

Testimony of

Dr. David Cuillier
Director, Associate Professor
The University of Arizona School of Journalism
President, Society of Professional Journalists

On behalf of

The Sunshine in Government Initiative

On

“Open Government and Freedom of Information: Reinvigorating the Freedom of
Information Act for the Digital Age”

Before the

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Chairman Leahy, Ranking Member Grassley and Members of the Committee on the Judiciary,

I want to thank you for the opportunity to testify today on behalf of the Sunshine in Government Initiative (SGI) and as president of the Society of Professional Journalists (SPJ), founded in 1909 as the most broad-based journalism organization in the nation, currently representing 8,000 members.

SGI consists of SPJ and eight other media associations: American Society of News Editors, The Associated Press, Association of Alternative Newsmedia, National Newspaper Association, Newspaper Association of America, Online News Association, Radio Television Digital News Association, and the Reporters Committee for Freedom of the Press.

I also thank those of you, particularly Senators Leahy and Cornyn, for your continued work to improve the people's access to their government. The 2007 OPEN Government Act was a good step toward fixing longstanding procedural issues with FOIA. The Office of Government Information Services (OGIS) has made inroads into making our government more accessible to journalists and other citizens. Many agencies demonstrate good intentions for carrying out their duties, and in many instances FOIA officers are well-trained and helpful, often looking for solutions to fulfilling requests.

But I'm afraid that today I must say FOIA is in desperate need of significant fixes. It is a broken shell of what it once was, and what it was intended to be. I have never seen journalists so frustrated, cynical, and angry when it comes to accessing federal records. And for good reason. Today I will lay out some of the research that demonstrates the increased secrecy in this nation and problems with FOIA. I don't think I am exaggerating when I say we are approaching a crisis when it comes to access to information. I cannot emphasize enough the urgency of the situation. I also will provide some suggestions for how we can turn this around. It is possible to find

common solutions that serve requesters and agencies, and most importantly, help citizens build stronger government and stronger communities.

Broken System: Trend Toward More Secrecy

From a global perspective, the United States, once a beacon of transparency, is quickly falling behind. This year the country dropped 13 spots in the 2014 ranking of press freedom by Reporters Without Borders, down to 46th place.¹ That is below Romania, El Salvador, and Botswana. The ranking methodology takes into account the strength and implementation of public records laws, as well as important factors outside the focus of this hearing, such as the lack of a federal shield law that has led to the jailing of journalists and the seizure of their phone records without notice, the efforts of the U.S. government to muzzle whistleblowers, and the excessive controls exerted by federal public information officers.

Similarly, international ratings of FOIA laws also indicate that we are falling behind. Access Info Europe and the Centre for Law and Democracy have rated the United States at 44th in FOIA strength, behind Uganda, Mexico, Kyrgyzstan, and Russia.²

It is no wonder the United States is falling behind in freedom of information. I see it nearly daily. Journalists and other requesters are having more and more difficulty getting information from the federal government. This downward trend directly hurts the public. When it works well, FOIA saves lives and improves society.³ For instance, recently journalists have used

¹ Reporters Without Borders for Freedom of Information, "World Press Freedom Index 2014," <http://rsf.org/index2014/en-index2014.php#>

² Access Info Europe (September 28, 2013). "Global Right to Information Rating," <http://www.rti-rating.org/files/docs/Report.13.09.Overview%20of%20RTI%20Rating.pdf>; Also, for a comparison showing how countries should not use the U.S. as a model for FOIA, see Stephen Lambie (June 2003). "FoI as a United States' foreign policy tool: a carrot and stick approach," *Freedom of Information Review*, 105, 38-43.

³ For a description of the breadth of societal good that came from journalists using FOIA, see Jennifer LaFleur (2003). "The Lost Stories," *Reporters Committee for Freedom of the Press*, <http://www.rcfp.org/lost-stories>; Ian Marquand (2001). "Open Doors," *Society of Professional Journalists*, <http://www.spj.org/opendoors5.asp>; and "FOI in Action," a list of public-interest stories reliant on public records, posted at the Sunshine Week website, <http://sunshineweek.rcfp.org/foi-in-action/>.

FOIA to show how drug companies influence the FDA's decision about what should appear on warning labels, dangers of crime aboard cruise ships, and security concerns at laboratories run by the Centers for Disease Control and Prevention.

