

Hearing

Before The Subcommittee on Government Operations,
House Committee on Oversight and Government Reform

“Ensuring Government Transparency Through FOIA Reform”

February 27, 2015

Statement of

American Library Association
American Society of News Editors
Association of Alternative News Media
Citizens for Responsibility and Ethics in Washington
National Security Archive
National Security Counselors
OpenTheGovernment.org
Project On Government Oversight
R Street
Sunlight Foundation

As frequent users of the Freedom of Information Act (FOIA) and groups dedicated to transparency in government and the accountability it brings, we applaud the Subcommittee for examining how the FOIA can be improved through legislation, specifically H.R. 653. The February 27 hearing, “Ensuring Transparency Through FOIA Reform,” provided a valuable opportunity to explore what is and is not working well with the FOIA process in government and how legislation can address its many problems.

We believe H.R. 653 presents a unique and valuable opportunity to stem some of the worst FOIA abuses and more effectively harness existing resources, particularly the Office of Government Information Services (OGIS) at the National Archives and Records Administration. We were especially heartened by Former OGIS Director Miriam Nisbet’s testimony, and her support for giving OGIS greater authority and independence. That only now, as a private citizen who no longer is speaking officially on behalf of OGIS, can Ms. Nisbet freely advocate for the additional authorities OGIS so badly needs itself speaks volumes about why OGIS must be freed from the inter- and intra-agency review process that has stifled the agency in the past from commenting freely and forcefully before Congress.

We certainly understand and expect that the government experience under the FOIA may differ from the experience we have had as requesters. But we very much take issue with testimony offered by Frederick Sadler, a former Federal Drug Administration FOIA official, concerning the foreseeable harm provision of H.R. 653 and the claimed technical problems with both a FOIA on-line portal and complying with section 508 of the Americans With Disabilities Act (ADA) if agencies are required to post all documents requested at least three times under the FOIA.

First, H.R. 653 amends 5 U.S.C. § 552(b)(5)(9) to provide:

An agency may not withhold information under this subsection unless such agency reasonably foresees that disclosure would cause specific identifiable harm to an interest protected by an exemption, or if disclosure is prohibited by law.

This “foreseeable harm provision” merely codifies the current operative policy mandated by Attorney General Eric Holder, in implementation of President Barack Obama’s day-one FOIA directive to all agencies. Mr. Sadler testified that in his

opinion, codifying this provision will delay agency responses and lead to more litigation, including litigation over access to any written determination of foreseeable harm agencies create. Mr. Sadler's fears, however, are completely unfounded. Agencies already are required to comply with the attorney general's FOIA directives, which include applying the foreseeable harm standard to all exemptions where disclosure is not prohibited by law. Further, codifying this provision likely will result in decreased litigation, as it ensures more, not fewer, disclosures.

Even more significantly, codifying the foreseeable harm standard is essential to avoid the political football that incoming administrations have made of the FOIA and to ensure the statute is implemented as Congress intended. We have seen widely divergent swings in the implementing policies of attorneys general. For example, Attorney General Janet Reno issued a FOIA policy memorandum mandating disclosure unless the agency could identify a specific, foreseeable harm that would result from such disclosure. This was followed by Attorney General John Ashcroft's FOIA policy memorandum essentially reversing this course and advising agencies the Department of Justice (DOJ) will defend all withholdings "unless they lack a sound legal basis or present an unwarranted risk of adverse impact on the ability of other agencies to protect other important records."¹ Attorney General Holder's memorandum reversed course once again, implementing the foreseeable harm standard.

These radically differing interpretations of the FOIA do a grave injustice to the statute, which was enacted with an intended presumption of openness and disclosure. The extent of the public's statutory rights to access government information should not vary depending on the administration in office. Yet that is precisely what has happened, reinforcing the need for Congress through H.R. 653 to codify the foreseeable harm provision, now followed as a matter of policy only.

Second, we strongly support the consolidated online request portal H.R. 653 would mandate. This portal would permit a requester to submit a FOIA request to any agency from a single website, while allowing individual agencies to create or continue their own online portals. Mr. Sadler testified that in his view the portal mandated by this provision is not well defined, that is will require more – not fewer – agency personnel to implement, and that the existing website operated by DOJ, www.FOIA.gov, sufficed for this purpose.

