



**Testimony of Angela Canterbury, Director of Public Policy,
Project On Government Oversight,
before the House Committee on Oversight and Government Reform
on
March 13, 2013**

Chairman Issa, Ranking Member Cummings, and Members of the Committee: Thank you for inviting me to testify today and for your attention to the critical issues of government transparency and accountability. I am the Director of Public Policy at the Project On Government Oversight (POGO). Founded in 1981, POGO is a nonpartisan independent watchdog that champions good government reforms. Therefore, POGO has a keen interest in achieving a more effective, accountable, open, and ethical federal government.

It is particularly a pleasure to be here again during “Sunshine Week” when we promote open government and celebrate “sunshine laws” such as the Freedom of Information Act (FOIA). Unfortunately, I cannot say that there has been tremendous progress on government openness since I last testified before you on this subject two years ago. The state of openness in our government is not simply put—it is complex and rife with contradictions. However, I will attempt to disentangle some of these issues for you today.

The Most Transparent Administration in History?

President Barack Obama recently said on a Google webcast, “This is the most transparent administration in history, and I can document how that is the case.”¹ True? It really depends upon how you measure it. That statement is true if the measure is putting information online, but that is only part of the picture.

On his first full day in office, President Obama called upon all federal executive departments and agencies to administer FOIA with a “clear presumption: In the face of doubt, openness prevails.”² The President also has advanced open government with two major government-wide initiatives: the Open Government Directive (OGD),³ also mandated on his first full day in office, and the Open Government Partnership (OGP),⁴ a multi-national initiative in which the U.S. has

¹ President Barack Obama, “President Obama Participates in a Fireside Hangout on Google+” YouTube video, 35:12, posted by “whitehouse,” February 14, 2013. https://www.youtube.com/watch?v=kp_zigxMS-Y&t=35m12s (Downloaded March 4, 2013) (Hereinafter President Obama Participates in Fireside Hangout)

² Memorandum from Barack Obama, President of the United States, to Heads of Executive Departments and Agencies, regarding Freedom of Information Act, January 21, 2009. <http://edocket.access.gpo.gov/2009/pdf/E9-1773.pdf> (Downloaded March 3, 2013)

³ Memorandum from Barack Obama, President of the United States, to Heads of Executive Departments and Agencies, regarding Transparency and Open Government, January 21, 2009. <http://www.gpo.gov/fdsys/pkg/FR-2009-01-26/pdf/E9-1777.pdf> (Downloaded March 4, 2013)

⁴ Open Government Partnership, “Home Page,” www.opengovpartnership.org/ (Downloaded March 4, 2013)

been deeply engaged. The current U.S. National Action Plan for the OGP commits the Obama Administration to a wide range of reforms from whistleblower protections to declassification to federal spending transparency. As required by the OGP, the Administration has consulted with POGO and other civil society organizations on the plan and actions to meet these commitments. We also have been carefully monitoring results. Our coalition of government transparency groups, OpenTheGovernment.org, just released an assessment of the U.S. National Action Plan that shows that the government met the letter of the majority of the commitments within the first year—technically meeting 19 out of 25 with the remaining 6 in progress.⁵ For the most part, the commitments were commendable first steps, and we will look for greater progress in the next National Action Plan.

Without question, there has been an unprecedented amount of proactive disclosure under the President’s leadership. Data.gov continues to expand and improve access to government information. The recent addition of Ethics.data.gov was especially welcome, as it brings together seven datasets for the public to search for undue influence, including campaign contributions, lobbying, travel records, and the White House visitor logs.

POGO’s Sunshine Week release with partner organizations of *Highlighted Best Practices for Openness and Accountability* provides several examples of useful and innovative practices by federal agencies that we hope will be replicated.⁶ These highlights include practices such as posting staff directories and calendars online; the Consumer Financial Protection Bureau’s excellent online credit card complaints database; public comments solicited on Open Government Plans, as well as on the plans in response to the President’s Memorandum on Scientific Integrity; the unprecedented tracking of federal spending available on Recovery.gov; extensive training at DOE on properly classifying information; online posting of performance and accountability reports; and FOIAOnline.regulations.gov, a one stop shop for FOIA requests, tracking, disclosure, and management created voluntarily by enterprising agencies—and a feature of the FOIA reform legislation we’ll discuss momentarily.

But first, it is important to address the fact that in spite of these achievements, secrecy has escalated in some areas of the government. The President recently admitted, “There are a handful of issues, mostly around national security, where people have legitimate questions where they’re still concerned about whether or not we have all the information we need.”⁷ We are indeed concerned, Mr. President.

