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Reform on “Ensuring Transparency through the Freedom of Information Act”

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Mr. Chairman, distinguished members of the Committee: thank you very much for your invitation to testify today about ensuring transparency through the Freedom of Information Act. My name is Nate Jones and I am the Director of the Freedom of Information Act Project of the independent, non-governmental National Security Archive, based at the George Washington University.

At the National Security Archive, we have filed more than 50,000 Freedom of Information Act requests in our efforts to challenge government secrecy, inform the public debate, ensure government accountability, and defend the right to know. We have conducted fourteen government-wide Freedom of Information Act audits that have displayed the inner-workings (or non-workings) of over 250 government agency and component FOIA shops. Our White House e-mail lawsuits against every President from Reagan to Obama have saved hundreds of millions of messages, and set a standard for digital preservation that the rest of the government has not yet achieved –as we know from the State Department. The Archive has won prizes and recognition including the James Madison Award for championing the public’s right to government information, an Emmy Award for news and documentary research, and the George Polk Journalism Award for “piercing self-serving veils of government secrecy.”

The key point that I would like to convey to you in my testimony is that the tremendous promise of the Freedom of Information Act –a tool that citizens can use to effectively and efficiently gain access to records produced by their government– has not been fulfilled. As any FOIA requester will likely tell you, using the FOIA to gain access to government records is far too frequently a huge challenge –often because government agencies want it to be one.

I would like to present to you today three of the largest barriers for Freedom of Information Act requesters; what I believe to be the overarching reason for these barriers; and how I believe

the Committee can help to reduce them. The first barrier is agencies' problematic (and fiscally unnecessary) use of FOIA fees to deter requesters from requesting government information. The second barrier is the increasing trend of agencies using FOIA exemptions, often Exemption Five, to censor embarrassing or inconvenient information that should be released. The third barrier is the inability of the federal government to harness technology to process FOIA requests and post FOIA releases online so that the public can have access to these released records more quickly. And finally, I'd like to point to the overarching problem that there is no real oversight of federal FOIA programs; no FOIA beat cop to ensure that agencies are effectively processing requests, not improperly withholding information, adhering to the spirit of the Freedom of Information Act, and effectively and efficiently releasing information to their public.

But before I begin on barriers, I must note that there are dozens of exemplary agencies that have up-to-date FOIA regulations, complete most or all requests within the required time limit, waive FOIA fees as a matter of policy, consistently release as much information as is truly possible, and post releases online. Likewise, there are hundreds of star FOIA professionals that I have met during my service with the American Society of Access Professionals who really do have "transparency in their bones," and place the requirements of the Freedom of Information Act above bureaucratic concerns and fear of embarrassment. To these agencies and FOIA specialists, thank you! I guess, in this case, the reward for competence is inconspicuousness.

Frequently, the first negative interaction a FOIA requester experiences with an agency is over fees; often because many agencies have adopted a strategy of using the specter of high FOIA fees to deter people from making requests. The Federal FOIA Advisory Committee, made up of government and non-government members including myself, has identified fees as the most frequently contentious issue in the FOIA process for those both inside and outside government. Miriam Nisbet, the former director of the FOIA Ombuds office, recently confirmed that some agencies use fees to dissuade people from filing FOIA requests.

The need for exorbitant fees to pay for FOIA requests is unnecessary from a fiscal perspective. According to the government's own most recent figures (FY 2014), the 100 agencies covered by FOIA processed 714,231 requests at a cost of \$441 million dollars –well worth it considering the value of a government accessible to its citizens. Total fees paid by FOIA requesters were just \$4.2 million, *less than one percent* of the cost of implementing the Act.

The use of fees to dissuade people from making requests becomes even more questionable when one understands that the money collected from fees goes to the U.S. Treasury's General Fund, not to defray actual agency FOIA costs; and, that as the statute is written, educational, scientific, and media FOIA requesters are not required to pay most FOIA fees, only everyday requesters are.

