

Copyright 2011 Federal News Service, Inc.

All Rights Reserved
Federal News Service

March 15, 2011 Tuesday

SECTION: CAPITOL HILL HEARING

LENGTH: 17060 words

HEADLINE: HEARING OF THE SENATE JUDICIARY COMMITTEE;

SUBJECT: "THE FREEDOM OF INFORMATION ACT: ENSURING TRANSPARENCY AND ACCOUNTABILITY IN THE DIGITAL AGE";

CHAIRED BY: SENATOR PATRICK LEAHY (D-VT);

WITNESSES: MIRIAM NISBET, DIRECTOR, OFFICE OF GOVERNMENT INFORMATION SERVICES (OGIS), NATIONAL ARCHIVES AND RECORDS ADMINISTRATION; MELANIE PUSTAY, DIRECTOR, OFFICE OF INFORMATION POLICY, DEPARTMENT OF JUSTICE; SARAH COHEN, KNIGHT PROFESSOR OF THE PRACTICE OF JOURNALISM AND PUBLIC POLICY SANFORD SCHOOL OF PUBLIC POLICY, DUKE UNIVERSITY; JOHN PODESTA, PRESIDENT AND CHIEF EXECUTIVE, CENTER FOR AMERICAN PROGRESS (CAP); THOMAS FITTON, PRESIDENT, JUDICIAL WATCH;

LOCATION: 226 DIRKSEN SENATE OFFICE BUILDING, WASHINGTON, D.C.

BODY:

HEARING OF THE SENATE JUDICIARY COMMITTEE SUBJECT: 'THE FREEDOM OF INFORMATION ACT: ENSURING TRANSPARENCY AND ACCOUNTABILITY IN THE DIGITAL AGE' CHAIRED BY: SENATOR PATRICK LEAHY (D-VT) WITNESSES: MIRIAM NISBET, DIRECTOR, OFFICE OF GOVERNMENT INFORMATION SERVICES (OGIS), NATIONAL ARCHIVES AND RECORDS ADMINISTRATION; MELANIE PUSTAY, DIRECTOR, OFFICE OF INFORMATION POLICY, DEPARTMENT OF JUSTICE; SARAH COHEN, KNIGHT PROFESSOR OF THE PRACTICE OF JOURNALISM AND PUBLIC POLICY SANFORD SCHOOL OF PUBLIC POLICY, DUKE UNIVERSITY; JOHN PODESTA, PRESIDENT AND CHIEF EXECUTIVE, CENTER FOR AMERICAN PROGRESS (CAP); THOMAS FITTON, PRESIDENT, JUDICIAL WATCH LOCATION: 226 DIRKSEN SENATE OFFICE BUILDING, WASHINGTON, D.C. TIME: 10:15 A.M. EDT DATE: TUESDAY, MARCH 15, 2011

SEN. LEAHY: And normally we would've started at 10, but Senator Grassley and I were both at the Supreme Court for the -- for the Judicial Conference. And so we appreciate everybody's willingness to start at 10:15.

This is an important hearing on FOIA, or the Freedom of Information Act. When Congress enacted FOIA more than 40 years ago, the watershed law ushered in a new and unprecedented era of transparency in government. And four decades later, FOIA continues to give citizens access to the inner workings of their government and to guarantee the right to know for all Americans.

The right to know is a cornerstone of our democracy. Without it, citizens are kept in the dark about key policy decisions that directly affect their lives. In the digital age, FOIA remains an indispensable tool in protecting the people's right to know. And as Americans from every corner of our nation commemorate Sunshine Week, they have good reason to cheer.

I'm pleased that one of President Obama's first official acts when he took office was he issued a historic new directive to strengthen FOIA. Just yesterday, the Department of Justice launched a new FOIA.gov website. It compiles all the department's FOIA data in one online location.

The Congress has made good progress in strengthening FOIA. Last year, the Senate unanimously passed the Faster FOIA Act. That was a bill that Senator Cornyn of Texas and I introduced to establish a bipartisan commission to study FOIA to make recommendations to Congress on ways to further improve FOIA. And we will reintroduce this bill later this week.

Both Senator -- the reason Senator Cornyn and I have joined together for years now on strengthening FOIA, we go under the assumption that no matter whether you have a Democratic or a Republican administration, whoever is there is going to be glad to talk about the things that go right -- not quite so eager to talk about things that might not have gone right. And it helps everybody -- no matter whether it's a Republican or a Democratic administration to know that the people being represented have a chance to find out what's happening.

And there's a reason to cheer the recent unanimous decision by the Supreme Court in the Federal Communications Commission v. AT&T, concluding that corporations do not have a right of personal privacy under the Freedom of Information Act. And that, again, makes our government more open and accountable to the American people.

Government is still not as open and as accessible as I'd like to see it, and many of us would. Implementation of FOIA continues to be hampered by the increasing use of exemptions, especially under Section B3 of FOIA. Last year, Senators Grassley and Cornyn and I worked together on a bipartisan basis to repeal an overly broad FOIA exemption in the historic Wall Street reform bill.

But it's also essential American people have a FOIA law that is not only strengthened by reform, but properly enforced. A report released yesterday by the National Security Archive found that while there's been some progress in implementing the president's FOIA reforms, only about half of the federal agencies surveyed have taken steps to update their FOIA guidance and -- (inaudible) -- and FOIA resources. And FOIA delays continue to be a problem. Six-year-old delays are far too much.

