



Electronic Frontier Foundation

Protecting Rights and Promoting Freedom on the Electronic Frontier

Testimony of

David L. Sobel

Senior Counsel

Electronic Frontier Foundation

**Information Policy, Census, and National Archives Subcommittee
Of the Oversight and Government Reform Committee**

Thursday, March 18, 2010 2154 Rayburn HOB 2:00 p.m.

“Administration of the Freedom of Information Act: Current Trends”

I would like to thank Chairman Clay and Ranking Member McHenry for permitting me the opportunity to appear before the Subcommittee to share my perspective on recent trends in the federal government's administration and implementation of the Freedom of Information Act (FOIA). I am Senior Counsel for the Electronic Frontier Foundation (EFF), a non-profit public interest organization that examines the potential impact of cutting-edge information technology on individual liberties and strives to inform the public about these issues. In that capacity, I direct EFF's FOIA Litigation for Accountable Government Project, through which we pursue transparency requests that focus on, among other things, government collection and use of personal information about Americans and federal agencies' development and use of new information technologies. EFF makes information obtained through such requests available to the public, the media, and policymakers.

In addition to my work on behalf of EFF, I serve on the steering committee of the OpenTheGovernment.org coalition and have represented a variety of public interest and new media organizations. My experience in litigating cases under the FOIA spans more than 25 years, so I have been involved in challenges to official secrecy during both Democratic and Republican administrations. As such, I believe my perspective on these issues is relatively broad, in terms of both the concerns of the FOIA requester community and the manner in which the Act has been implemented for the past quarter century.

The Pro-Transparency Obama Policy Statements

Any assessment of current trends in the administration of FOIA must begin by acknowledging the sea-change we have experienced with respect to official statements of policy emanating from the highest levels of the government. Much has been said about the historic commitment to transparency President Obama

made on his first full day in office,¹ as well as the policy memorandum issued by Attorney General Holder² a year ago tomorrow, amplifying the President's directive that a "presumption of openness" should control all agency actions respecting the FOIA. While it has received somewhat less notice than those two highly-visible pronouncements, the fairly detailed guidance issued last April by the Justice Department's Office of Information Policy (OIP)³ as a follow-up to the Attorney General's memorandum was a very important contribution to the Administration's stated commitment to greater transparency.

EFF has joined with its colleagues in the open government advocacy community in welcoming these developments and applauding the Obama Administration for elevating transparency as a policy priority. While the President and other top officials have said the right things and attempted to convey the right message, implementation of their stated objectives remains unfulfilled and there are strong indications that bureaucratic resistance to transparency in general – and FOIA in particular – continues to pose significant challenges to the realizations of their goals. Unfortunately, among those who appear somehow to have not heard the pro-transparency message are frontline attorneys in the Justice Department who, despite the Attorney General's pronouncements, continue reflexively to defend the withholding of government information when FOIA requesters find it necessary to bring cases to the federal courts.

¹ Barack Obama, "Memorandum for the Heads of executive Departments and Agencies: Freedom of Information Act," (Jan. 21, 2009).

² Eric Holder, "Memorandum for Heads of executive Departments and Agencies: Freedom of Information Act," (March 19, 2009).

³ Department of Justice, FOIA Post, OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a "New Era of Open Government," (April 17, 2009), <http://www.usdoj.gov/oip/foiapost/2009foiapost8.htm>.

No Discernible Impact on Pending Cases

When President Obama assumed office in January 2009 and announced a new disclosure policy for the Executive Branch, EFF had a half dozen FOIA lawsuits pending. We believed that these cases presented a unique opportunity to assess the impact of the new administration's recently articulated presumption in favor of disclosure. The cases, which sought information on a range of government activities, including the FBI's collection of billions of records in its Investigative Data Warehouse⁴ and the Department of Homeland Security's use of its data-heavy Automated Targeting System,⁵ initially arose under the Bush Administration's pro-withholding policies.⁶ Assuming that the words of the President and the Attorney General would have a tangible impact on the agencies' positions in these cases, we suggested to the DOJ attorneys handling the cases that further proceedings should be stayed to permit the agencies to re-evaluate their withholding decisions in light of the newly-announced policy shift. In all but one of these cases, the defendant agencies rejected our suggestion and actively resisted any requirement that they take into account the guidance issued by the President and the Attorney General.

Ultimately, despite the direction of the Attorney General and OIP that agencies make "discretionary releases" of information where no foreseeable harm would result – even if the material was technically exempt from disclosure – our pending lawsuits resulted in the discretionary disclosure of virtually no substantive information, even in cases where tens of thousands of pages of records were at issue. As such, we were unable to discern any real difference between the manner

⁴ *EFF v. Dep't of Justice*, Civ. No. 06-1773-RBW (D.D.C.).

⁵ *EFF v. Dep't of Homeland Sec.*, Civ. No. 06-2154-RBW (D.D.C.).

⁶ *See, e.g.*, John Ashcroft, "Memorandum for Heads of all Federal Departments and Agencies: The Freedom of Information Act," (Oct. 12, 2001).

in which the disputed information was handled first under the Bush policy, and later under the Obama policy.

