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Good morning, Mr. Chairman and Members of the Committee. As someone who has worked with the Freedom of Information Act (“FOIA”) for more than thirty-five years now, I am pleased to be here to provide an academic perspective on the Act and its governmentwide administration.

My own views today are rooted in my work at American University’s Washington College of Law in recent years, where I teach courses in government information law and direct the Collaboration on Government Secrecy (“CGS”). CGS came into existence in 2007 as the first academic center at any law school in the world to focus on this subject area; three more have been established since then. In addition to maintaining an extensive Web site as an academic resource for all who are interested in government secrecy and transparency (as two sides of the same coin), we have conducted a series of day-long programs on the subject, with particularly heavy focus on the FOIA and, most recently, on the Obama Administration’s implementation of it.¹ Next week, in fact, we will hold our twenty-fourth such academic program -- our annual celebration of Freedom of Information Day during “Sunshine Week” -- and I am pleased to be able to note that this Committee’s Chairman has twice participated in them.²

This academic perspective is also informed by decades of experience in leading the component of the Department of Justice that discharges the Attorney General’s responsibility to guide all agencies of the Executive Branch on the complexities of the FOIA’s administration. I

¹ The most recent such program, entitled “Transparency in the Obama Administration -- A Fourth-Year Assessment,” is part of a series of FOIA Community Conferences that were conducted by CGS on January 20 of each year in 2010, 2011, 2012, and 2013, following an initial forward-looking such program that was held on January 29, 2009. CGS’s Web site contains a compilation of all of its programs to date (including one held in January 2008 on initial implementation of the 2007 FOIA Amendments), which is available at this link: <http://www.wcl.american.edu/lawandgov/cgs/programs.cfm>.

² CGS’s Web site is found at <http://www.wcl.american.edu/lawandgov/cgs/>. It is a non-partisan educational project devoted to openness in government, freedom of information, government transparency, and the study of “government secrecy” in the United States and internationally. Its mission is to, among other things, foster both academic and public understanding of these subjects by serving as a center of expertise, scholarly research, and information resources; promote the accurate delineation and development of legal and policy issues arising in this subject area; conduct educational programs and related activities for interested members of the academic and openness-in-government communities; and become the premier clearinghouse for this area of law both in the United States and worldwide. It engages in no lobbying activity but rather provides expertise at congressional request.

know first-hand of both the difficulties that FOIA requests can pose to federal agencies and the challenges involved in encouraging proper compliance with the Act, including new policy conformity, by all agencies notwithstanding those difficulties. Simply put, I have “been there, done that,” through several presidential administrations, time and again.

Obama/Holder FOIA Policy Implementation

So it is through that lens that I view the many ways in which the openness-in-government community has been disappointed by the surprising inadequacies of the Obama Administration’s implementation of new FOIA policy -- especially the key standard of “foreseeable harm” -- during what has now been these past five years.³ This began with the Holder FOIA Memorandum itself, quickly issued as it was, in March 2009. Contrary to all expectations, and despite the precedent established by Attorney General Janet Reno not so many years before, the Holder FOIA Memorandum did not by its terms apply its new “foreseeable harm” standard to all pending litigation cases -- where it could have had an immediate, highly consequential impact.⁴ Rather, it contained a series of lawyerly hedges that appear to have effectively insulated pending cases from it.⁵ As one of the speakers at a CGS FOIA Community Conference pointedly observed, the FOIA-requester community is still waiting to see a list of

³ Actually, the specific policy standard employed by Attorney General Eric Holder is not “new,” in that he in fact adopted the same “foreseeable harm” standard that was established by the Reno FOIA Memorandum in October 1993 and was used during the Clinton Administration. This standard is designed to govern both litigation and agency decisionmaking at the administrative level, and it works hand in hand with a strong policy emphasis on the making of discretionary disclosures under the Act wherever possible. In short, it calls upon agencies to look beyond the fact that requested information does technically fall within the contours of a FOIA exemption.

⁴ As an example, when the “foreseeable harm” standard was applied to all pending litigation cases under the Reno FOIA Memorandum, the Justice Department applied it even to a litigation case that had recently concluded, one in which the courts already had upheld nondisclosure for a Justice Department report investigating the Nazi past of former U.N. Secretary-General Kurt Waldheim. See *FOIA Update*, Vol. XV, No. 2, at 1 (noting that the new policy “triggered a decision to disclose the report entirely as a matter of administrative discretion . . . [even] though there was a substantial legal basis for withholding, affirmed by the court of appeals”), available at http://www.justice.gov/oip/foia_updates/Vol_XV_2/page1.htm.