So I'm pleased we have representatives from the Department of Justice and the Office of Government Information Services, and I will continue to work with Senator Cornyn, Senator Grassley and others because this is something we should all join on. It's important for the country.

Senator Grassley.

SENATOR CHUCK GRASSLEY (R-IA): This is a very important hearing and thank you for it, and particularly coming during this week that's Sunshine Week -- observed annually -- seemingly coinciding with James Madison's birthday, founding father of our checks and balances system of government. Open government and transparency are more than just pleasant-sounding words. They're essential to maintain our democratic form of government.

FOIA is based on the belief that citizens have a right to know what their government is doing and that the burden is on the government to prove otherwise. It requires that our government operate on the presumption of disclosure. So it's important to talk about the Freedom of Information Act and the need for American citizens to be able to easily obtain information from their government.

Transparency is not adequate, even in a Republican administration, as far as I'm concerned. Although it's Sunshine Week, I'm disheartened at continuing the practices of previous presidents -- Republican or Democrat -- that we don't have the openness that we should. And contrary to President Obama's hopeful pronouncements when he took office more than two years ago, the sun still isn't shining on the executive branch.

Given my experiences in trying to pry information out of the executive branch and based on investigations by the media, I'm disappointed that President Obama's statements about transparency are not being put into practice. Federal agencies under the control of his political appointees have been more aggressive than ever in withholding information. There's a real disconnect between the president's words and the actions of his political appointees.

On his first full day in office, President Obama issued memorandum on FOIA to heads of all executive agencies, quote, "The government should not keep information confidential merely because public officials might be embarrassed by disclosure, because errors and failures might be revealed or because of speculative and abstract fears," end of quote. But further quoting his instruction to executive agencies, "adopt a presumption in favor of disclosure." And that's very important to remember those words: "Adopt a presumption in favor of disclosure in order to renew their commitment to the principles embodied in FOIA and to usher a new era of open government.

"

Unfortunately, based upon his administration's actions, this appears at the eyes of the president's political appointees, his hopeful words about open government and transparency are mere words. It's not just a matter of disappointment in the administration's performance in complying with requests for information and it's not even about bureaucratic "business as usual." It's more and far worse.

Perhaps the most dramatic and troubling departure from the president's vow to usher a new era of open government are revealed in e-mails from the Department of Homeland Security obtained by Associated Press July, last year. A report by Ted Bridis of AP uncovered that for at least a year Homeland Security was diverting requests for records to senior political advisors who delayed the release of records they considered politically sensitive. The review often delayed the release of information for weeks beyond the usual wait.

Specifically, in July, the Department of Homeland Security introduced a directive requiring a wide range of information to be vetted by political appointees no matter who requested it. Career employees were ordered to provide Secretary Napolitano political staff with information about the people who asked for records, such as where they lived, whether they were private citizens or reporters, and about the organizations they worked for. If a

member of Congress sought such documents, employees were told to specify Democrat or Republican.

The Homeland Security directive laid out an expansive view of the sort of documents that required political vetting. Anything that touched on controversial or a sensitive subject, that could attract media attention, or that dealt with meetings involving prominent business and elected leaders had to go to political appointees. I was very disturbed by the Association (sic) Press Report which came out July 21st last year.

Accordingly, in August, Representative Issa and I wrote the inspectors general -- the inspectors general of 29 agencies and asked them to review whether their agencies were taking steps to limit responses to Freedom of Information Act requests from lawmakers, journalists, activist groups and watchdog organizations. The deadline for responding to my letter passed about five months ago. To date, only 11 of the 29 agencies have responded. The lack of a response from so many agencies send disturbing messages. The leadership of the federal agencies don't seem to consider the political screening of requests under the Freedom of Information Act to be a matter worthy of their attention.

My concern about the lack of responses to my letter was well founded. It now appears that the Department of Justice may have also politicized compliance with the Freedom of Information Act. February the 10th, 2011, blog -- I've got three more pages and I'm laying out a case here. If you don't want me to, I'll put it in the record.

SEN. LEAHY: No, go ahead -- (inaudible).

SEN. GRASSLEY: On February the 10th, 2011, blog posting, Christian Adams, a former attorney in the Voting Section of Civil Rights Division at the Justice Department, discussed this disturbing development in detail. Specifically, Adams's review of Voting Section's logs for Freedom of Information Act requests reveal that requests from liberals or politically connected civil rights groups are often given the same-day or expedited turnaround. By contrast, requests from conservatives or Republicans face long delays if they are fulfilled at all.

Adams reported that as of August 2010, the logs show a pattern of political screening and politicalizing compliance. Overall, the data in the logs obtained by Adams reveal priorities of the Civil Rights Division, transparency for insiders and friends, stonewalling for critics, political appointees and Republicans.

So there is a disturbing contradiction between President Obama's words and the actions of his political appointees. When the agencies I'm reviewing get defensive and refuse to respond to my request, it makes me wonder what they're trying to hide.