Two American Governments

There seems to be two Obama Administrations—two American governments, really. One looks like a democracy in which an open government accountable to the people is an ideal and a priority; and the other is a national security state, where claims of national security often trump

⁵ Openthegovernment.org, *Civil Society Report on Implementation of the First U.S. National Action Plan*, March 2013.

⁶ Project On Government Oversight with contributions from the American Association of Law Libraries, Bauman Foundation, Brennan Center, Center for Effective Government, OpenTheGovernment.org, Sunlight Foundation, and the Union of Concerned Scientists, *Highlighted Best Practices for Open and Accountable Government*, March 2013. <http://www.pogo.org/our-work/resources/2013/best-practices-for-open-and-accountable-government.html>

⁷ President Obama Participates in Fireside Hangout

democratic principles such as the people’s right to know, civil liberties, freedom of speech, and whistleblower protections. Of course, this is not an approach exclusive to this President. But the unchecked secrecy of Obama’s national security state is at cross-purposes with many of his Administration’s openness objectives, and it raises doubts about the President’s commitments and declarations about transparency.

One case in point is on whistleblower protections—a foundational transparency and accountability policy. More than any other president, Obama has advanced legislation and policies to protect federal workers who blow the whistle on waste, fraud, and abuse. Most presidents have been outright hostile and have opposed strengthening whistleblower protections.

President Obama was the first to strongly support the Whistleblower Protection Enhancement Act (WPEA)—a bill championed by Chairman Issa, Ranking Member Cummings, and then-Committee members Representatives Platts and Van Hollen. He signed it into law in November 2012—the culmination of a hard-fought 13-year campaign by POGO and our partners. President Obama also issued Presidential Policy Directive 19 (PPD-19), using executive action to extend some protections to intelligence and national security community personnel that were left out of the final version of the WPEA.

But at the same time the Administration created a national security loophole for whistleblowers that undermines both the WPEA and the PPD. The Administration’s appeal in *Berry v. Conyers and Northover*⁸ resulted in a decision that allows agencies to label job positions arbitrarily as “sensitive” for national security and remove employees from those positions—even if it is in retaliation for blowing the whistle on waste, fraud, and abuse. Additionally, the President has ordered the Director of National Intelligence to join rulemaking⁹ that we anticipate will affirm that loophole by substantially replacing the rights Congress enacted for civil servants and whistleblowers with an alternative national security system. Employees with security clearances and access to classified information have long had different rights. However, the employees with so-called sensitive national security positions do not have access to classified information and, until the *Conyers* decision, had the same rights as other civil servants. Thus, we are deeply concerned that the *Conyers* decision and the DNI rulemaking will greatly expand the boundaries of the national security state, dramatically increasing secrecy and decreasing oversight and accountability.¹⁰

⁸ John Berry, Director Office of Personnel Management v. Rhonda K. Conyers, Devon Haughton Northover and Merit Systems Protection Board (Fed. Cir. 2012) <http://www.cafc.uscourts.gov/images/stories/opinions-orders/11-3207.pdf> (Downloaded March 5, 2013)

⁹ The White House, Office of the Press Secretary, “Presidential Memorandum—Rulemaking Concerning the Standards for Designating Positions in the Competitive Service as National Security Sensitive and Related Matters,” January 25, 2013. <http://www.whitehouse.gov/the-press-office/2013/01/25/presidential-memorandum-rulemaking-concerning-standards-designating-positi> (Downloaded March 5, 2013)

¹⁰ Margaret Talev, “Obama Memo on ‘Sensitive’ Jobs Stirs Whistle-Blower Fears,” Bloomberg.com <http://www.bloomberg.com/news/2013-02-27/obama-memo-on-sensitive-jobs-stirs-whistle-blower-fears.html> (Downloaded March 4, 2013)

Additionally, I know you share our concerns about a recent signing statement¹¹ by the President that seeks to limit disclosures of unclassified information to Congress.¹² He said the new protections for contractor and grantee employees “threaten to interfere with my constitutional duty to supervise the executive branch.” President Bush made a similar claim, but what makes this signing statement more alarming is that it specifically objects to disclosures to Congress. What’s more, President Obama isn’t just trying to block classified information, but instead is seeking to withhold information he ambiguously refers to as “otherwise confidential.” You can’t do your jobs and there won’t be checks and balances if the President is allowed to keep secrets from Congress.¹³