A Rare Glimpse Behind an Agency's Withholding Decision

One case in particular offers an interesting glimpse into the continuing failure of many agencies to implement the Obama Administration's transparency directives.⁷ Over the years, we have grown accustomed to receiving agency documents with large amounts of information blacked out – or “redacted” in the official parlance. While we often suspect that much of these deletions are made to conceal innocuous, or perhaps embarrassing, information, it is usually impossible to confirm those suspicions. But we were recently able to learn precisely what a recalcitrant agency improperly withheld from public view.

This opportunity arose when the Washington Post published a series of internal FBI e-mail messages concerning the Bureau's abuse of national security letter (NSL) authority. NSLs are used to obtain, among other things, telephone toll billing records and subscriber information and electronic communication transactional records. In a report issued in March 2007, the Justice Department's Inspector General concluded that the FBI had systematically violated the law by improperly issuing hundreds of NSLs without proper authorization.⁸ Within days of the IG's report, EFF submitted an FOIA request to the FBI for documents detailing these abuses. Of the tens of thousands of pages of material that the Bureau eventually identified as responsive to our request, the vast majority of the relevant information was redacted.

The e-mail messages published by the Washington Post were obtained from an FBI whistleblower who had been directly involved in the Bureau's handling of

⁷ *EFF v. Dep't of Justice*, Civ. No. 07-656-JDB (D.D.C.).

⁸ Department of Justice, Office of Inspector General, *A Review of the Federal Bureau of Investigation's Use of National Security Letters*, Special Report, March 2007.

NSLs. Through a careful comparison of the redacted material released to EFF by the FBI with the recently published messages, we were able to see precisely what the Bureau withheld. We were particularly struck by the fact that the FBI redacted all references to a proposal that had been floated within the Bureau to legitimize questionable demands for communications records – a plan that the DOJ Inspector General clearly described in his report. According to the IG’s report, a review of e-mail exchanges revealed that Bureau attorneys had proposed the establishment of “generic” or “umbrella” investigations that the FBI could use to issue NSLs “when there were no other pending investigations to which the request could be tied.”

A side-by-side comparison of the redacted and full-text e-mail messages shows that the FBI withheld all references to its proposal to use “generic” or “umbrella” investigations as a rationale to justify questionable demands for sensitive information relating to private communications.⁹ The FBI continued to withhold this information even after the President and Attorney General announced that a new “presumption of openness” should guide agency FOIA implementation. Despite the fact that the Attorney General had directed that the Justice Department only defend an agency’s decision to withhold information if it could demonstrate a “foreseeable harm” from disclosure, in this instance DOJ attorneys defended the FBI’s withholding of information that, as we now know, was revealed by the Department’s own Inspector General three years ago. This episode does not generate a great deal of confidence in DOJ’s willingness (or perhaps ability) to fulfill the Attorney General’s promise.

DOJ’s Defense of Agency Withholdings Appears Unchanged

I believe it’s important to emphasize this last point. One of the significant differences between the Ashcroft policy and the Holder policy was the altered standard for DOJ defense of agencies in FOIA litigation. While Mr. Ashcroft told

⁹ See <http://www.eff.org/pages/sunshine2010>

agencies that “[w]hen you . . . decide to withhold records, in whole or in part, you can be assured that the Department of Justice will defend your decisions unless they lack a sound legal basis.” Mr. Holder expressly rescinded that policy. In its place, he directed that DOJ “will defend a denial of a FOIA request only if (1) the agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions, or (2) disclosure is prohibited by law.”

While this change was lauded by the transparency community – especially those of us who actively litigate FOIA cases – we have not witnessed any notable change in the Justice Department’s reflexive willingness to defend every FOIA lawsuit aggressively. In response to this concern, several organizations that often find it necessary to resort to the courts for relief made a simple suggestion to top officials at DOJ: in the spirit of transparency, the Department should periodically publish a list of FOIA lawsuits it has declined to defend under the Holder standard.¹⁰ Only by making such information public, we argued, will recalcitrant agencies be put on notice that the policy of the Executive Branch has, indeed, changed. We were disappointed to find that DOJ officials rejected this suggestion and appear unwilling to account for the manner in which the supposedly revised FOIA case defense policy is being implemented. I would urge this Subcommittee to request this information from the Justice Department and consider making it publicly available. Tomorrow marks the first anniversary of the issuance of the Attorney General’s memorandum on FOIA policy, and I believe it is an appropriate time for the American people to be put in a position to assess the true impact of the changes announced in that document.

Make Transparency a “Critical Element” of Job Performance

Allowing agencies to see that DOJ is not going to defend every withholding decision would be just one way to begin changing the ingrained culture favoring secrecy that pervades many agencies. The high-level pro-disclosure message

¹⁰ See, e.g., <http://www.openthegovernment.org/otg/FOIAissuesDOJ.pdf>

needs to filter down to the frontlines, where agency employees handle FOIA requests on a daily basis. Training sessions and policy memos can only achieve limited results in changing the culture; agency personnel need to know that there are now high expectations with respect to their support of, and compliance with, transparency goals, and that their work in furtherance of those goals will be measured along with other “critical elements” of their jobs. Serious consideration should be given to incorporating transparency elements into the annual performance review process, to create incentives for exceptional achievement in this area.