Throughout my career, I have actively conducted oversight of executive branch regardless of who controls Congress or who controls the White House. It's our constitutional duty. It's about basic government -- good government -- and accountability, not party politics or ideology. Open government is not a Republican or Democrat issue. It has to be -- and our chairman has highlighted that -- a bipartisan approach. Our differences on policy issues and the workings of government must be debated before our citizens in open.

I know you -- I know that you know this, Mr. Chairman. I know how hard you've worked with Senator Cornyn on the Open Government Act of 2007 which amended FOIA. Mr. Chairman, I hope that you and I are disturbed -- or that you're as disturbed as I am by these reports and by the attorney general's approach to them. I hope that you will work with me to investigate these allegations. I also hope that more in the media will investigate disturbing

reports.

I'm disappointed that there hasn't been more media coverage of the Associated Press on covering the political screening of the Freedom of Information Act requests by the Department of Homeland Security and Christian Adams's article about similar conduct DOJ. I'm also disappointed that there has not been more coverage of Representative Issa's efforts to investigate Homeland Security's political screening of information requests.

This conduct isn't just political decision making, it's a politically motivated withholding of information about the very conduct of our government from our citizens. In particular, it's the withholding of information about Obama's administration's controversial policies and about its mistakes. We cannot ignore or minimize this type of conduct. It's our job in Congress to help ensure that agencies are more transparent and responsive to government we represent.

I view this hearing as the chance to have the facts come out and as the chance to examine some of the disturbing practices which have been reported on. In other words, as I sum it up, except for national security and intelligence information -- and that's about 1 percent of total federal government's business -- 99 percent of what the government does is the public's business and it ought to be public. Thank you very much.

SEN. LEAHY: Well, I agree with the senator, when requests are made, we ought to get answers. I think of the thousands of requests made during the Bush administration have yet to be answered -- never were answered there.

SEN. GRASSLEY: For this senator too.

SEN. LEAHY: Yeah and for the hundreds of thousands of e-mails that they still say they can't find from that time. So I would not want to suggest that the blame just falls on one -- on one side. We've had those requests during -- (inaudible) -- we have the Lyme disease one of -- they're still trying to find requests during the last administration, but what I want to know is how we make it work best. And Melanie Pustay -- did I pronounce that correctly? Thank you.

MELANIE PUSTAY: Pustay, yes.

SEN. LEAHY: -- is the director of the Office of Information Policy at the Department of Justice. Has a statutory responsibility for directing the agency in compliance with the Freedom of Information Act. Before becoming the office's director, she served for 8 years as the deputy director. She has extensive experience in FOIA litigation, received the Attorney General's Distinguished Service Award for her role in providing legal advice, guidance and assistance on records disclosure -- (inaudible). Earned her law degree from American University Washington College of Law, and she was on the law review there.

We will put your whole statement in the record of course. But please, in the time -- (inaudible) -- go ahead and tell us whatever you'd like.

MS. PUSTAY: Thank you. Good morning, Chairman Leahy and Ranking Member Grassley and members of the committee. I'm pleased to be here this morning to address the subject of the Freedom of Information Act and the efforts of the Department of Justice to ensure that President Obama's memorandum on the FOIA, as well as

Attorney General Holder's FOIA guidelines, are indeed fully implemented across the government.

As the lead federal agency responsible for proper implementation of the FOIA, we at the Department of Justice are strongly committed to encouraging compliance with the act by all agencies and to promoting open government.

As you know, the attorney general issued his new FOIA guidelines during Sunshine Week two years ago. The attorney general called on agency chief FOIA officers to review their agency's FOIA administration each year and then to report to the Department of Justice on the steps they've taken to achieve improved transparency. These reports show that agencies have made real progress in applying the presumption of openness and improving the efficiency of their FOIA processes, reducing their backlogs, expanding their use of technology, and making more information available proactively.

Now, while there is always work that remains to be done, for the second year in a row agencies have shown that they're improving FOIA compliance and increasing transparency. For example, across the government there was an overall reduction in the FOIA backlog for the second year in a row. There was also an increase in the number of requests where records were released in full. And I'm particularly proud to report that the Department of Justice for the second straight year in a row increased the number of responses where records were released in full and were released in part.

In my office -- the Office of Information Policy -- we've provided extensive government-wide training on the new guidelines to agencies, and we've issued written guidelines to assist agencies. We've also reached out to the public and the requester community. We will be holding our first- ever FOIA requester/agency town hall meeting, which will bring together FOIA personnel and frequent FOIA requesters.

Yesterday, the first day of Sunshine Week, the attorney general approved new updated FOIA regulations for the department. These regulations will serve as a model for all agencies to use in similarly updating their own FOIA regulations.

And then most significantly, yesterday, we launched our newest transparency initiative, which is our website called FOIA.gov. Now, combining the department's leadership and policy roles in the FOIA, the FOIA.gov website shines a light on the operation of the FOIA itself. The website has two distinct elements; first, it serves as a visual report card of agency compliance with the FOIA. All the detailed statistics that are contained in agency annual FOIA reports are displayed graphically, and the website will be able to be searched and sorted and comparisons made between agencies and over time.

We'll also be reporting key measurements of agency compliance and we're -- it's our hope that FOIA.gov will help create an incentive for agencies to improve their FOIA performance. The site will also provide a link to each agency's FOIA website, which will allow the public to readily locate records that are already posted on agency websites.