Many high fee estimates are also probably illegal. The 2007 FOIA amendments make it very clear that any time an agency misses its twenty-day statutory deadline to process a request, the agency is only allowed to charge copying fees to non-commercial requesters. Agencies, with the support of the Department of Justice, have improperly skirted the intent of these provisions so often that both FOIA bills currently pending in Congress include language (the Senate's is ironclad) which should prohibit these fee hijinks, once and for all.

The second major barrier I would like to address is the improper withholding of information requested under FOIA. This Sunshine Week, White House spokesperson Josh Ernest repeated a Department of Justice figure touting a 91% release rate under FOIA. But this figure is extremely misleading. DOJ numbers ignore nine of the eleven reasons FOIA requests are denied, including improper no records responses, administrative closures, and "fee related reasons." If you include all the reasons FOIAs were denied to get your data, the actual release rate is just over 50 percent –and many of those "partial releases" contain swaths of completely redacted pages.

More startling is the *Associated Press'* recent finding that almost a third of all FOIA denials that are appealed lead to the release of more information. That is: when challenged, government agencies admit they wrongly withhold information from requesters almost a third of the time. The DOJ reports that in the last fiscal year, just 12,754 requests (3 percent of denials) were appealed. Extrapolating, this means that it is possible a staggering 71,024 or more requests were closed by agencies that withheld too much, or all of the information that requesters sought.

As this committee well knows, the most oft-abused FOIA exemption is Exemption Five, which allows agencies to choose to withhold any "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency" as well as an agency-claimed "draft." This exemption, earlier characterized by John Podesta the "withhold it because you want to" exemption, is the go-to tool that agencies use to withhold embarrassing, incriminating, or –sometimes even– burdensome-to-process documents. In an emblematic (and ironic) misuse of Exemption Five, the Federal Election

Commission once used it to censor its own guidance on when to use Exemption Five –even though it had already been posted on the FEC’s website.

Certainly, not all evocations of Exemption Five are improper. There are of course occasions where Exemption Five can and should be invoked to protect attorney client privilege and candid advice between officials. But its ever-rising use shows that it is being abused far more than it is being properly used. Just a week ago *The Washington Post’s* Al Kamen published an email about a potential traffic delay sent within the Department of Justice (the agency required to “encourage compliance” of the FOIA). This innocuous email was marked “ATTORNEY-CLIENT PRIVILEGED COMMUNICATION”, “ATTORNEY WORK PRODUCT”, and “SENSITIVE/PRIVILEGED COMMUNICATION”. The implication is clear: emails are marked this way so they can be “knee-jerk” denied using Exemption Five in response to FOIA requests.

Infuriatingly, Department of State officials are continuing their painstaking review of former Secretary of State Hillary Clinton’s emails to withhold information under Exemption Five (a discretionary exemption) even though she herself stated that she wants them released for the public to see. Just days ago, the Department of State improperly used Exemption Five to attempt to censor a line where the former Secretary noted that “using private security experts to arm the [Libyan] opposition should be considered.” We must remain vigilant as their review continues that our access to our history of knowledge of our government’s operations is not “B5’ed away.”

Exemption Five’s power to deny records can be even stronger than the security classification system. Recently the Central Intelligence Agency cited Exemption Five’s deliberative process, not national security risks, to withhold the “Panetta Review,” an internal account of its torture program, from *Vice* reporter Jason Leopold. The reason: a declassification review would have in-all-likelihood led to the release of portions of the report; the broad latitude of Exemption Five allowed the CIA to withhold it all.

The Central Intelligence Agency may have learned of “the power of Exemption Five” during its declassification battles with the National Security Archive. The Archive has had much success convincing declassification reviewers and judges that many historic CIA documents no longer merit continued classification; we have had less success when the CIA uses Exemption Five. The Agency continues to hide the final volume of its history of the 1961 Bay of Pigs Invasion not by claiming that it contains classified national security secrets, but by claiming it is a “draft,” that

its release could “confuse the public” and that, therefore, this document should remain hidden indefinitely.