There are a host of other examples of extreme secrecy in the name of national security that require your attention, but can’t be adequately addressed at this hearing. But allow me to just mention a few more issues of critical concern. We have objected to administrative action¹⁴ and proposed legislation¹⁵ to plug leaks of classified information that threaten free speech, freedom of the press, civil liberties, and whistleblowers.¹⁶ We also have raised concerns repeatedly about the aggressive prosecutions of so-called leakers. There have been more prosecutions for disclosures of alleged wrongdoing under the Espionage Act under this Administration than all others combined.¹⁷ We believe these prosecutions have a chilling effect that silence would-be whistleblowers. There continues to be far too much over-classification of information, which undermines our legitimate secrets and makes them harder to keep. Then there are the secret legal opinions that among other things justify the targeted killings of American citizens suspected of terrorism. Constitutional law expert Lou Fisher says, “No plausible case can be made for withholding legal reasoning. With secret legal memos, government functions by fiat. The dominant force is not law but executive will over democracy and the constitutional system of checks and balances.”¹⁸

¹¹ The White House, Office of the Press Secretary, “Statement by the the [sic] President on H.R. 4310,” January 3, 2013. <http://www.whitehouse.gov/the-press-office/2013/01/03/statement-president-hr-4310> (Downloaded March 4, 2013)

¹² Letter from Senators Darrell E. Issa, Clair McCaskill, Elijah E. Cummings, and Charles E. Grassley to President Barack Obama, regarding concerns about limiting disclosures of unclassified information to Congress, January 17, 2013. <http://pogoarchives.org/m/ns/dei-mccaskill-ec-c-grassley-to-president-wpea-ndaa-20130117.PDF>

¹³ Angela Canterbury, “Obama, Bush and the imbalance of power,” *The Hill*, January 18, 2013. <http://thehill.com/blogs/congress-blog/politics/278047-obama-bush-and-the-imbalance-of-power> (Downloaded March 4, 2013)

¹⁴ Memorandum from Jacob J. Lew, Director of the Office of Management and Budget, to the Heads of Executive Departments and Agencies, regarding Initial Assessments of Safeguarding and Counterintelligence Postures for Classified National Security Information in Automated Systems, January 3, 2011. www.whitehouse.gov/sites/default/files/omb/memoranda/2011/m11-08.pdf (Downloaded March 4, 2013)

¹⁵ Ron Wyden—Senator for Oregon, “Wyden Places Hold on Intelligence Authorization Bill,” November 14, 2012. <http://www.wyden.senate.gov/news/press-releases/wyden-places-hold-on-intelligence-authorization-bill-> (Downloaded March 4, 2013)

¹⁶ Suzie Dershowitz and Angela Canterbury, “Wyden Pumps the Brakes on Anti-Leaks Legislation,” *The (POGO) Blog*, November 19, 2012. <http://www.pogo.org/blog/2012/11/wyden-pumps-the-brakes-on-anti-leaks-legislation.html>

¹⁷ Phil Mattingly and Hans Nichols, “Obama Pursuing Leakers Sends Warning to Whistle-Blowers,” Bloomberg.com, October 17, 2012. <http://www.bloomberg.com/news/2012-10-18/obama-pursuing-leakers-sends-warning-to-whistle-blowers.html> (Downloaded March 4, 2013)

¹⁸ Louis Fisher, “What grounds for secrecy?” *The National Law Journal: Opinion*, January 21, 2013. <http://www.constitutionproject.org/documents/what-grounds-for-secrecy/> (Downloaded March 4, 2013)

Each of these encroachments deserves more scrutiny. What should be of critical concern for all of us—and especially this Committee—is that the lack of transparency and accountability for the national security state is growing. The more it grows, the more illegitimate secrecy threatens our basic rights and our democracy.

Egregious Problems at Certain Agencies

Another serious problem we've encountered is agencies actively engaged in cover-ups to evade accountability. The Department of Defense (DoD) has repeatedly withheld records to hide the extent of the water contamination at Camp Lejeune that poisoned an estimated million Marines, family members, and civilians for 34 years.¹⁹ The Food and Drug Administration (FDA) has spied on whistleblowers,²⁰ prompting the Office of Special Counsel to issue a reminder to all agencies not to violate the rights of whistleblowers to make disclosures without retaliation.²¹

However, there are other instances where perhaps the reasons for the secrecy are not nefarious, but the results are. The Department of Agriculture and the Fish and Wildlife Service are among the agencies that have been called out recently for having “made it difficult for scientists to communicate their findings and views directly to the media and the public.”²² FOIA requesters have to wait an average 926 days to receive a response to an expedited request²³ from the Department of State. POGO discovered this when we closely examined the *Summary of Agency Chief FOIA Officer Reports for 2012*²⁴ and the *Summary of Annual FOIA Reports for FY 2011*.²⁵ We also found that State and USAID have an average response rate to simple requests of more