⁵ Specifically, the Holder FOIA Memorandum states as follows: “With regard to litigation pending on the date of the issuance of this memorandum, this guidance should be taken into account and applied if practicable when, in the judgment of the Department of Justice lawyers handling the matter and the relevant agency defendants, there is a substantial likelihood that application of the guidance would result in a material disclosure of additional information.” One of the speakers at a CGS Obama Administration transparency-assessment program, herself a former Justice Department FOIA litigator, described this as “a major loophole” (actually, a group of several loopholes), which continues to the present day. See also Metcalfe, D., “Sunshine Not So Bright: FOIA Implementation Lags Behind,” 34 *Admin. & Reg. L. News* 5, 6-7 (Summer 2009), available at <http://www.wcl.american.edu/faculty/metcalfe/sunshinenotsobright.pdf>.

any litigation cases in which the “foreseeable harm” standard has been applied to yield greater disclosure -- and after all these years now there is a strong suspicion that there are few or perhaps even “no such cases.”⁶ Thus, the best possible opportunity to press for full adoption and use of this standard throughout the Executive Branch⁷ -- in a concrete, exemplary fashion -- has been lost.⁸

⁶ This speaker, a veteran FOIA litigator, elaborated as follows: “We have asked the Justice Department on several occasions to consider publishing a list of cases in which a decision has been made based on the Holder guidance that the Department is not going to defend a FOIA lawsuit and they consistently refuse to make that information public -- and I believe it is because there are no such cases.” CGS produces Webcasts of all of its programs, and this comment can be found at the 48th minute of the part of the program Webcast that is available directly at this link: <http://media.wcl.american.edu/Mediasite/SilverlightPlayer/Default.aspx?peid=84bf0e08-c5fc-4d67-8ce4-82d841c7e53e>.

⁷ It should be noted in this regard that the bipartisan FOIA amendment bill passed by the House of Representatives two weeks ago, H.R. 1211, contains a provision that would codify the “foreseeable harm” standard as a matter of law. Specifically, Section 2(b) of that bill would place this existing policy standard directly into the “exemptions” part of the Act, 5 U.S.C. § 552(b), such that agencies would be required to adhere to it by statutory command. See also House Report 113-155 (July 16, 2013), at 7 (stating that under H.R. 1211 “agencies may only withhold information if the disclosure of such records could cause foreseeable harm [sic]).” Putting aside the technicalities of this particular provision, such a legislative step could fairly be seen as ensuring the effective continuation of Attorney General Janet Reno’s discretionary disclosure FOIA policy throughout the current as well as future presidential administrations.

⁸ Also perplexing, to say the least, was the Holder FOIA Memorandum’s primary emphasis, as a purported “important implication” of its openness policy, on the making of “partial disclosures” of records that cannot be disclosed in full -- as if agencies were not already doing so to begin with. In fact, all federal agencies have been following this practice, without question, since the mid-1970s, as matter of clear statutory command, not policy. Yet the Justice Department still states as if with significance that Attorney General Holder directed agencies to “consider making partial disclosures.” See, e.g., OIP Chief FOIA Officer Reports Guidance (undated), *available at* <http://www.justice.gov/oip/cfo-report.pdf>. It would be far better to place concentrated emphasis on implementation of the renewed “foreseeable harm” standard than on a decades-old statutory requirement, as if the latter were something new.

Similar to this is the fact that the Justice Department persistently fails to bring the “foreseeable harm” standard into sharp focus by inexplicably speaking of the Holder FOIA policy as establishing “a presumption of openness” instead -- thereby using that amorphous term as if it were a better means of guiding and influencing agencies. See, e.g., FOIA Post, “Kickoff [sic] Sunshine Week 2014 with the Department of Justice” (Feb. 27, 2014) (stating merely that “[t]he Attorney General directed agencies to administer the FOIA with a presumption of openness”), *available at* <http://blogs.justice.gov/oip/archives/1368>. I can tell the Committee from my own experience with writing and implementing FOIA policy guidance that this term is a poor vehicle for effecting change. Just imagine walking into an agency FOIA office, with

Neither did the Holder FOIA Memorandum or its initial implementation guidance take the expected step of directing agencies to reduce their backlogs of pending FOIA requests. Whereas the Reno FOIA Memorandum and its implementing guidance had immediately confronted that difficult subject, their 2009 counterparts contained hardly a word about it, much less a direction to reduce any backlog; that did not come until what is known as the broader “Open Government Directive” was issued by the Office of Management and Budget in December 2009. But in an oft-overlooked part of that governmentwide directive, it indeed was mandated that all federal agencies “with a significant pending [FOIA] backlog . . . shall take steps to reduce any such backlog by ten percent each year” in the coming years. Memorandum for the Heads of Executive Departments and Agencies (Dec. 8, 2009), at 3, ¶ 1(i), *available at* <http://www.whitehouse.gov/sites/default/files/microsites/ogi-directive.pdf>.