Last summer, in a two-to-one decision, the DC Court of Appeals agreed with the agency. It wrote: “According to the FOIA requester, the CIA’s interest in protecting any contentious or sensitive issues discussed in the draft of Volume V has diminished over time. But unlike some statutes, such as certain provisions of the Presidential Records Act, see 44 U.S.C. § 2204(a), Exemption 5 of FOIA does not contain a time limit. We must adhere to the text of FOIA and cannot judicially invent a new time limit for Exemption 5.”

Fortunately, your Committee has taken up the Court’s challenge. The bipartisan FOIA Oversight and Implementation Act of 2015, HR 653, that you unanimously passed out of Committee this February contains two important provisions that will go a very long way toward curtailing agency Exemption Five abuse. It amends the law so that agencies cannot use Exemption Five to withhold information that is older than 25 years. (The Presidential Records Act forbids the use of Exemption Five for all documents beginning twelve years after the president leaves office. Certainly, agency documents should not be withheld when presidential documents cannot be.) Second, the bill’s language stating that “records that embody the working law, effective policy, or the final decision of the agency” cannot be withheld under Exemption Five is highly lauded by the National Security Archive –and no doubt the 50 other organizations on the record supporting the most robust strengthening of the Freedom of Information Act as possible.

One warning though: as Congress closes some loopholes used to withhold information from the public, agencies will look for new ones. The current 2016 National Defense Authorization Act includes a dangerous provision for the vast expansion, government-wide, of the amount of information that can be withheld under FOIA’s Exemption Two, which covers internal agency practices. (The Supreme Court wisely curtailed this expansive exemption in its 2011 *Milner v. Department of Navy* decision).

Likewise, the National Security Archive has heard that the State Department is or will soon ask Congress for a new “Statutory” Exemption Three provision to exclude foreign government information. This, to quote my Director Tom Blanton, “Is a terrible idea.” As he correctly explained to the Senate Judiciary Committee: “Right now, such information earns protection only if it is properly classified, meaning that its release would harm an identifiable national security interest. Even with this limitation, the State Department routinely abuses the designation...A ‘foreign government information’ exclusion as a b-3 exemption would

effectively import into our laws the lowest common denominator of foreign countries' secrecy practices. Instead, the standard needs to be 'foreseeable harm' to our own national interests, with a 'presumption of disclosure.' We can lower our standards so diplomats are more comfortable cozying up to dictators, or keep everyone on notice that ours is an open society, and that's where we draw our strength and our ability to address and fix problems."

Thanks to the members of this Committee and their staffs for presenting legislation that will roll back the most oft-abused FOIA exemptions and for continuing to monitor, flag, and push back against potential new statutory exemptions which could undermine the FOIA.

The third barrier to access to information that I would like to highlight is the inability of agencies to harness technology to improve the records management and FOIA processes, a problem that members of the Committee have long sought to improve.

Perhaps a silver lining to the State Department's email fiasco is that the public now has an inkling as to just how anachronistic record keeping systems are at the Department of State, and indeed across the federal government. When agencies, in 2015, still practice a "print and physically file" system to preserve email records, we know there is something direly wrong with the federal IT system.

According to a Department of State Office of Inspector General report, in 2011 just .006 percent of emails throughout the entire Department were saved. The sad irony is that although former Secretary Clinton was likely in breach of record keeping laws and best practices, her personal email system preserved emails better than that the State Department's system. Of course, neither Clinton's emails nor the billions of deleted Department of State emails were searched and processed in response to FOIA requests. Because the Department of State relied primarily upon a "print and file" system to save digital records, a generation of our records has been lost.

The Department of State has borne the brunt of criticism for its willful deletion of federal record emails, but the problem is government-wide. In 2008, the OpenTheGovernment.org coalition and Citizens for Responsibility and Ethics in Washington (CREW) surveyed the government and could not find a single federal agency policy that mandated an electronic record keeping system agency-wide. The same year –seven years ago– the Government Accountability Office produced an indictment of the "print and file" approach, concluding that even the agencies recognize it "is not a viable long-term strategy" and that the system was failing to capture "historic records "for about half the senior officials" surveyed. Despite ruling

after ruling requiring White House emails to be saved, the Office of Management and Budget and the National Archives and Records Administration did not act until 2012 to require agencies to preserve their email. Even then, agencies received a four-year grace period to start doing what the White House has done since 1994.