¹⁹ Martha Waggoner, “U.S. Senate panel hears about Camp Lejeune water,” *Star News Online*, March 13, 2012. <http://www.starnewsonline.com/article/20120313/ARTICLES/120319920> (Downloaded March 4, 2013)

²⁰ Ellen Nakashima and Lisa Rein, “FDA lawyers authorized spying on agency’s employees, senator says,” *The Washington Post*, July 16, 2012. http://articles.washingtonpost.com/2012-07-16/politics/35489846_1_erica-jefferson-fda-contractor-computer-surveillance (Downloaded March 4, 2013)

²¹ Memorandum from Steven VanRoekel, Federal Chief Information Officer and Boris Bershteyn, General Counsel, to the Chief Information Officers and General Counsels, regarding Office of Special Counsel Memo on Agency Monitoring Policies and Confidential Whistleblower Disclosures, June 20, 2012. <http://www.whistleblowers.org/storage/whistleblowers/documents/ombandosc.monitoringmemo.pdf> (Downloaded March 4, 2013)

²² Celia Viggo Wexler, “From ‘The Daily Show’ to the daily news, federal scientists often face obstacles sharing their knowledge,” *Sunshine Week*, February 27, 2013. <http://sunshineweek.rcfp.org/from-the-daily-show-to-the-daily-news-federal-scientists-often-face-obstacles-sharing-their-knowledge/> (Downloaded March 4, 2013)

²³ According to the guidelines, FOIA processing should be expedited when an individual’s life or safety would be jeopardized or if substantial due process rights of the requester would be impaired by the failure to process a request immediately. Department of Justice, “When to Expedite FOIA Requests,” FOIA Update Vol. IV, No. 2, 1983. http://www.justice.gov/oip/foia_updates/Vol_IV_3/page3.htm (Downloaded March 4, 2013)

²⁴ Department of Justice, *Summary of Agency Chief FOIA Officer Reports for 2012 and Assessment of Agency Progress in Implementing the President’s FOIA Memorandum and the Attorney General’s FOIA Guidelines With OIP Guidance for Further Improvement*, <http://www.justice.gov/oip/docs/sum-2012-chief-foia-officer-rpt.pdf> (Downloaded March 4, 2013)

²⁵ Office of Information Policy, Department of Justice, *Summary of Annual FOIA Reports for Fiscal Year 2011*, <http://www.justice.gov/oip/foiapost/fy-2011-annual-report-summary.pdf> (Downloaded March 4, 2013)

than seven times the legal limit of 20 days.²⁶ Public Citizen has filed a petition objecting to FDA having routinely violated the letter and spirit of the Freedom of Information Act.²⁷

But some of the worst FOIA practices and policies have been by the very agency that issues guidance to other agencies on FOIA: the Department of Justice (DOJ). Last year, the National Security Archive even gave DOJ its annual Rosemary Award for worst open government performance.²⁸ As one of the contributing factors, the group cited Justice's "'FOIA-as-usual mindset' that has failed to transform decades-old FOIA policies within its department, much less throughout the government." When it did propose updating its FOIA regulations, we were alarmed by the ways in which FOIA would be undermined, including its proposal to lie to requesters, which was finally withdrawn after public pressure.²⁹ DOJ's proposed modifications to its FOIA system of records also drew fire from Senators Leahy and Cornyn who were concerned about repeated references to the Office of Information Policy (OIP) at DOJ as an ombudsman.³⁰ Their 2007 law specifically designates another entity as the FOIA Ombudsman—the Office of Government Information Systems (OGIS)—which was intended to create a neutral arbiter of FOIA, something that DOJ is not.

Unlimited Loopholes to FOIA

We continue to see overly broad exemptions to FOIA being sought by agencies—or by regulated entities. In addition to the nine permanent exemptions to FOIA, there are hundreds of statutory exemptions pursuant to FOIA's Exemption b(3), known as statutory exemptions or b(3)s.³¹ POGO has long been concerned about the proliferation and the scope of these statutory exemptions, as well as the lack of oversight. Any exemption to FOIA must be narrowly tailored and must carefully balance the public's right to know with other interests for withholding information.