Despite pledges by our government for greater transparency, and despite some preliminary indicators early in Obama's term that showed some movement toward transparency,⁴ recent research indicates government agencies have delivered just the opposite. For example, an Associated Press analysis of FOIA request data showed that in 2012, agencies' use of exemptions to deny requests increased 22 percent over the previous year.⁵ A study by researchers from Penn State examined the percentage of FOIA requests denied under privacy Exemptions 6 and 7(C), comparing the last three years of the George Bush administration to the first three years of the Obama administration. The researchers found that under the Obama administration, the percentage of denials among most agencies actually increased.⁶ Yesterday, the Center for Effective Government released an analysis of 15 federal agencies' processing of requests, rules for access, and online ease for users. None of the agencies earned exemplary scores and only eight earned passing grades.⁷ The evidence is clear: FOIA is broken.

I can tell you, as well, that journalists are frustrated and downright angry about what they have experienced over the past several years. Surveys by myself and others indicate that

⁴ See, for example, OMB Watch (March 16, 2011). *Assessment of Selected Data from the Annual Agency Freedom of Information Act Reports*; OpenTheGovernment.org (June 10, 2013). "Secrecy Check: FOIA by the Numbers," <http://www.openthegovernment.org/node/4013>; and The National Security Archive (March 14, 2011). "Glass Half Full," <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB338/index.htm>

⁵ Jack Gillum & Ted Bridis (March 11, 2013). "FOIA Requests Being Denied More Due to Security Reasons Than Any Time Since Obama Took Office," *The Associated Press*.

⁶ Martin E. Halstuk, Benjamin W. Cramer, & Michael D. Todd, (in press). "Tipping the Scales: How the U.S. Supreme Court Eviscerated Freedom of Information in Favor of Privacy," in Charles N. Davis and David Cuillier (eds.) *Transparency 2.0: Digital Data and Privacy in a Wired World*, Peter Lang Publishing.

⁷ Center for Effective Government (March 2014). "Making the Grade: Access to Information Scorecard 2014 Shows Key Agencies Still Struggling to Effectively Implement the Freedom of Information Act."

journalists perceive that it is getting more difficult to get information from the federal government.⁸

The bottom line, Mr. Chairman, is this: Agencies are getting more sophisticated in denying, delaying, and derailing requests, using FOIA as a tool of secrecy, not openness.

For example, you might recall the chemical contamination of the Elk River drinking water supply in Charleston, W.V., in January. Ken Ward Jr., a reporter at the *Charleston Gazette*, has been trying to inform the 300,000 residents about the risks to their health. However, Ward and other journalists have faced excessive stonewalling and evasion from the Environmental Protection Agency and Centers for Disease Control and Prevention.⁹ Ward remains frustrated. Just last week the CDC denied his petition for expedited review of a FOIA request regarding the chemicals' effects on pregnant women. The agency told Ward that there was no "urgent need" to inform the public about the issue.

I also continue to hear complaints from journalists about the difficulty of the FOIA process – delays, excessive fees, and gaming of the system by agencies. For example, a reporter requested data from Immigration and Customs Enforcement a few years ago, and after delay the agency referred the matter to OGIS for mediation. After more time, ICE declined to participate in the mediation, and then said the appeal window had run out, closing the request. The reporter now has to submit another request and start over, extending his search even longer. This sort of behavior is commonplace and unconscionable.

⁸ See Carolyn Carlson, David Cuillier, & Lindsey Tulkoff (March 12, 2012). "Mediated Access: Journalists' Perceptions of Federal Public Information Officer Media Control," <http://spj.org/pdf/reporters-survey-on-federal-PAOs.pdf>; David Cuillier (May 18-20, 2011). "Pressed for Time: U.S. Journalists' Use of Public Records During Economic Crisis," presented to the Global Conference on Transparency Research, Newark, N.J.; Anne Diffenderffer & Karen Retzer (April 2011). "Reporters' Rights and Access Survey," *Chicago Headline Club*, found that 41 percent of Chicago journalists said their experience with FOIA is worse than with state/local records, 37 percent said it is the same, and 22 percent said better. Also, The Associated Press was due to release this week survey results of its members indicating that they perceive access to public records is becoming more difficult.