Today, right now, federal agencies are still not required to digitally preserve their emails. The deadline, set by NARA, is December 31, 2016 for all federal agency e-mail records to be managed, preserved, and stored electronically. Three years later, in 2019, agencies are supposed to be managing all their records electronically. Until then, federal employees will continue to be allowed to select themselves which emails they believe to be federal records, print them out, and file them in a box. As long as this practice continues, it is unrealistic to expect that more than .006 percent of all emails across the federal government will be preserved or searched in response to FOIA requests.

Additionally, the majority of agencies are not harnessing technology to improve FOIA processing. This year, the Department of Justice pointed to an increasing number of FOIA requests (probably a good thing more citizens are interested in obtaining federal documents!) and the “increasing complexity” of requests received as reasons for the government’s growing backlogs and oft-slow response times. I would add one more reason: the government’s slow adoption of technology to more quickly and efficiently process requests. It is my hope this Committee can prod government FOIA shops to follow the private sector’s lead (which also deals with larger and larger amounts of “big data”) and utilize e-discovery tools, automated tools to redact privacy and other information which must be withheld, and continue to move FOIA processing from a paper based FOIA process to a digital one.

The National Security Archive is also extremely concerned that twenty years after the passage of the E-FOIA Act, only 40 percent of federal agencies are following the intent of the law. Just 67 out of over 165 agencies covered by the Archive’s latest FOIA Audit --coauthored with my esteemed colleague Lauren Harper-- are routinely posting documents released through FOIA and reducing the processing burden on the agencies and on the public.

Long FOIA delays and growing FOIA backlogs make proactive disclosure even more important. The zero-sum setting of FOIA processing in a real world of limited government budgets means that any new request we file actually slows down the next request anybody else files; older requests slowing down our new ones, especially if they apply to multiple records systems. The Department of State argues that since it is now processing former Secretary Clinton’s emails, all

other FOIA requesters need to take a number, have a seat, and wait (or sue). The only way out of this resource trap is to ensure that agencies post online whatever they are releasing, with few exceptions for personal privacy requests and the like. When taxpayers are spending money to process FOIA requests, the results should become public, and since agencies rarely count how often a record may be requested, requirements like “must be requested three times or more” just do not make sense. Many examples of agency leadership –posting online the Challenger space shuttle disaster records or the Deep Water Horizon investigation documents, for example– have proven that doing so both reduces the FOIA burden and dramatically informs the public.

Our audit this year found 17 out of 165 agencies that are real E-Stars, which disproves some assertions that it is just too difficult to post released FOIA records online. The excuse most frequently given against online posting is about complying with disability laws; that making records “508-compliant” is too burdensome and costs too much for agencies actually to populate those mandated online reading rooms. In fact, all government records created today are already required to be 508-compliant, and widely-available tools like Adobe Acrobat automatically handle the task for older records with a few clicks.

The Department of State, notwithstanding its problems of FOIA and records management, leads all federal agencies in its approach to posting FOIA releases online. As an E-Star, State’s online reading room is robust, easily searchable, and uploaded quarterly with released documents – which allows requesters a useful window of time with a deadline to publish their scoops before everybody gets to see the product. State accomplished this excellent online performance using current dollars, no new appropriations. State’s FOIA personnel deserve our congratulations for this achievement. When Secretary Clinton’s e-mails finally get through the department’s review (which should not take long, since none were classified), they should be posted onto State’s online reading room, which will provide a real public service for those reading her e-mails.

In light of these problems, I strongly agree with the language in your bill that requires that agencies shall “make information public to the greatest extent possible through modern technology.” They have a long way to go, but it is high time agencies began harnessing the power of modern tech.