Now, in addition, the FOIA.gov website will serve a second and equally important function. It will be a place where the public can be educated about how the FOIA process works, where to make requests and what to expect through the FOIA process. Explanatory videos are embedded into the site. There's a section addressing frequently asked questions. There's a glossary of FOIA terms. A wealth of contact information is given for each agency. Significant FOIA releases are also posted on the site to give the public examples of the types of records

that are made available through the law.

The Department of Justice envisions that this website will be a one-stop shop both for reviewing agency compliance with the FOIA and for learning about how the FOIA process works. We plan to continually add features and updates to the site, and we welcome comments from both the public and from agencies.

Now, looking ahead, OIP will be assessing where agencies stand in their ongoing efforts to improve compliance with the FOIA. We will be providing additional training to agencies. We'll continue our outreach to requesters.

As I stated earlier, the department is committed to achieving the new era of open government that the president envisions. We've made progress in the past two years toward that goal, but OIP will continue to work diligently to help agencies achieve even greater transparency in the years ahead.

In closing, the Department of Justice looks forward to working together with the committee on all matters pertaining to the FOIA, and I'd be pleased to answer any questions that you or any other member of the committee might have. Thank you.

SEN. LEAHY: Thank you very much, and we'll also hear -- before we go to questions -- from Director Miriam Nisbet. And we've been joined by Senator Cornyn -- did you notice? Ms. Nisbet is -- (inaudible) -- director of the Office of Government Information Services at the National Archives and Records Association. Before that, she served as director of the Information Society Division for UNESCO. Her extensive information policy experience includes previous work as legislative counsel to the American Library Association and the deputy director of the Office of Information Policy for DOJ. She earned her bachelor's degree and law degree from the University of North Carolina. Welcome back.

MS. NISBET: Thank you, Mr. Chairman.

Good morning to you, Senator Grassley and members of the committee. I really appreciate the opportunity to be here with you during Sunshine Week to talk about my office, which is an important part of the freedom of information and open government initiatives of the federal government.

As you know, the Office of Government Information Services -- or OGIS, as we refer to it -- has been hard at work carrying out its statutory mission since opening in September 2009. While we have worked to resolve disputes under the Freedom of Information Act and to review agency FOIA policy procedures and compliance, we have realized that much of our work falls under the designation that Congress gave us as the FOIA ombudsman. As an ombudsman, OGIS acts as a confidential, informal information resource, communications channel and complaint handler. OGIS supports and advocates for the FOIA process and does not champion requesters over agencies or vice versa. We encourage a more collaborative, accessible FOIA process for everyone.

We are off to quite a start. In our first 18 months, we heard from requesters from 43 states, the District of Columbia, Puerto Rico and 12 foreign countries. We answered questions, provided information, listened to complaints and tried to help in any way we could. For the more substantive disputes, we facilitated discussions between the parties, both over the phone and in person, and worked to help them find mutually acceptable solutions.

The statutory term, "mediation services," which you all are aware of as authors of that language, includes the following: formal mediation, facilitation and ombuds services. OGIS continues to offer formal mediation as an option for resolving disputes, but so far we've not yet had a case in which the parties agreed to participate in that process. However, we have found that the less formal method of facilitation by OGIS staff provides a very similar process and parties are more willing to engage with OGIS and with each other without the perceived formality of mediation.

Since September 2009, OGIS has closed 541 cases, 124 of them true disputes between FOIA requesters and agencies, such as disputes over fees charged and FOIA exemptions as applied. As a facilitator for the FOIA process to work as it is intended, we were not calling balls or strikes but letting the parties try to work matters out with our assistance in an effort to avoid litigation. In three-quarters of the disputes we handled, we believe that the parties walked away satisfied and that OGIS involvement helped to resolve their disputes.

A realization we quickly faced is that defining success is a challenge. The final result of our process is not both parties getting exactly what they want --- sometimes not even close --- but if we are able to help them in some way by providing more information or by helping them understand the other party's interests, we have provided a valuable service. When OGIS first set out, we spoke of changing a culture or mind-set from one of reacting to a dispute in an adversarial setting to one of actively managing conflict in a neutral setting.

Because we have had so many requests for mediation services, we've also been challenged in setting up a comprehensive review strategy for that prong of our statutory mission. For now, the review plan includes providing agencies with FOIA best practices, using existing data to address topics such as backlogs for referrals and consultations, and offer what we call collaborative reviews along side willing agencies. We are also offering training for FOIA professionals in dispute resolution skills to help them to prevent or resolve disputes at the earliest possible time.

OGIS has a unique perspective on the way FOIA works. As an entity that works side-by-side with agency FOIA professionals to improve the process from within and that also works closely with requesters on the outside to address shortcomings, we have seen the importance of building relationships and trust among the members of the FOIA community. It's an exciting process, and while we have just gotten started and see it as a long-term effort, we are pleased to see so many positive results in the short term and to see that our process works.

Thank you. Please let me know if you have questions or if we can help your constituents.

SEN. LEAHY: Thank you very much.