¹ Memorandum for Heads of all Federal Departments and Agencies from John Ashcroft, The Freedom of Information Act, October 12, 2001, available at <http://www.justice.gov/archive/oip/foiapost/2001foiapost19.htm>.

Mr. Sadler's testimony reflects a fundamental misunderstanding about the portal provision, the needs of requesters, and the limitations of DOJ's website. The portal concept is far from new; currently, for example, the Environmental Protection Agency maintains a portal that allows requesters to submit requests directly online to any of the participating agencies, FOIAonline. For requesters unfamiliar with specific and varying agency practices about how and where to submit requests, online portals are a life saver.

Nor does Mr. Sadler's fear that broadening the implementation of an online portal will require additional agency resources have merit. To the contrary, automating as much of the FOIA process as possible offers the best hope for agencies dealing with dwindling agency resources and increasing FOIA requests.

We are aware that previously DOJ fought behind the scenes to wrest control of this portal from the EPA, eventually settling for its own website, www.FOIA.gov, which it has tried to suggest is a valid alternative to portals like those operated by the EPA. In fact, however, DOJ's website is no substitute for the kind of portal H.R. 653 mandates, as it merely provides links to various agency websites, rather than a single portal for submitting all requests.

Third, Mr. Sadler objected to the requirement in H.R. 653 that agencies post online "copies of all releasable records, regardless of form or format, that have been requested three or more times under paragraph (3)[.]" According to Mr. Sadler, this provision poses an insoluble conflict, as it would require agencies to choose between complying with either section 508 of the Rehabilitation Act or the FOIA, as amended by H.R. 653. This is an excuse we have seen far too often to justify why agencies should not be required to post all released documents.

In fact, however, as Mr. Sadler conceded, government records created after 1998 already are 508-compliant. Moreover, the Department of State, the FBI, all of the agencies participating in EPA's FOIAonline portal, and the Interagency Security Classification Appeals Panel (ISCAP) post the vast majority of their releases, which include many legacy, pre-1998 documents, online in a 508-compliant manner. There simply is no reason other agencies cannot do so as well.

Mr. Sadler also testified to the inordinate cost to make documents 508-compliant. But his testimony ignores the fact that both Google and Adobe Acrobat do this for free or at low cost. Further, the Department of Homeland Security has posted on

its website a guide explaining how the agency makes its records 508-compliant.² It also bears noting that the FOIA Advisory Committee, established by the National Archives and Records Administration, is examining this issue, among others, and has solicited agency input on whether section 508 of the Rehabilitation Act is a hurdle to online posting. Notably, to date the FDA has failed to provide any input.³

We were pleased to hear the committee members solicit additional ideas for improvements to the FOIA. Toward that end, we would urge a change to section 2(b)(1) of H.R. 653, which, as currently drafted, would amend FOIA exemption 5 to exclude from withholding “records that embody the working law, effective policy, or the final decision of the agency[.]”

This restriction is designed to prevent the abuse of exemption 5 to create a body of secret law, a goal our organizations support very strongly. Unfortunately, however, DOJ likely will seek to evade the provision as currently drafted, using the same arguments it has successfully invoked to withhold Office of Legal Counsel (OLC) memoranda, despite common law prohibitions on using FOIA exemptions to withhold working law or final agency policy decisions. DOJ takes the position that OLC opinions are, categorically, “not the working law of any agency.”⁴

For example, in a 2014 case, the D.C. Circuit upheld the refusal of the FBI to disclose in response to a FOIA request an OLC memo, accepting DOJ’s argument that “OLC did not have the authority to establish the ‘working law’ of the FBI[.]”⁵ The court reasoned, “OLC is not authorized to be an authoritative statement of the agency’s policy.”⁶ Similarly, a federal district court in New York upheld OLC’s reliance on FOIA exemption 5 to withhold memoranda on targeted killing in a heavily redacted opinion containing minimal legal analysis.⁷

To address this serious and ongoing problem, we propose that Congress amend section 2(b)(1) to include the following:

² See https://www.dhs.gov/xlibrary/assets/foia/priv_cfoiao_oast_memo_creating_accessible_pdfs_20100614.pdf.

