

**Statement of Adina Rosenbaum
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on
Administration of the Freedom of Information Act: Current Trends
before the
**Information Policy, Census, and National Archives Subcommittee,
Oversight and Government Reform Committee,
United States House of Representatives**

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Thank you Mr. Chairman, Ranking Member McHenry, and members of the Information Policy, Census, and National Archives Subcommittee for inviting me to testify before you today about the Freedom of Information Act (FOIA).

I am an attorney at Public Citizen, a national non-profit consumer advocacy organization, and the Director of Public Citizen's Freedom of Information Clearinghouse. Recognizing that meaningful citizen participation depends on the public's ability to access information, Public Citizen has since its inception been devoted to promoting openness in government. Through the Freedom of Information Clearinghouse, we provide assistance to individuals, organizations, journalists, and academics seeking to obtain information under FOIA and other open government laws. We also run the Public Interest FOIA Clinic, which assists and represents community groups and other non-profit organizations seeking government-held records for advocacy, research, or community service purposes.

Through the Clearinghouse and Clinic, we regularly speak to individuals and organizations that have requested information from the government under FOIA. My comments today are based primarily on trends in processing FOIA requests that we have noticed in our own experience and through our conversations with FOIA requesters over the past year or so.

Perhaps the most striking change in FOIA's operation has been in this Administration's attitude towards government openness: On his first full day in office, President Obama expressed a commitment "to creating an unprecedented level of openness in Government." The President issued a memorandum underscoring the importance of transparency and explaining that FOIA should be "administered with a clear presumption" that in "the face of doubt, openness prevails." On March 19, 2009, Attorney General Holder issued a memorandum on FOIA encouraging agencies to discretionarily release records, rescinding Attorney General Ashcroft's memorandum that took a more narrow view of advisable FOIA disclosure, and announcing that the Department of Justice would defend a denial of a FOIA request only if the law prohibits disclosure or if "the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions."

We applaud President Obama's stated commitment to openness and his new policies in favor of transparency. In promoting transparency, however, the Administration has often focused more on

proactive disclosure and tools for interaction between the government and the public than on the administration of FOIA. I do not want to downplay the need for affirmative disclosure of records and, particularly, the usefulness of making more agency records readily available on agency websites. At the same time, the FOIA request-and-response process, as opposed to unilateral disclosure by agencies, plays an important role in ensuring that the public is informed about the government's activities—particularly about those activities that the government would rather keep hidden—and we have found that the implementation of the Administration's open government goal in response to FOIA requests has been inconsistent.

Over the past year, I have spoken to some requesters who report that their requests are being responded to more quickly than they used to be; that they are receiving documents that used to regularly be withheld; and that they are receiving responses that are more helpful than before. But I have also spoken to many requesters who have faced serious problems accessing records through FOIA requests: Their requests have been followed by months of agency silence; they have found their interactions with agency FOIA personnel frustrating; and the records they have eventually received have contained unsupportable redactions. And with regard to pending litigation, we have found agencies reluctant to reconsider their litigation positions.

I want to focus today on four categories of problems that are often faced by requesters: persistent delays and backlogs, communication misunderstandings with agencies, problems due to inter-agency referrals, and over-withholding and redaction.

I. Persistent Delays and Backlogs

The problem that requesters mention to us the most is the long amount of time it generally takes agencies to respond to requests. FOIA requires agencies to respond to requests within 20 business days, but, in reality, it often takes months, or even years, for agencies to respond. In Fiscal Year 2009, for example, the median amount of time it took the Food and Drug Administration to respond to complex requests was 293 business days.

I hear regularly from requesters who file a request and then, after receiving a letter saying that the request was received, encounter months of silence from the agency. People within my own organization have had similar experiences. For example, in early March, I called an agency about a FOIA request that a colleague of mine made last November and was told that, although the agency hoped to have a response within 60 days, it could not make any promises. In other words, although the statute requires the agency to respond within 20 business days, the agency was not willing to promise that it would respond within six months of when we made the request.

People who call us because they have received no response to their FOIA requests tend to be frustrated and are looking for ways to make the agency respond. They look at the statute, see that the agency has violated the law in taking more than 20 days to respond, and assume they can do something to force a response. Unfortunately, they have little power. If the agency does not respond to a request in the statutory time limits, the requester is deemed to have exhausted her administrative remedies and can go to court, and the process of filing a lawsuit sometimes leads to the production of

records. For example, my office recently represented a woman whose administrative appeal of a FOIA denial had been pending for over eleven months. After we filed a lawsuit, the agency released the requested record. However, litigation is expensive and often has its own delays, and individual lawsuits do not resolve the underlying problem of agency backlogs.