Let me ask this -- we've talked about this, but I've worked for years on a bipartisan basis to reinvigorate FOIA, and I'm pleased by the support we've gotten for that. I was also pleased when -- in March 2009, when Attorney General Holder issued new FOIA guidelines. It, I believe, rightfully restored the presumption of disclosure of the report released yesterday by the National Security Archives found only half of the federal agencies surveyed had taken concrete steps to update the FOIA policies and procedures in light of this guidance. They're doing what they did in past administrations.

So Ms. Pustay, what's the department doing to help keep the president's promise of a more transparent

government?

MS. PUSTAY: To respond to the National Security Archive report issue first, the conclusions that they reached in that report are incomplete because the eight agencies were asked -- all 97 agencies subject to the FOIA were specifically asked by the Department of Justice to address the issues of training and -- training guidance and staffing, which are the two factors that were looked at by the National Security Archive report. And what happened with the archive report is they took the absence of a response or the absence of documents to mean that the agency had done nothing in those factors. But if you look at their chief FOIA officer reports, they have addressed those very factors. And so, for example, an agency might not have created its own guidance for implementing the -- Attorney General Holder's guidelines, but what they've done is used the Department of Justice's guidance that's already posted and has been posted since the guidelines first came out.

SEN. LEAHY: Well, that's because some of the agencies -- in fact, 12 of them -- have pending FOIA requests that go way back. They weren't answered during the Bush administration and so on, being answered -- they go back six years. What do you do about that? I mean, that seems somewhat excessive to me.

MS. PUSTAY: Right. No, of course, the --

SEN. LEAHY: Especially if you have to make decisions in your own life based on those answers.

MS. PUSTAY: We have -- the age of the oldest requests across the government definitely continues to be too old. There's no doubt about that. And that has been a specific area that we have focused on. The Department of Justice first required agencies to report on their 10 oldest requests as a way of making more accountability and transparency on the issue of the age. So it's specifically something that we're asking agencies to address. When they look at their backlogs, we ask them to measure it both in terms of numbers of requests and age of request, because we see them as two distinct aspects of backlog reduction.

I am happy to say, though, that for the second straight year in a row, agencies have reduced their backlogs. So since implementation of our new guidelines, we're seeing progress. Backlogs are going down. The age of them -- the age of the oldest is improving, so we are on the right track.

SEN. LEAHY: Well, let me ask on that, Ms. Nisbet, we have the Office of Government Information Services, OGIS, that is trying to provide cost-effective alternatives to resolving FOIA disputes because, as you know, sometimes a dispute can just drag on and the cost gets too much and so nothing ever happens. Can OGIS actually help reduce the current backlog that Ms. Pustay has talked about?

MS. NISBET: Senator Leahy, we believe that we can. I'm not sure that we're able today to show in measurements exactly how we're doing that, but I can tell you that the cases that come to us -- and we've now had as of last week just shy of 600. About one in five do continue to be problems with delays in response, but what we are finding that we can do with that, with the help of the agencies and working with the requesters, is sometimes to narrow the focus of the request, help with the search, resolve issues pretty quickly in terms of fees, and move things along that way.

SEN. LEAHY: We had -- I'll go back to Ms. Pustay -- last week the Supreme Court held Milner vs. Navy -- the government may not rely upon FOIA Exemption 2 to withhold government records that are unrelated to personnel

or human resources matter. They rejected the concept of the so-called "High 2" --

MS. PUSTAY: "High 2."

SEN. LEAHY: -- exemption of FOIA that was established in the D.C. circuit in the Crooker case --

MS. PUSTAY: Crooker case.

SEN. LEAHY: -- about 25, 30 years ago.

MS. PUSTAY: Right -- 1981. (Laughs.)

SEN. LEAHY: Some -- it seems like -- to some of us it seems like only yesterday. (Laughter.)

Some have suggested that Congress should enact legislation to allow the government to continue to withhold "High 2" information in response to Milner. So what's the department's position on that, and are you going to oppose legislation in Congress?

MS. PUSTAY: We're considering the impact of the Milner decision. As you can imagine, it's just brand new, and so I'm not prepared yet to say what we're going to propose. We're obviously carefully looking at the impact of the decision.

SEN. LEAHY: Well, as you're looking at it, please keep in touch with myself, I know -- Senator Cornyn, Senator Grassley --

MS. PUSTAY: I appreciate that.

SEN. LEAHY: You'll do --

SEN. GRASSLEY: Yeah, thank you.

Going back to some statements I made in my opening comments, it would seem obvious that the political vetting policy at the Department of Homeland Security that was uncovered by AP violates both the president's and the attorney general's orders set forth in their memos. A simple question first to you, Ms. Pustay, and then to Ms. Nisbet: Would you agree?

MS. PUSTAY: I'm sorry, I --

SEN. GRASSLEY: OK. The question is, would you agree, whether -- what The Associated Press uncovered about the Department of Homeland Security and their political vetting process violates both the president and the attorney general's orders set forth in memos from --

MS. PUSTAY: Oh, certainly. If the statements in the article are true, of course it would be very serious and would be something that we would have serious concerns with, of course.

I can tell you that the policy of the Department of Justice and certainly what we share with agencies and in our training with agencies, our 101 guidance, all our presentations, of course is that the identity of a requester has nothing to do with the response given to the request, that the process is one that is to be handled by agencies without any -- in the normal course of events, typically FOIA professionals within an agency are career employees who handle the requests -- in a routine matter that does not involve or implicate any of the things that were mentioned in that article.