The final, overarching point that I would like to make for the Committee today is that the root cause for the FOIA problems and the underlying reason for much of the public unhappiness with the Freedom of Information Act that you’ve heard today is the lack of an independent,

robust, organization that monitors, and forces FOIA compliance throughout the federal government –a FOIA beat cop, if you will.

The Office of Government Information Service, created by the FOIA reforms of 2007, may have been envisioned by Congress to play this role, but in my opinion, it has not yet. It certainly doesn't help that it has not had a director for more than six months, notwithstanding the efforts of Acting Director Nikki Gramian.

This February, OGIS's past director Miriam Nesbit testified to your Subcommittee on Government Operations: "If you want recommendations, reports, and testimony that have not had to be reviewed, changed, and approved by the very agencies that might be affected, then you should change the law." She was right. As of now, OGIS is not independent and thus cannot serve its Ombuds role. Fortunately, your pending legislation will go a long way to fixing this.

Unfortunately, at least from my perspective, Ms. Nesbit also testified that while she believed OGIS should be independent, she did not believe OGIS "wants to or will be the FOIA police." Nevertheless, when it was created in 2007, Congress gave OGIS the power to "issue advisory opinions if mediation has not resolved [a FOIA] dispute." OGIS has completed over 3,000 FIOA mediations, but unfortunately in my view, has yet to issue a single advisory opinion.

I believe some type of "FOIA police" is needed to fix and prevent many of the incidences of unfair fee levying, decades-long FOIA waits, and improper withholdings that your Committee has heard about today. OGIS, to me, could be potentially well-suited to serve this role, but is not currently and unfortunately does not aspire to.

The Department of Justice Office of Information Policy also is not a FOIA beat cop that requesters can turn to. Its mission is to "to provide legal and policy advice to all agencies on administration of the FOIA" and also to "encourage[] agency compliance with the law and for overseeing agency implementation of it." (OGIS is charged to "review" compliance.) Having worked with the professionals DOJ OIP for over five years, my sense is that the office does a superb job helping agencies with legal and policy advice, but has done far too little "encouraging" agency compliance with the law. When members of the Federal FOIA Advisory Committee met with the DOJ OIP last year, the office confirmed that the extent of the compliance was ensuring that agencies properly submitted their annual reports.

So the problem remains. Congress can and will pass good legislation with good ideas such as requiring agencies to regularly post FOIA releases online (1996) and prohibiting agencies from charging many FOIA fees if they miss their deadline (2007), but without a FOIA enforcer –from OGIS, DOJ, the White House, or some other entity– some agencies will continue to flout the law without consequence.

According to reporting from the *Wall Street Journal*, this is precisely what happened at the Department of State. A high-level political appointee intervened and stopped the release of documents State Department FOIA professionals had determined could be viewed by the public without harm. A FOIA specialist was called into high level policy meetings to advise on how to hide documents from disclosure (including by marking them “deliberative process”). Other problems at State likely continue today, the *Journal* reports, “that there is no pressure on bureaus or embassies to respond to document searches in a timely fashion; that FOIA specialists hold little stature; and that there are no consequences for people who don’t produce documents requested.” The most troubling aspect is that these issues are not isolated to one department. Due to the absence of FOIA beat cops, this behavior –which your Committee has now seen many examples of– spans the federal government.

The current processes of “encouraging” and “reviewing” agency compliance with FOIA are not actually *establishing* agency compliance with FOIA. My fear is that without a robust enforcement entity, the Freedom of Information Act reforms included in HR 653 will not fundamentally fix the root cause of the problems your Committee has heard today.

Esteemed members of this committee: thank you again for holding this hearing today and for your support of the Freedom of Information Act. Thank you for your unanimous passage of HR 653, the FOIA Oversight and Implementation Act of 2015. Your dedication to this issue makes me hopeful that this strong FOIA reform will be enacted this session and that more documents will be released to more people, more quickly.

I ask the Committee’s permission to include this statement in the record, and to revise and extend these prepared remarks to include responses to the other witnesses today.