Yet from the aggregate governmentwide statistics made available by the Justice Department for the years since then,⁹ it appears that the governmentwide backlog of pending FOIA requests did not at all decrease in the years following the Open Government Directive, let alone decrease by ten percent each year as mandated. Rather, it actually *increased* from Fiscal Year 2010 to Fiscal Year 2012 (the most recent year for which such aggregate figures are available).¹⁰ And at the same time, remarkably, the Justice Department’s own backlog of pending requests also increased, from 7786 to 10,298.¹¹

This should be a matter of concern today for more than one reason. The awkward fact that the Justice Department’s FOIA backlog has been allowed to worsen over the past three years is bad enough for its own FOIA requesters. But when the “lead” government agency for the governmentwide administration of the FOIA fails so badly to reduce its own backlog as mandated, it makes it much harder for it to press other departments and agencies to dutifully

FOIA analysts making excisions or not on the documents that are placed in front of them; is their decisionmaking going to be affected more by the articulation of a vague phrase or by the concrete requirement that they pause and consider whether the information they are about to withhold can be foreseen to pose actual harm? During the Clinton Administration, I can tell you, that answer was clear.

⁹ See “Summary of Annual FOIA Reports for Fiscal Year 2012” (June 3, 2013), *available at* <http://www.justice.gov/oip/docs/fy2012-annual-report-summary.pdf>.

¹⁰ See *id.* at 8 (reporting aggregate number of “backlogged requests” for the end of Fiscal Year 2012 as 71,790, as compared to 69,526 for the end of Fiscal Year 2010). These figures cover the fiscal years that fully post-date the Open Government Directive’s backlog-reduction mandate. In other words, they do not even count the nine-plus months of the initial partial fiscal year (Dec. 8, 2009 to September 30, 2010) of the requirement. They amount to a 3.25% *increase* over the course of Fiscal Years 2011-2012, rather than the 19% aggregate decrease that the Open Government Directive required. And apparently they are reached even within the parameters of the Justice Department’s self-serving redefinition of the word “backlogged” to exclude large numbers of newly received FOIA requests as of 2008.

¹¹ These figures are taken from the Department’s annual reports of its FOIA activities, for which figures recently became available for Fiscal Year 2013.

comply with that mandate. And this “do as I say, not as I do” problem is exacerbated by the fact that the Department’s high-visibility leadership offices saw their own numbers of pending FOIA requests increase, rather than decrease, over the same period by an aggregate figure of 3.95%.¹² This makes it impossible to lead by example.¹³

Exemption 2

Turning to the FOIA’s exemptions, as I respectfully suggest this Committee must, the one that continues to cry out for immediate attention is of course Exemption 2. This is because until 2011 federal agencies had for nearly three decades been using the so-called “High 2” aspect of this exemption to withhold sensitive information the disclosure of which could reasonably be expected to enable someone to circumvent the law -- especially in a post-9/11 context. Almost exactly three years ago, however, the Supreme Court firmly ruled that that longstanding interpretation of Exemption 2 was incorrect; as of that moment, “High 2” simply ceased to exist. See *Milner v. Dep’t of the Navy*, 562 U.S. 3 (2011).¹⁴ This meant that the large amounts of information that agencies have regularly withheld under Exemption 2 alone were no longer properly withheld on that basis, and it has placed agencies in an critical quandary over how to

¹² According to the Department’s most recent annual FOIA report, the numbers of FOIA requests that remained pending as of the end of that reporting year (Fiscal Year 2013) increased to 342 (187 in the Office of the Attorney General, 130 in the Office of the Deputy Attorney General, and 25 in the Office of the Associate Attorney General), as compared to a total of 329 at the end of Fiscal Year 2010. Thus, in summary, the backlog-reduction mandate of the Open Government Directive has been met with backlog increases, rather than decreases (1) within the Executive Branch as a whole, (2) within the Justice Department as a whole, and (3) even within the Justice Department’s own leadership offices in particular.