³ See <https://nsarchive.wordpress.com/2015/02/11/foia-advisory-committees-third-meeting-tackles-508-compliance/>.

⁴ Memorandum in Support of Defendant’s Motion to Dismiss at 32, *Citizens for Responsibility and Ethics in Washington v. Dep’t of Justice* (Case No. 13-cv-1291, Nov. 11, 2013), available at <http://fas.org/irp/agency/doj/olc/111313-opp.pdf>.

⁵ *Elec. Frontier Found. v. Dep’t of Justice*, 739 F.3d 1, 10 (D.C. Cir. 2014).

⁶ *Id.*

⁷ *ACLU v. Dep’t of Justice*, (Case No. 12-0794, October 31, 2014), available at https://www.aclu.org/sites/default/files/assets/tk_foia_ruling_10_31_2014.pdf.

In no event shall this subsection apply to prevent from disclosure formal, signed written opinions issued by the Department of Justice to an Executive Branch official who has requested the opinion of the Office of Legal Counsel.

This proposed language has the advantage of simplicity and clarity, thereby avoiding protracted litigation disputes about the application of FOIA exemption 5 to OLC memoranda. It also avoids infringing on the ability of other agencies to deliberate or receive legal advice in confidence.

Another change we would like to see concerns section 2(a)(1)(A)(iii) of H.R. 653, which requires agencies to make publicly available in electronic format “copies of all records, regardless of form or format, that have been requested three or more times [under the FOIA].” As drafted, this language will not achieve its goal of ensuring proactive disclosure of certain records already made public to avoid repeated FOIA requests for those records and the corresponding burden on the entire processing system. Agencies typically do not track how often they have released individual records to the public. Moreover, agencies routinely fail to comply with the similar proactive disclosure requirement found in (a)(2) that they make available records that have become or are likely to become the subject of subsequent requests for substantially the same records.

To address these problems, we suggest changing section 2(a)(1)(A)(iii) of H.R. 653 to read:

(2) Each agency, in accordance with published rules, shall make available in an electronic, publicly accessible format –

(E) all records, regardless of form or format, that have been released in response to a FOIA request, whether to the same or a different requester.

Further, we recommend adding language that provides for access by those processing FOIA requests to digital records systems. One significant impediment to timely processing of FOIA requests is the lack of direct access of FOIA officers to requested records. Many have to rely on program offices, where searching for FOIA documents is viewed as a less important and collateral duty. By ensuring direct access for FOIA officers to records stored electronically, the timeliness of

agency FOIA processing will be improved. Accordingly, we recommend the following addition to H.R. 653:

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system. The FOIA Officer of the agency and his or her designees shall be provided access to search for and retrieve any records created and/or stored in electronic form or format for the processing of FOIA requests. An agency may not limit the scope of a search to systems searchable by the FOIA Officer without an independent, substantive reason for the limitation.

Finally, DOJ has issued guidance improperly interpreting 5 U.S.C. § 552(c), which provides that the FOIA “is not authority to withhold information from Congress.” According to DOJ, this provision is limited to requests made by “a House of Congress as a whole (including through its committee structure),” and excludes requests made by individual members, even when acting “in a completely official capacity[.]”⁸ To address this plainly incorrect interpretation, we propose amended 5 U.S.C. § 552(d) to read:

This section does not authorize the withholding of information or limit the availability of records to the public, except as specifically stated in this section. This section is not authority to withhold information from any member of Congress.

We fully support the critical work of this Subcommittee as it continues to work on improving the FOIA. We welcome the opportunity to work with you in crafting the most effective bill possible.

⁸ FOIA Update: OIP Guidance: Congressional Access Under FOIA, Vol. V, No. 1, January 1, 1984, *available at* <http://www.justice.gov/oip.blog/foia-update-oip-guidance-congressional-access-under-foia>.