With the help of Ranking Member Cummings and Senator Leahy, we were able to narrow an extremely broad exemption the DoD was seeking.³² But its implementation now needs oversight,

²⁶ Suzie Dershowitz, "Federal Agencies Lagging on FOIA Processing—What's the Hold Up?" *The (POGO) Blog*, September 20, 2012. <http://www.pogo.org/blog/2012/09/20120920-federal-agencies-lagging-on-foia.html>

²⁷ Public Citizen, "Petition to FDA to Revoke Deletions Policy for FOIA Processing," petition, September 19, 2012. <http://www.citizen.org/documents/Petition-to-FDA-to-Revoke-Deletions-Policy-for-FOIA-Processing.pdf> (Downloaded March 4, 2013)

²⁸ The National Security Archive, "Justice Department Wins Rosemary Award for Worst Open Government Performance in 2011." <http://www.gwu.edu/~nsarchiv/news/20120214/index.htm> (Downloaded March 4, 2013)

²⁹ Dana Liebelson, "Did Your FOIA Request Really Not Exist—Or is That Just What the DOJ Told You?" *The (POGO) Blog*, November 4, 2011. <http://www.pogo.org/blog/2011/11/did-your-foia-request-really-not-exist-or-is-that-just-what-the-doj-told-you.html>

³⁰ Patrick Leahy-United States Senator for Vermont, "Leahy, Cornyn Urge DOJ To Clarify Department's Position On FOIA Ombudsman," March 26, 2012. <http://www.leahy.senate.gov/press/leahy-cornyn-urge-doj-to-clarify-departments-position-on-foia-ombudsman> (Downloaded March 4, 2013)

³¹ 5 U.S.C. § 552(b)(3): specifically exempted from disclosure by statute (other than section 552b of this title), if that statute—(A) (i) requires that the matters be withheld from the public in such a manner as to leave no discretion on the issue; or (ii) establishes particular criteria for withholding or refers to particular types of matters to be withheld; and (B) if enacted after the date of enactment of the OPEN FOIA Act of 2009, specifically cites to this paragraph.

³² Letter from the Project On Government Oversight et al. to the Senators of the 111th Congress, regarding support for Leahy's amendment to the NDAA to fix FOIA exemptions, November 17, 2011. <http://www.pogo.org/our->

as does the use of the many others on the books. Sometimes unnecessary exemptions are moving too fast in legislation without a referral to this Committee, and it is almost impossible to prevent these loopholes to FOIA and accountability from becoming law. Other times, there are powerful interests and claims of national security seeking to withhold information that ought to be disclosed. All of the proposed cybersecurity legislation from the 112th Congress include overly broad or wholly unnecessary loopholes to the public's right to know,³³ as does the "CISPA" bill recently reintroduced in the House.³⁴

I urge you to not only study existing statutory exemptions to FOIA, but also to find a better way to review proposed exemptions before they become law to ensure each is narrowly targeted to a specific, compelling need to withhold information from the public. Unnecessary, overly broad, or abused statutory exemptions already in the law should be repealed.

Bureaucratic Foot-Dragging

Bureaucracy often gets in the way of open government. Delays are by far the most common complaint by FOIA requesters. Many agencies routinely violate the 20-day rule for responses to FOIA. In a FOIA project we conducted, only 8 out of 100 agencies responded with the requested records within the deadline.³⁵ Many claim that responding with a letter acknowledging receipt of the request within 20 days fulfills the requirement. We disagree, and so do our friends at Citizens for Responsibility and Ethics in Washington who have brought suit against the Federal Elections Commission for this claim.³⁶

Conflict of Mission

But perhaps the greatest challenge for implementation of the President's directives on openness is that there isn't a proper entity with authority and an interest in making the agencies improve their FOIA practices and increase their openness. It's mostly voluntary and without any real consequences for agencies that fail.

Generally, the OIP at DOJ is thought of as the entity responsible for FOIA since it issues guidance to the agencies and plays an important role in compliance. But, as you so aptly pointed out in your letter last month to Melanie Pustay, Director of OIP, there is a significant disconnect

[work/letters/2011/gs-foia-20111117.html](http://www.pogo.org/our-work/letters/2011/gs-foia-20111117.html); Patrick Leahy-United States Senator for Vermont, "Senate Adopts Leahy Amendment To Promote Transparency In Defense Auth. Bill," December 1, 2011. <http://www.leahy.senate.gov/press/senate-adopts-leahy-amendment-to-promote-transparency-in-defense-auth-bill> (Downloaded March 4, 2013)

³³ Letter from the Project On Government Oversight et al. to the Senators of the 112th Congress, regarding opposition to FOIA threats in cybersecurity bills, May 14, 2012. <http://www.pogo.org/our-work/letters/2012/gs-foia-20120514.html>

³⁴ 113th U.S. Congress, "Cyber Intelligence Sharing and Protection Act" (HR 624), introduced February 13, 2013, by Representative Mike Rogers.