SEN. GRASSLEY: Can you say whether you agree or disagree, Ms. Nisbet?

MS. NISBET: Well, I think the issues raised are of great concern, and I do note that Congressman Issa is continuing to look into this matter, as you referred to, to find out more about it and to see what steps might need to be taken.

SEN. GRASSLEY: Thank you.

March 19, 2009 memorandum, General Holder repeated President Obama's hopeful pronouncements about transparency and stated, quote, "Each agency must be fully accountable for the administration of the Freedom of Information Act," end of quote. So Ms. Pustay, how are the political appointees at the Department of Homeland Security who authored and carried out the political vetting policy being held accountable for their actions?

MS. PUSTAY: I'm really not -- I don't think I'm in a position right now to talk about the Department of Homeland Security and their -- and this -- the allegations from that article. What I can say is that part of what the department is doing to make real the words of accountability is connected directly with our website, our FOIA.gov website, where all the detailed data about how FOIA requests are handled is available now for all the public to see and to be able to compare and contrast information.

SEN. GRASSLEY: What sort of an environment would you need to talk about it? Or is it -- are you saying you can't talk about it at all?

MS. PUSTAY: I'm not -- I'm not in a position to talk about the Department of Homeland Security's process.

SEN. GRASSLEY: OK. Is your office or any other unit in the Justice Department or any other unit in the government investigating the political vetting policy at Homeland Security which was uncovered by Associated Press? That's simple. Either you're investigating it or you aren't investigating it.

MS. PUSTAY: I'm not aware of us investigating it.

SEN. GRASSLEY: OK. So then obviously the next follow-up question was who was conducting the investigation, but you don't think that there's any investigation.

Number -- third question: March 1st, 2011, Representative Frank Wolf questioned General Holder about Christian Adams's article. The attorney general testified that he had looked into the issues and assured to Congressman Wolf that there's no ideological component to how the Justice Department answers FOIA requests. So to you as well, would you describe for us in as much detail as possible the Justice Department's investigation into the allegations made in Christian Adams's article?

MS. PUSTAY: On that topic, I can tell you that we're looking into the issue at the Department of Justice and there will be a response coming to Representative Issa. What I also, though, can tell you is that there -- from what I know of the facts of that -- those allegations is that the article mistook different versions -- different types of access procedures that the civil rights had -- compared apples and oranges, if you were. There -- the Civil Rights Division has multiple ways to access records separate and apart from FOIA, and so one of the causes of confusion or concern raised by the article writer was mixing those two different forms of access up. Again, I can tell you the policy certainly within the Department of Justice is that the identity of the requester has nothing to do with how the -- how a FOIA request is processed.

SEN. GRASSLEY: My time's up. I hope I can have a second round. I guess you're in charge now.

SENATOR SHELDON WHITEHOUSE (D-RI): I'm sure there will be no objection to a second round, although we do have a second panel, as well. But I'll leave that to the chairman on his return.

Thank you both for your testimony. I'm interested in the extent to which the FOIA process might be facilitated by modern digital technology. There's a sort of a early beginnings of a website in FOIA.gov, but as I understand it, it tracks the FOIA process but doesn't contain much substantive information of any kind. As somebody who in my state life was on the receiving end of a lot of FOIAs, we had to copy stuff and send it out, and then it was gone. And if somebody else asked the same question a week later, you had to go back, copy it all again and send it out again. And why is there not a database that you can go and search through the way -- why can't you Google all the old FOIA requests? Should we be able to? Is there a process for getting there, and what can we do to accelerate that process?

MS. PUSTAY: That is absolutely something that agencies, and certainly at the Justice Department we're very much -- very much working on. One of the things already that's available on the FOIA.gov website are links to every single FOIA website of every agency so that the records that each agency has already put up on their website are all available just by clicking on the -- clicking on the links. So that's existing right now in FOIA.gov.

SEN. WHITEHOUSE: Yeah.

MS. PUSTAY: We're working on a search capability that will allow the requests -- a member of the public or a requester to type in a search term and have the technology capabilities of FOIA.gov launch a search through all the FOIA websites of every agency and pull up all the records that would match that term. So that's something that's actively being worked on now, so we're hopeful -- we're pretty hopeful that that capability will be available soon on FOIA.gov.

SEN. WHITEHOUSE: We ran -- I ran pretty small offices and I don't think we kept the old FOIA requests once they were sent out. What's the -- what do the federal agencies do --

MS. PUSTAY: Agencies absolutely need -- a common part of our guidance is to keep copies of what has been processed, because of course the easiest way to process it when it comes in the second time is that you already have it. But more than that, we have had a policy for quite some -- we have actually by law, once a request has been -- once a subject matter has been requested three times, it's required by the FOIA itself to be posted on the agency's website. With the -- Attorney General Holder's guidelines, we've expanded that and have been

encouraging agencies at any time to think about records that might be of interest to the public, put them up on the website even before there's one request. We've certainly seen in the chief FOIA officer reports that we have just gotten in this past week lots of agencies taking steps to put information up on the website that's been requested and to anticipate interest in records. So agencies are definitely right onboard with this concept.