⁹ "SEJ, SPJ Say Agency Media Obstacles Hurt Public Confidence in Water, Safety," (January 20, 2014) <http://www.sej.org/sej-spj-say-agency-media-obstacles-hurt-public-confidence-water-safety>

It is becoming more difficult in this country to access information about our government. Despite the good ideas Congress has baked into the law, FOIA still needs to be fixed.

Commonsense Solutions to Reinvigorate FOIA in a Digital Age

We as a nation, and you as the Senate Judiciary Committee, have many opportunities to address these challenges and reverse this trend toward more secrecy. Specifically:

1. **Codify the presumption of openness.** Many of us already see the presumption of openness throughout the text of the FOIA, but Justice Department policy guidance over the years has oscillated between a presumption of openness and a presumption that information should be withheld whenever legally defensible. Mr. Chairman, we appreciate your longstanding support for this change to the statute. Now would be a great time to enshrine into law the current stated policy presuming that records should be disclosed absent a specific, foreseeable, identifiable harm.
2. **Strengthen OGIS.** The Office of Government Information Services should be able to issue recommendations and speak its mind without prior approval from the White House, the head of NARA or input from any other agency. We need to create a Chief FOIA Officers Council to recommend changes to FOIA. OGIS could use more resources. And most important, OGIS needs enforcement power, similar to what some states, such as Texas, provide.¹⁰ If Mexico has figured out how to create an independent records agency with enforcement powers,¹¹ I think we can, as well.

¹⁰ For an excellent explanation of enforcement provisions in state and federal open meeting and open record laws, see Daxton R. “Chip” Stewart (2010). “Let the Sunshine In, or Else: An Examination of the “Teeth” of State and Federal Open Meetings and Open Records Laws,” *Communication Law & Policy*, 15, 265-310.

¹¹ For an examination of how Mexico’s FOIA processes are strong on paper but have had difficulty in implementation, see Zachary Bookman & Juan-Pablo Guerrero Amparan (2009). “Two Steps Forward, One Step Back: Assessing the Implementation of Mexico’s Freedom of Information Act,” *Mexican Law Review*, 1(2), <http://info8.juridicas.unam.mx/pdf/mlawrns/cont/2/arc/arc1.pdf>.

3. **Streamline the process online.** Invest in a single online portal for receiving and tracking requests. The system should allow people to make requests to any agency online, and allow requesters and agencies to monitor progress, just as we can with packages – or even pizza delivery – ordered online. This will provide more transparency about the FOIA process itself. Already, some organizations have produced interesting online tools to help requesters, such as the Reporters Committee for Freedom of the Press iFOIA tool (<https://www.ifoia.org/#!/>), but more action is needed by the federal government. Requesters should not have to be faxing their requests to agencies. The Internet is a powerful tool – let’s harness it to save money, time, and frustration – on everyone’s part.
4. **Reign in statutory exemptions.** Statutory exemptions are used to end-run FOIA’s balanced framework, making them one of the most frustrating parts of the process for journalists, in addition to excessive delays. Mr. Chairman, once again we appreciate your efforts over the years to find and push back against proposals to write new statutory exemptions to FOIA into the law, most recently with the farm bill. But we should be inoculating the FOIA against overbroad attacks by restraining the abuse of Exemption b(3). Congress should include sunsets when writing new statutory exemptions to FOIA so agencies periodically re-examine their need for secrecy. Congress should also require a public interest balancing test in applying exemptions, introduce review mechanisms so agencies must assess their need for new legal protections, and require that exemption proposals in Senate legislation go through the Judiciary Committee for review.

This Senate committee has the opportunity to make significant improvements to FOIA that can make a real difference for enlightening the public and reinvigorating the spirit of

transparency that this country once enjoyed. I cannot stress enough the urgency and need for significant reform.

While journalists are extremely frustrated and see first-hand how FOIA's flaws are preventing important information from being released, I want to emphasize that this is not a press issue. Journalists are merely proxies for the public. This is about our citizenry and the very nature of what we aspire to be as a nation. If we do not act now then I fear the trend toward secrecy will continue, and this country will look very different in 20 years.

Thank you for your dedication to reinvigorating FOIA and the opportunity to testify today. I look forward to answering your questions.