¹³ In this vein, the Committee should be aware of a very recent White House issuance entitled “Memorandum for the Heads of Executive Departments & Agencies Re: 2014 Open Government Plans” (Feb. 24, 2014), which speaks to the FOIA backlog- reduction problem and is available at http://www.whitehouse.gov/sites/default/files/microsites/ostp/open_gov_plan_guidance_memo_final.pdf. In it, the White House reiterates the December 2009 Open Government Directive’s requirement that agencies were to have reduced (and continue to reduce) their backlogs “by at least 10 percent each year” (*id.* at 4) since 2009 -- but it does so without any regard whatsoever for whether that requirement actually has been met during the past four years. Bluntly put, the Obama Administration’s evident capacity for FOIA-related self-assessment, apart from hortatory self-congratulation, has been abysmal.

¹⁴ It should be noted that with this, Exemption 2 is now almost entirely a “dead letter,” at least as a matter of policy under the Holder FOIA Memorandum. This is because the exemption’s other major aspect, known as “Low 2,” uniquely is not based on any expected harm from disclosure but rather shields an agency from the mere burden of responding to requests for low-level administrative information of no real significance. As such, any “Low 2” information readily fails the “foreseeable harm” policy standard and could not properly be withheld in accordance with it. (The residual core of Exemption 2, involving actual personnel rules and practices, has long been a minor, practically negligible, chord.)

handle sensitive such information both at the administrative level and (in some instances) in pending FOIA litigation.

Justice Kagan, in her opinion for the Court in *Milner*, observed with some understatement that the Court's decision "may force considerable adjustments," and she suggested FOIA Exemptions 1, 3, and 7(F) as "tools at hand" for that. 562 U.S. at _____. Justice Alito, writing separately, took pains to suggest likewise as to Exemption 7(F) "[i]n particular."¹⁵ *Id.* at _____ (Alito, J. concurring). No doubt some part of the *Milner* "adjustment" involves at least two of these three FOIA exemptions, but there also should be no doubt that federal agencies now maintain highly sensitive records -- computer system vulnerability assessments, for example -- with respect to which remedial legislation is vitally necessary.¹⁶ Put simply, it is utterly unfathomable why and how the "*Milner* Exemption 2" problem still remains unaddressed.¹⁷

¹⁵ To be sure, some portion of the highly sensitive information previously withheld by agencies on an "anti-circumvention" basis may well qualify for protection under Exemption 7(F) in lieu of it. The compilation of cases in the "Post-9/11" FOIA Litigation section of CGS's Web site indicates that. See <http://www.wcl.american.edu/lawandgov/cgs/post911foia.cfm#ex7f> (citing, e.g., *Living Rivers, Inc. v. U.S. Bureau of Reclamation*, 272 F. Supp. 2d 1313 (D. Utah 2003)). It also is foreseeable that some small portion will qualify under Exemption 7(E) of the Act as well. See *id.*; but see also *Elec. Privacy Info. Ctr. v. Dep't of Homeland Security*, No. 13-260 (JEB), slip op. at 15 (D.D.C. Nov. 12, 2013) (rejecting such claimed Exemption 7(E) and Exemption 7(F) applicability by pointedly repeating the Supreme Court's observation that "the Government may of course seek relief from Congress," quoting *Milner*, 131 S. Ct. at 1271), available at <https://epic.org/foia/EPICvDHS-SOP303-Opinion.pdf>. As for the viability of Exemption 1 toward that end, such an approach, to any degree, would run directly contrary to the current policy imperatives favoring less national security classification rather than more.

¹⁶ And with due respect to Justice Kagan's suggestion that Congress might possibly address this through Exemption 3, it appears that nothing less than a wholesale rewrite of Exemption 2, carefully contoured to protect security-sensitive information with a firm harm standard, is now warranted. Given the inexplicable passage of time without action by the Justice Department or the Office of Management and Budget on this critical gap, CGS today suggests that something along the lines of the language appearing in the article cited in footnote 17 below might possibly be used by this Committee to "jump start" this legislative process, though by so doing CGS does not lobby for revision of Exemption 2 in any particular form. See also note 2 *supra*.

I should also note that such a remedial legislative process would of course involve taking the rare step of "opening up the FOIA's exemptions," something that has not been done since the mid-1980s and which historically is viewed with anxiety on both sides of the FOIA divide. In such an event, for instance, Congress conceivably could be pressed to legislatively overrule some or all aspects of the Supreme Court's landmark *Reporters Committee* decision with respect to Exemptions 6 and 7(C). See, e.g., *O'Kane v. U.S. Customs Serv.*, 169 F.3d 1308, 1310 (11th Cir. 1999) (describing efforts to overrule *Reporters Committee* indirectly through 1996 FOIA Amendments).