SEN. WHITEHOUSE: Two questions further. Does the search capacity, or when it's installed will the search capacity reach the FOIA request or just the substance? Because sometimes the value of the FOIA answer is that a knowledgeable person has aggregated the information that's relevant to a particular request, and if it's just out there and you don't really know -- if the responsiveness in and of itself is of some informative value --

MS. PUSTAY: Right. Of course.

SEN. WHITEHOUSE: Are they just posting things or is the original request that came in that they're responsive to also part of what's on the web and what can be searched?

MS. PUSTAY: The answer is yes to both of those things.

SEN. WHITEHOUSE: OK.

MS. PUSTAY: Both types of things are being posted, both types of things will be retrievable with our search function once we get it up and running.

SEN. WHITEHOUSE: OK. And is there a role for -- I mean, a lot of this stuff ends up in government archives one way or another.

Is there a way for other agencies to participate in this and have the FOIA thing be a part of a larger government records retrieval and retention system?

MS. PUSTAY: Well, FOIA already is, obviously, part of a larger system because every agency handles its own records, and so it -- and every agency has a FOIA website where there are things that are required to be put on that website. FOIA.gov is now our new way to capture all of that material across the government from one single website. So that's what we think is one of the real beauties of FOIA.gov and --

SEN. WHITEHOUSE: In my last 15 seconds, how far back are agencies expected to go in stuff that they've set up, asked and loaded onto their websites?

MS. PUSTAY: What we advise agencies to do is to put on their website information that they anticipate would be of interest to someone today. So that's a judgment call they make, and we've seen really good examples of agencies thinking proactively when events occur and they know what requests will come in, and so they put the information up on their website.

SEN. WHITEHOUSE: My time is expired. Mr. Chairman, thank you very much.

SEN. LEAHY: Thank you.

Senator Cornyn?

SENATOR JOHN CORNYN (R-TX): Thank you, Mr. Chairman.

Mr. Chairman, it's been a pleasure to work with you on FOIA issues over the eight years I've been in the Senate, and I'm glad to see Ms. Nisbet here, who is the first ombudsman created by the federal government to help people who request records navigate the labyrinthine bureaucracy of the federal government to try to get some information. I know you and I both believe, Mr. Chairman, that openness and transparency is essential to self-government, and frankly, I think we need to have a dramatic culture change here in Washington, D.C. about just whose records these are and to make sure there are real teeth and enforcement procedures within the law that guarantee a reasonable request would be responded to in a reasonable time.

Ms. Pustay, let me ask you: According to the report released Monday by the National Security Archive, 90 different FOIA requests -- but 17 agencies were reported still working on a response to the request after 117 business days when the law provides for 20 days. Can you explain -- is that -- what consequences there are when an agency fails to respond in a timely basis to a FOIA request?

MS. PUSTAY: The statute provides, of course, that there's a 20- working-day period to respond, but then the FOIA also actually recognizes that there are situations where agencies will need additional time to respond -- if they have voluminous records to process or have to search in a field facility, that type of thing. And so the idea that that's built into the statute is that requesters are notified of the time or the estimated time for completion and given a chance to work out an agreed upon time with the requester. Ultimately, of course, if the requester is unhappy with the delay, what we would certainly encourage the requester to do is to contact the FOIA public liaison or contact the agency official who is handling the request to find out what the delays are all about.

SEN. CORNYN: And in each case where there's a FOIA request made, you're saying the agency must within the 20 working days provided by the statute provide a response either including the records that were requested or a response that there are voluminous records that are going to require some time to examine and pull out relevant records. Is that what you're saying?

MS. PUSTAY: Yes. Sure. The statute -- the statute itself provides -- there's a standard 20-day response period, or there's an additional 10-day response period if you have those circumstances, and then also the statute provides for if the period of time to respond is going to be longer than that 30 days total, there's a process where the agency gives an estimate to the requester and works with the requester on the time.

SEN. CORNYN: And if they don't do that, what recourse does the citizen have?

MS. PUSTAY: Ultimately, of course, a requester can go to court because there's constructive exhaustion built into the FOIA, where if their agency goes beyond the statutory time period, you are allowed as a requester to go to court. Nobody encourages that, nobody wants to see that happen, and what we have instead is a real focus on having agencies work with the requester to explain why the delay is happening. We have 600,000 requests across the government, so it's an incredible crush of requests that agencies are facing, and oftentimes just explaining that to requesters is helpful.

SEN. CORNYN: Well, what I meant earlier when I said we need to change the culture here in Washington -- I

think too often the agencies believe that this is a nuisance to be avoided and they don't treat the requester as a customer or the fact -- or recognize -- acknowledge the fact that actually the federal government works for the people who are requesting the documents.

But Ms. Nisbet, let me ask you in your capacity as the ombudsman, what's been your experience? I notice in this National Security Archive report, four of the agencies denied even getting the FOIA requests, and you know and I know that saying, "Well, you can always sue the federal government in court" -- that's a hollow promise in many instances because people simply don't have the resources to do that.

MS. NISBET: And, indeed, I believe that was one of the strong interests of you all in setting up the Office of Government Information Services is to have an alternative to litigation so that neither requesters nor agencies have to litigate over issues, particularly involving delays when the agency hasn't had a -- hasn't been able to give a response.