Study – and Solve – The Processing Delay Problem

Congress should also consider the issue of resources made available for agency FOIA compliance. I am not unsympathetic to the burden that many agency employees encounter when they attempt to be diligent in responding to FOIA requests in a forthcoming and timely fashion. Nonetheless, as a requester, it is frustrating to know that the statutory deadline of twenty working days for response to a request has become one of the longest running jokes within the federal government. It is not uncommon for agencies to take many months, if not years, to complete their processing of requests. Indeed, even when tardy agencies are sued for lengthy processing delays, they often ask for – and receive – so-called *Open America* stays that allow them even more time to complete their work. In one of EFF’s cases, the FBI requested a *six-year* stay¹¹ – a delay that would be shocking if it was not relatively commonplace.

The problem of delay has been with us for a long time, but has not, in my view, ever been examined in a serious way. To that end, many of us in the transparency community have, for several years, advocated the creation of a federal advisory committee to address the issue. I am pleased to note that, earlier this week, Senators Leahy and Cornyn introduced the “Faster FOIA Act,” bipartisan legislation that would establish an advisory panel to examine agency

¹¹ *EFF v. Dep’t of Justice*, 563 F. Supp. 2d 188 (D.D.C. 2008).

backlogs in processing FOIA requests. Under the legislation, the panel – the Commission on Freedom of Information Act Processing Delays – would be required to provide to Congress recommendations for legislative and administrative action to enhance agency responses to FOIA requests and identify methods to reduce processing delays. I strongly urge the Subcommittee to take up this issue and support establishment of the Commission.

The White House Should Lead By Example

As noted, the Obama Administration deserves a great deal of credit for elevating the goal of transparency to an unprecedented level within the Executive Branch. The White House itself has also taken steps to make its own activities more open to public view, most notably in its decision to release the names of individuals visiting the White House complex for official purposes. While this high-profile example of greater transparency is certainly a step in the right direction, there remain other instances in which the current administration is, in fact, less transparent than many of its predecessors with respect to White House operations.

In the early days of the Obama Administration, EFF submitted requests directly to the White House for information concerning two technology issues that had generated a significant amount of public attention. In a letter sent to then-White House Counsel Gregory Craig on January 27, 2009, we requested information about the use of visitor-tracking cookies on the WhiteHouse.gov website, noting the controversial privacy implications of the practice.¹² While recognizing that the Counsel's Office is not subject to mandatory disclosure requirements under FOIA, we asked Mr. Craig, in keeping with the President's stated commitment to transparency, to nonetheless make relevant information public. After not receiving a response to our initial request, we followed up several times, reiterating the public interest in information about the privacy practices of

¹² http://www.eff.org/files/EFF_letter_craig.pdf

federal websites. More than a year after submitting our request, we have received no response.

On February 12, 2009, we sent a request letter to the White House's Office of Administration seeking disclosure of information about the President's "BlackBerry" (or whatever type of handheld device he uses) and policies governing the use of various electronic communications devices and systems by the President, Vice President, and White House staff.¹³ We noted that electronic messaging raises a host of issues under federal open records laws, and our belief that the public has a right to know about the policies and procedures that have been put in place to ensure compliance with those laws. As we also noted in our letter, the Bush Administration took the position (for the first time in history) that the White House Office of Administration is not subject to FOIA. Although the courts have upheld the previous administration's position on the issue,¹⁴ we noted in our request letter that, if President Obama intends (as he has said) to "usher in a new era of open Government" and "creat[e] an unprecedented level of openness in Government," it seems that a good place to start is in the White House by reversing the Bush policy that banished FOIA from the premises. We have never received a response to our request, nor has the counsel's office responded to a letter submitted by 37 open government advocates urging a reversal of the Bush Administration policy with respect to the status of the Office of Administration.¹⁵

Earlier this week, in recognition of Sunshine Week, President Obama declared that his administration "will continue to work toward an unmatched level of transparency, participation and accountability across the entire

¹³ http://www.eff.org/files/OA_FOIA_request.pdf

¹⁴ *Citizens for Responsibility & Ethics in Washington v. Office of Admin.*, 566 F.3d 219 (D.C. Cir. 2009).

¹⁵ http://www.politico.com/static/PPM116_office_admin.html

Administration.”¹⁶ To that end, the open government community urges the President to return to the practice of many of his predecessors and restore FOIA access to the records of the Office of Administration. Through such action, the White House can lead by example and send a strong message that the rhetoric of transparency must be made a reality in the everyday operations of the Executive Branch, from the highest levels on down.

Thank you for your consideration of my views, and I would be glad to respond to your questions.

¹⁶ <http://www.whitehouse.gov/the-press-office/statement-president-sunshine-week>