The long periods of time people wait to receive records keep the requesters from using those records as effectively as they could. For example, if Public Citizen's Health Research Group has identified a health safety issue that it believes is harming the public, it wants the records it needs to alert the public about that problem now, not in six months, one year, or two years. But the problem of delay goes beyond whether records can be used effectively. When people do not receive responses in a timely manner, they assume that the agency is hiding something. Most requesters I talk to assume that a long delay indicates that the agency is trying to cover up something or purposefully keep the requester from trying to enter into a policy debate. In this way, delay engenders mistrust in the government and its activities.

The problem of delay and backlog is one that has plagued FOIA for years, and efforts should be taken to try to solve it. Earlier this week, Senators Leahy and Cornyn introduced a bill in the Senate, the Faster FOIA Act of 2010, that would establish a Commission to study methods of reducing delays. The Commission would report back to Congress within a year with recommendations of steps that could be taken to reduce delays. We support the establishment of such a commission to give serious thought to methods of combating delay in responding to FOIA requests. Congress should also consider greater incentives for agencies to respond in a timely manner, such as the loss of the right to claim that records are protected by the deliberative process privilege if the agency has not timely processed them.

Overall, until the problems with delays and backlogs are fixed, FOIA will not be able to fulfill its full potential of ensuring that the government remains open and accessible to the American people, and too many people will come out of the FOIA process believing that the process is driven by a desire for secrecy rather than openness.

II. Communication Between Agencies and Requesters

Over the past year, we have seen increased attempts by agencies to communicate with requesters. Many requesters have reported to us that agencies are calling them after receiving requests to talk about the requests and to get a better sense of where to look for records. Also, requesters seem to be receiving more interim letters letting them know that the agency is in the process of processing their requests. This increase in communication from agencies to requesters is a step in the right direction.

At the same time, there are breakdowns in these communications between agencies and requesters. To begin with, although in general we encourage agencies to get in touch with requesters to better understand requests, requesters too often feel that they are being pressured to narrow their requests in these conversations. An agency will call a requester and ask, "What is it that you really

want?” when the requester feels that he has already laid out what he really wants: He wants the records he requested in his FOIA request. He does not want to limit the request to some subset thereof, and he does not want to have repeated conversations with officials in which he feels that he is being pressured to narrow or withdraw his FOIA request.

We have also heard a number of stories recently about FOIA requests being rejected based on technicalities. In the past few months, for example, a couple of agencies have refused to process Public Citizen FOIA requests because we did not include a statement in the request saying that we would agree to pay \$25 in fees. However, requesters who are entitled to fee waivers should not have their requests bounced because they will not promise to pay fees if their fee waivers are denied. Similarly, I recently had a conversation with a FOIA officer who told me that I had not given him adequate information to search for records because I could not tell him what component of his agency would be responsible for issuing the policy guidance I had requested. We have also heard from public interest organizations that are having their fee waiver requests denied on the ground that the organizations have not provided sufficient information showing that they are entitled to a fee waiver, even though their fee waiver requests had regularly been granted for years.

Moreover, some agencies are still very difficult to communicate with because they are difficult to reach. At the beginning of this month, I made multiple phone calls in an effort to contact an agency public liaison and ran into the difficulty that he is not generally at his desk and does not have voicemail. I called the phone number listed for him on his agency’s website, and it just rang and rang.

I know that the Office of Government Information Services (OGIS) is doing some work with public liaisons. Hopefully, OGIS will be able to help resolve and mediate some of these communication difficulties. Furthermore, these communication breakdowns demonstrate that additional leadership is necessary to ensure that communications between requesters and agencies promote—rather than hinder—full, timely responses to FOIA requests.

III. Inter-Agency Referrals

When agencies have records responsive to a FOIA request that originated with another agency, they generally refer those records to that other agency for processing. This practice of inter-agency referrals—called consultations in agency annual FOIA reports—creates its own set of delay and communications problems. From the FOIA requester perspective, when an agency refers records to another agency for processing, they are essentially being sent into a black hole.