³⁵ Andrew Wyner, "SUNSHINE WEEK: Many Agencies Violate FOIA's 20-Day Requirement," *The (POGO) Blog*, March 16, 2012. <http://www.pogo.org/blog/2012/03/sunshine-week-many-agencies-violate-foias-20-day-requirement.html>

³⁶ Citizens for Responsibility and Ethics in Washington (CREW), "CREW v. Federal Election Commission." <http://www.citizensforethics.org/lawsuits/entry/crew-v-federal-election-commission-commissioners-correspondence> (Downloaded March 4, 2013)

between OIP's actions and the President's orders.³⁷ We share your concerns about "outdated FOIA regulations, exorbitant and possibly illegal fee assessments, FOIA backlogs, the excessive use and abuse of exemptions, and dispute resolution services."³⁸ You raised several important questions that must be answered.

Naturally, OIP did not respond to the Committee's questions by the date requested.

In the end, we can never expect OIP to properly lead on FOIA compliance and ensure that the presumption of openness is employed because it has an inherent conflict of interest—a conflict of mission, really. DOJ is charged with defending the agencies when they withhold information under FOIA. This responsibility of serving as the agencies' lawyers means that they do not have a primary interest in promulgating a presumption of openness. One need look no further than DOJ's own proposed rulemaking on FOIA to see a defensive posture that undermines the public's right to know.³⁹ Clearly it is time to consider moving away from this dysfunctional model and centralizing FOIA authority at an independent entity without such conflicts.

Fixing and Modernizing FOIA

The proposed FOIA reform legislation by Chairman Issa and Ranking Member Cummings envisions a more modern FOIA and provides for some commonsense next steps.

POGO strongly supports the following reforms in this bill:

- Codifying the "foreseeable harm standard" which says that an agency "shall not deny a request for records unless the agency reasonably foresees that disclosure would harm an interest protected by one of the exemptions."
- Giving a boost to FOIAOnline⁴⁰ by increasing the number of agencies that use this one stop shop for requesters.
- Providing the Office of Government Information Services with more involvement in FOIA rulemaking and compliance to provide more balance with OIP's role.
- Encouraging more proactive disclosures.
- Making more of FOIA requests, processing, responses, and policy available in electronic format and online.
- Requiring agencies to review and update their FOIA regulations.
- Clarifying the responsibilities of the Chief FOIA Officers for improving FOIA practices at their agencies.

³⁷ Letter from House Committee on Oversight and Government Reform Chairman Darrell E. Issa and Ranking Member Elijah E. Cummings to Melanie Ann Pustay, Director Office of Information Policy, regarding the federal government's compliance with FOIA, February 4, 2013. <http://oversight.house.gov/wp-content/uploads/2013/02/2013-02-04-DEI-EEC-to-Pustay-re-FOIA.pdf> (Downloaded March 4, 2013)

³⁸ Suzie Dershowitz, "House Oversight Committee Takes a Stand on FOIA," *The (POGO) Blog*, February 20, 2013. <http://www.pogo.org/blog/2013/02/20130220-house-oversight-committee-takes-stand-on-foia.html>

³⁹ Department of Justice, "Proposed Rules: Freedom of Information Act Regulations," Federal Register Volume 76, Number 54, March 21, 2011. <http://www.gpo.gov/fdsys/pkg/FR-2011-03-21/html/2011-6473.htm> (Downloaded March 4, 2013)

⁴⁰ FOIAonline, "Home Page." <https://foiaonline.regulations.gov/foia/action/public/home> (Downloaded March 4, 2013)

- Creation of a Chief FOIA Officers Council to ensure interagency cooperation and public input in compliance and improved performance with FOIA.
- Studying ways to further improve compliance with FOIA and limit the over-use and abuse of exemptions.

All of these are important, commonsense next steps for fixing FOIA. The “foreseeable harm standard” means that agencies cannot withhold information unless harm to an interest protected by an exemption can be identified. Putting this into statute will prevent future presidents from abandoning the need to make this justification for withholding, and will increase disclosures under FOIA. Mandating performance responsibilities for the Chief FOIA Officers, creation of a Chief FOIA Officers Council, and updates to FOIA regulations will go a long way to bringing agencies in compliance with FOIA.

Modernizing FOIA also means mandating a migration away from last century’s approach towards one that harnesses today’s technology to make it simple for the public to access its own information held by the government.

I called out a few agencies as problem children earlier, but it is also extremely important to credit the extraordinary initiative and voluntary investments made by the three agencies that created FOIAOnline.regulations.gov: OGIS, the Department of Commerce, and the Environmental Protection Agency. In response to the President’s OGD, these agencies created a platform for FOIA requesters and administrators that facilitates FOIA processing with a non-proprietary system that can be used by any and all agencies. Their vision is that one day it will serve as a portal for all FOIA requests so that requesters would no longer need to know exactly which agency holds the information they seek—but that would mean that all federal departments and agencies would have to use the system. The pilot proposed by the legislation will help boost the agencies participating in FOIAOnline and increase its potential for success.