¹⁷ It is not as if this problem has escaped this Committee's notice. Indeed, as far back as two years ago this week, the Justice Department characterized what was already a one-year-old

Exemption 3

Speaking of Exemption 3, I think the Committee also should carefully consider the proliferation and use of other statutes to withhold information under the FOIA, which has been a matter of growing concern in recent years. I know that it struggles almost daily, as does its House counterpart, to identify for full attention any proposed new “Exemption 3 statute.” To be sure, this process was made easier by the 2009 amendment of Exemption 3 on that point, which I know derived directly from the Chairman’s longstanding concerns about Exemption 3 statute proliferation. But beyond that, there is the matter of the numerous *existing* statutes that are used -- or in many instances evidently misused -- by agencies to withhold information from FOIA requesters on a daily basis. Not long ago, CGS conducted an academic study of this by first compiling all of the different statutes that are relied upon by agencies for Exemption 3 withholding, more than 300 in total, and then analyzing each one for technical compliance with Exemption 3’s substantive standards. Amazingly, we found that less than half of them, just slightly more than 150, do properly qualify for use under Exemption 3 -- which means that by their own admissions (in their annual FOIA reports) agencies are employing roughly twice as many statutes in this way as they ought to and are improperly withholding untold amounts of information from FOIA requesters in so doing.

I suggest that the time has come for this Committee to seriously consider taking the next logical step. The Committee could take this academic groundwork and readily build upon it, simply by asking each agency that reports using a questionable statute under Exemption 3 to look into why and how it is doing so.¹⁸ Perhaps some agencies would try to take issue with CGS’s substantive evaluation of one or more of the statutes that they use (and that would be only fair), but I guarantee that if the Committee were to take such a step it would at a minimum result in dozens of agencies realizing that many dozens of the statutes they now regularly use are not truly Exemption 3 statutes at all. (See the Exemption 3 section of CGS’s Web site, which can be reached at this link: <http://www.wcl.american.edu/lawandgov/cgs/about.cfm#exemption3>.)

In sum, there certainly is much reason to look askance at the implementation of new FOIA policy over the course of the past five years, to put it mildly, all rosy characterizations of it notwithstanding. And this relatively brief recitation here today does not even take the

problem as having by then become “critical” to this Committee, which then prompted this Committee’s Ranking Member to logically ask: “[I]sn’t it irresponsible to ignore the problem?” See Metcalfe, D., “Amending the FOIA: Is it Time for a Real Exemption 10?,” 37 Admin. & Reg. L. News 16, 18 & n.4 (Summer 2012) (quoting hearing colloquy), *available at* <http://www.wcl.american.edu/faculty/metcalfe/ABA.article.2012.pdf>

¹⁸ On the Committee’s part, this would require no more than taking an agency’s annual FOIA report, comparing its required list of Exemption 3 statutes used that year against the CGS-vetted list (found at http://www.wcl.american.edu/lawandgov/cgs/existing_exemption_3_statutes.cfm), and then inquiring about any statute found on the former but not the latter. For the agency’s part, such a congressional inquiry would necessarily consume resources that otherwise would be available to handle pending FOIA requests more quickly, but should not be overly burdensome in that regard.

Committee's time to consider in depth other large deficiencies, such as the fact that most federal agencies (especially, and again inexplicably, the Department of Justice) have not updated their vital FOIA regulations for many, many years now, even where required under the 2007 FOIA Amendments.¹⁹ I surely appreciate the Committee's efforts to, in the words of today's hearing title, "reinvigorate the FOIA for the digital age," but I daresay that what now appears to be needed -- much to nearly everyone's great disappointment and surprise -- is sustained attention of a serious remedial nature.

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

¹⁹ This glaring problem was well described and documented in a study that was conducted by the National Security Archive in early 2013 and released during "Sunshine Week" last year. See "Freedom of Information Regulations: Still Outdated, Still Undermining Openness" (Mar. 13, 2013), available at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB417/>. Once again, I can say from experience that this is a problem of federal agencies naturally waiting to follow the Justice Department's lead -- which certainly never was a problem in the past. Suffice to add that, for reasons quite hard to understand, the Justice Department still has not updated its own FOIA regulations, with what should be a model for all other agencies, in more than a decade. See "Sunshine Not So Bright," supra note 5, at 5-6; see also Metcalfe, D., "The Cycle Continues: Congress Amends the FOIA in 2007," 33 Admin. & Reg. L. News 11 (Spring 2008), available at http://www.wcl.american.edu/lawandgov/cgs/documents/aba_arln_sp2008_cycle_continues.pdf.