For example, last June, Public Citizen sent the Office of the United States Trade Representative (USTR) a FOIA request for certain records related to the World Trade Organization and financial services. After a series of phone calls, USTR released some records in whole or in part and referred the remainder to the Federal Reserve, the Department of the Treasury, the Department of Commerce, the Department of Transportation, and the Department of State. After Public Citizen appealed the adequacy of the search, USTR did another round of searching, which turned up more

documents, including two that were referred to the Departments of Treasury and State. Over the following months, Public Citizen staff spent a considerable amount of energy tracking down these referred requests. The records that were sent to the Departments of Transportation and Commerce were sent to the agencies' central FOIA offices, but then transferred to subagencies' FOIA offices. At each stage, the responsible staff member and tracking number would change, without any communication from the agencies to Public Citizen, which is still awaiting a tracking number on one of the documents.

Once an agency refers a request to another agency, it is not productive to communicate with the referring agency about the request, but the requester does not necessarily know whom to contact at the other agency. Moreover, referring records can lead to large delays, as each office that receives the request, in turn, figures out how to respond. These delays can be lengthy. According to its Fiscal Year 2009 FOIA annual report, for example, the Department of State has at least 10 consultations that have been pending for at least 1,000 days. Its oldest consultation has been pending since May 2003.

Systems need to be instituted to facilitate inter-agency referrals. Requesters should be able to track a request that is sent from one agency to another and know who in the new agency is responsible for tracking the request. Moreover, given that the receiving agency does not need to conduct its own search—just to review the records that have been referred to it—agencies should be required to process and return the records quickly, so as not to multiply the delays experienced by the requester. An inter-agency committee devoted to consultations and referrals should be established to develop mechanisms for referring requests from one agency to another that would reduce delay and allow requesters to be able to follow and follow up on their referred requests.

IV. Redactions and Withholdings

I have focused so far on problems with agencies responding to FOIA requesters, but requesters' difficulties in receiving records persist even after they receive a response. Despite the President's and Attorney General's directions that a presumption of disclosure be applied, too often records are redacted or withheld when no exemption applies or when no foreseeable harm would result from releasing them. Indeed, last Monday, the National Security Archive released its FOIA audit and found no clear upward trend in discretionary releases.

For example, agencies continue to invoke the deliberative process privilege in Exemption 5 to withhold records that contain factual information or where the deliberations took place decades ago. We represented a requester in a case earlier this year in which the agency had been withholding the contents of a box marked "final action" under the deliberative process privilege, which applies only to predecisional documents. Similarly, agencies tend to withhold the names of agency personnel when they release records, even when the release of the person's name would not reveal anything embarrassing about them or make them targets of harassment or attack; we have seen an agency produce hundreds of e-mails in which every name in the "To" and "From" line was blacked

out, making it impossible to know whether e-mails went from a superior to a subordinate, or vice-versa, and whether the same or different people were participating in the various communications.

Of course, when agencies redact or withhold records that are not exempt, the requester can go to court and challenge the withholding. Again, however, requesters do not always have the time and resources to litigate their FOIA denials. We are pleased that OGIS has already been able to provide mediation to help some agencies and requesters resolve their disputes over withholdings. We hope that agencies will be open to participating in OGIS's mediation procedures and believe that they should be instructed that they are expected to engage in the mediation process when it is requested of them.

In addition, continuing training for agency staff and emphasis on the presumption of disclosure is needed. The Administration's encouragement of prizes and challenges to promote open government is a step in the right direction toward encouraging agency personnel to recognize the benefits of transparency and internalize the expectation that they should be operating in an open manner.

Finally, Congress should amend FOIA to promote government transparency. In talking to requesters, I have found that many people are surprised that no public interest balancing test is incorporated into many of FOIA's exemptions. However, for some records that are exempt from disclosure, the benefit that would come from disclosure would outweigh the harm. We believe that a public interest balancing test should be incorporated into each exemption, with the possible exception of Exemption 3. Another simple amendment that Congress could make to FOIA is adding a presumption that older records are not protectable under the deliberative process privilege. Decreased reliance on that privilege would greatly aid the public in learning about the operations and activities of its government. Congress could also amend FOIA to clarify that corporations do not have personal privacy rights under Exemptions 6 and 7(c).

The past year has been an exciting time for people who care about transparency. President Obama has charted a new direction for agencies with respect to government openness, and we have seen some agencies taking steps to implement those visions. Problems with delay, communication, and over-withholding persist, however. Further leadership is necessary for the vision of transparency that the President has articulated to be fully realized throughout the Executive Branch.

Thank you for the opportunity to testify today. I look forward to answering any questions you may have.