exacerbated by the desire to renew the contractor's own employment.

Solution 1: Perform an Audit

One solution is to request that the Government Accountability Office conduct an audit of FOIA contracting across the federal workforce. An easy examination was possible prior to the recent "upgrade" of usaspending.gov. But now that contract descriptions have been eliminated from that portal, as well as keyword searches across contracts, it is no longer possible to see how much each agency is devoting to outsourcing its FOIA functions.

Solution 2: Cap FOIA Litigation Funds

While increased reliance on contractors for FOIA processing incentivizes withholding and denial of fee waivers, there is no countervailing pressure balancing the scales. This is to say that to the extent a department excessively denies, provoking an abundance of legal challenges, the Justice

Department appears to rise to the challenge without the ordinary limitations imposed by governmental budgets. For instance, the Obama administration has defended its failure to prosecute illegal entry to or stays in the United States on grounds that the Attorney General has a finite budget for doing so and must exercise prosecutorial discretion on how to prioritize limited resources. No such limitation appears to exist in the realm of FOIA. As a result, agencies do not have any reason to compromise or settle. Even assuming denial of a record or a classification was legally plausible and within an agency's discretion, there is no benefit to surrendering a position not worth the money to insist upon as far as the agency is concerned.

To the extent that inherent constraints exist in the prosecution of murder and rape, how much more reasonable and necessary is it to impose a cap on how much the federal government is allowed to allot to fighting compulsory release of government records subject to FOIA?

Thank you Chairman Chaffetz and Ranking Member Cummings for your time and attention to this matter. I am happy to answer any questions.