We also support taking a closer look at the persistent structural problems manifested in delays, backlogs, and other issues; and practices that lead to more withholding than disclosing, such as the use of statutory exemptions. We support your proposal for OGIS to conduct the study, but also support the Faster FOIA Act, proposed by Senators Leahy and Cornyn, which creates an independent commission to study these issues. We want OGIS to have a greater role and more authority, but not without increased resources. It is already struggling to fulfill its mission with its slashed budget.

POGO strongly supports your efforts to improve FOIA. We look forward to helping you make these good reforms law.

Other Legislation for Government Reform

There are several other bills to increase government transparency and accountability that this Committee advanced in the last Congress, and in some cases were passed by the House but not enacted. We supported both the House and Senate versions of the Digital Accountability and

Transparency or DATA Act,⁴¹ both of which would dramatically improve the ability of the public to discover how their taxpayer dollars are spent.⁴² The myriad problems with the current system and inaccuracies of data at USAspending.gov are widely known.⁴³ We hope you will not only advance the DATA Act in the House, but also that you will work with the Senate to ensure the best reforms in both bills become law. We urge you to advance the following reforms mandating:

- Unique identifiers for recipients, obligations, and federal entities that also describe relationships (perhaps piggybacking on the Legal Entity Identifier or LEI).
- Date standardization government-wide on spending data, including interoperability and/or common data formats with tagging that allows for linkages (such as XML or XBRL).
- Treasury outlay data matching with obligations currently on USAspending.gov.
- All sub-recipient data reporting (not just first sub, but all sub-contractor and grantees all the way down the line).
- Real and frequent data quality assessments.
- Independent board that will have the necessary independence and motivation to ensure the DATA Act will be properly implemented, based on the Recovery Accountability and Transparency Board model.

We support more transparency and accountability in all federal spending, including in grant-making and contract-letting, which together exceeds an estimated \$1 trillion in taxpayer dollars.⁴⁴ The Grant Reform and New Transparency Act reported by the Committee last year was promising.⁴⁵ We appreciate your willingness to address some issues of concern raised by our colleagues at the Union of Concerned Scientists regarding protecting the identity of peer reviewers and intellectual property, just as we protect proprietary business information. We also hope that the Committee will similarly advance more transparency in contracting. For starters, both contracts and grants should be put online as they are in many cities and states.⁴⁶ Among other reasons, we need more transparency about the individuals and entities receiving federal funds to ensure that taxpayer money is going to experienced and reliant performers.

Another bill we also hope you will advance in this Congress is the Access to Congressionally Mandated Reports Act.⁴⁷ These reforms would allow the Administration, Congress, and the

⁴¹ 112th U.S. Congress, “DATA Act” (S. 1222), introduced June 16, 2011, by Senator Mark Warner; 112th U.S. Congress, “DATA Act” (H.R. 2146), introduced June 13, 2011, by Representative Darrell Issa.

⁴² Angela Canterbury, “New DATA Act Would Make Following the Money Easier,” *The (POGO) Blog*, September 28, 2012. <http://www.pogo.org/blog/2012/09/new-data-act-make-tracking-government-spending-easier.html>

⁴³ Sunlight Foundation, “Clear Spending,” <http://sunlightfoundation.com/clearspending/> (Downloaded March 5, 2013)

⁴⁴ In Fiscal Year 2012 the government spent \$516 billion on contracts and \$537 billion on grants, which exceeds \$1 trillion. USAspending.gov, “Prime Award Spending Data FY 2012,”

http://usaspending.gov/index.php?q=node%2F3&fiscal_year=2012&tab=By+Agency (Downloaded March 5, 2013)

⁴⁵ 112th U.S. Congress, “GRANT Act” (H.R. 3433), introduced November 16, 2011, by Representative James Lankford.

⁴⁶ U.S. Prig Education Fund, “Report: Through Transparency, Shaping a Government Accountable to the People,” <http://www.uspignedfund.org/reports/usp/transparency-city-spending> (Downloaded March 5, 2013)

⁴⁷ 112th U.S. Congress, “Access to Congressionally Mandated Reports Act” (H.R. 1974), introduced May 24, 2011, by Representative Mike Quigley.

public to have easy access on a centralized website to reports Congress tells the agencies to produce.

Additionally, there are five noncontroversial transparency reforms included in Ranking Member Cummings' Transparency and Openness in Government Act⁴⁸ on which the Committee should quickly take action:

- Electronic Message Preservation Act
- Federal Advisory Committee Act Amendments⁴⁹
- Government Accountability Office Improvement Act⁵⁰
- Presidential Library Donation Reform Act
- Presidential Records Act Amendments

Lastly, we would like to urge the Committee to review our most recent report on the revolving door between the SEC and the industry it regulates.⁵¹ It illustrates a coziness between regulators and the regulated that is not exclusive to the SEC, and that causes potential conflicts of interest throughout government. We hope you will explore ways to increase transparency and limit the conflicts created by the revolving door.

Implementation of the Reforms You've Championed

Naturally, government spending is a real concern, especially as our economy continues to struggle. However, we hope this Committee will work with appropriators to ensure the proper implementation of the reforms you champion. The DATA Act, FOIA reforms, and whistleblower protections all require short-term investments to yield long-term savings to taxpayers. We strongly believe that investing in government watchdogs such as the Inspectors General, the Recovery Accountability and Transparency Board, the Government Accountability and Transparency Board, the Government Accountability Office, Office of Government Information Services, and the very effective Office of Special Counsel pays huge dividends to taxpayers.⁵²

I also urge the Committee to conduct vigilant oversight of the whistleblower and taxpayer protections you ushered into law. As you know, the Administration has already taken actions that undermine these reforms. I hope you will keep a close eye on implementation, and will legislate as necessary to preserve strong protections for whistleblowers, including those in the intelligence

⁴⁸ 112th U.S. Congress, "Transparency and Openness in Government Act" (H.R. 1144), introduced March 17, 2011, by Representative Elijah Cummings.

⁴⁹ 112th U.S. Congress, "Federal Advisory Committee Act Amendments of 2011" (H.R. 3124), introduced October 6, 2011, by Representative Lacy Clay Jr.

⁵⁰ 112th U.S. Congress, "Government Accountability Office Improvement Act of 2011" (S. 237), introduced January 31, 2011, by Senator Claire McCaskill.

⁵¹ Project On Government Oversight, *Dangerous Liaisons: Revolving Door at SEC Creates Risk of Regulatory Capture*, February 11, 2013. <http://www.pogo.org/our-work/reports/sec-revolving-door.html>

⁵² Letter from Project On Government Oversight et al. to the Chairmen and Ranking Members of the House and Senate Appropriations Committees and the Chairmen and Ranking Members of the House and Senate Financial Services and General Government Subcommittees, regarding investing in OSC pays dividends, February 26, 2013. <http://www.pogo.org/our-work/letters/2013/POGO-and-Partners-Tell-Congress-Investing-in-OSC-Pays-Dividends.html>

and national security communities. It may be necessary to explicitly clarify that there should be no restrictions on executive branch disclosures to Congress. Congress cannot fulfill its constitutional mandate to conduct oversight if it is kept in the dark.

We also hope you will fight for the House's stronger provisions included in the STOCK Act passed last year.⁵³ The STOCK Act will shine a brighter light on potential financial conflicts of interest of Members of Congress, congressional staff, and executive branch employees. Unfortunately, the implementation has been slowed.⁵⁴ We believe that the House had the right idea in making all public financial disclosure forms available online, and that there shouldn't be another retreat from these enacted reforms.

Conclusion

In conclusion, when I was last here, I urged you all to work collaboratively, across party lines, on legislative reform and productive oversight. While it hasn't always been the case that this Committee has put aside partisanship, it is truly encouraging to see the tremendous good you have done for the country when you have.

Though everyone can agree that we ought to have a more open and accountable government, there are enormous challenges and we need your leadership more than ever. In particular, we can't allow whole swaths of our government to be hidden and unaccountable just because they have been labeled as having something to do with national security.

Lastly, I can't resist ending with another call for you to model openness. Congress, and particularly the House, is increasingly making more information available online in a timely fashion for the American people. We applaud this, but also think it is time for you to do what you have done for the executive branch: make Congress subject to FOIA and to protect members and staff who blow the whistle on waste, fraud, abuse, and other illegality.

Thank you again for inviting me to testify today. I hope that the next time Sunshine Week rolls around there will be more progress to report. POGO and our partners pledge to continue to work with you to fulfill the promise of a government that is truly open and accountable to the American people.

⁵³ Suzanne Dershowitz, "President Obama Signs the STOCK Act into Law," *The (POGO) Blog*, April 4, 2012. <http://www.pogo.org/blog/2012/04/president-obama-signs-the-stock-act-into-law.html>

⁵⁴ Kellie Lunny, "Congress again delays STOCK ACT for senior execs," *Government Executive*, December 6, 2012. <http://www.govexec.com/pay-benefits/2012/12/congress-again-delays-stock-act-senior-execs/60006/> (Downloaded March 4, 2013)