What we are finding, though, is that, yes, delays, as I mentioned before, continue to be an issue. It's a legitimate reason. There are legitimate reasons for that, of course, because requests can be quite complex, records can be voluminous; sometimes it's very difficult to even start a search for records in a short amount of time. But what is important is having some channels of communication between the requester and the agency. Requesters often are willing to work with the agency, and, in fact, they should work with the agency on the scope of the request. They are understanding of delays if someone talks to them, explains to them and works with them so that they know that someone is trying to provide that service that you're talking about, even if it's not going to be as quickly as the requester likes.

SEN. CORNYN: I know my time is up, but let me just -- for this round, but let me just say that I think that was one of the most important things that we were able to do in the legislation in the Open Government Act is to create an ombudsman that could help the requester narrow the request because -- and to get what they're -- what they want as opposed to overly broad requests which basically misses the target. And so I think it's really important that we have somebody they can talk to, not an adversarial relationship but somebody who can help facilitate that and get the information in the hands of the requester on a timely basis.

Thank you, Mr. Chairman.

SEN. LEAHY: Thank you. Did you have any other questions of this panel before -- because we only have another half-hour.

SEN. GRASSLEY: Yeah. I've got, I hope, only three short questions. I already referred in my opening comments about our letter to the inspector generals at 29 agencies wanting to request from the extent to which requests from lawmakers, journalists, activist groups and watchdog organizations were -- the inspector general was asked to determine the extent to which political appointees are systematically made aware of FOIA requests and their part in the decision-making process. We asked the inspector general to look into that. He passed it on to you, and then your response admits Freedom of Information Act offices at the Justice Department make their political leadership aware of FOIA requests and, quote, unquote, "seek their input on responding." Your memo does not provide any specifics on the nature of the input from political appointees.

So these are my questions. What type of input do political appointees under the Obama administration give to

career employees regarding response to freedom of information requests? And then I have two follow-up questions.

MS. PUSTAY: When I -- to prepare that response, I did a survey of all the components in DOJ, and fundamentally I was completely unsurprised by the responses that they gave me, because the practice that's at DOJ now is exactly how it's been for the two decades that I've been working at DOJ. So there was nothing unusual at all.

Essentially components will make the management offices of the Department of Justice aware of requests in their capacity as the managers of the department. So it's completely appropriate, completely something that we've seen, literally, since the -- for the decades that I've been at DOJ.

SEN. GRASSLEY: Since the memo was put out in January 2009, have responses to FOIA requests ever been delayed pending review by political appointees at the Department of Justice?

MS. PUSTAY: Not at the Department of Justice. We have, I think, an outstanding track record at DOJ of processing more requests these past two years than we ever have before of releasing more records these past two years than ever before and of managing our backlog over the past two years. So I think the facts speak for themselves.

SEN. GRASSLEY: OK. Then why or why not to this question: Do you believe that the involvement of political appointees in FOIA requests is acceptable practice within the Justice Department?

MS. PUSTAY: Oh, the involvement that we have is totally acceptable, and as I said, exactly how it's always been. It's awareness for awareness in management purposes, and that's all.

SEN. GRASSLEY: Thank you, Mr. Chairman.

SEN. LEAHY: Thank you very much.

Senator Cornyn.

SEN. CORNYN: I just have a few more questions.

I noticed in the FOIA.gov website, which I compliment the department for putting up -- I hope it becomes very robust and something that people will be able to use for multiple purposes. But I notice that for fiscal year 2010, the Department of Justice received -- it looks like 7,700 -- excuse me -- 7,224 requests. And -- or, I'm sorry, it looks like that was the number of requests pending.

MS. PUSTAY: We get about 63,000 requests a year at DOJ.

SEN. CORNYN: So -- OK, I read this wrong. So the number of requests pending at the start of the year was 7,224. And at the end of the year, it was 7,538. So rather than chipping away at the backlog, the backlog is getting worse, right?

MS. PUSTAY: Our backlog only increased by 204 at the Department of Justice, and that's despite receiving over 2,000 more requests this past year than the year before. So --

SEN. CORNYN: I guess you're looking at the glass being half-full and I'm looking at it being --

MS. PUSTAY: Absolutely.

SEN. CORNYN: -- half-empty.

MS. PUSTAY: Absolutely. Out of 63,000 requests --

SEN. CORNYN: And your backlog is getting worse. It's sort of like the federal government and spending. Our debt keeps getting bigger and bigger.

SEN. LEAHY: Let her finish the answer, though, if you could.

SEN. CORNYN: Well, I'm sorry. I thought --

SEN. LEAHY: I'll make sure you have plenty of time to continue.

Had you finished the answer?

MS. PUSTAY: With having increased our processing of requests -- we processed more this past year than we did last year. Despite having received 2,000 more requests, the backlog only went up by 204 out of 63,000 incoming requests for a year. I think that really is a remarkable statistic.

SEN. CORNYN: And at the end of the year, you had 7,538 requests pending.

MS. PUSTAY: Yeah, you're looking at -- pending is different than backlog, but that could be right. Pending could mean it came in the day before the report was issued. Backlog means it's something that's been on the books over the statutory time period. So it's just two different stats. That's all.

SEN. CORNYN: And how many -- how many are in the backlog?

MS. PUSTAY: Two hundred and four --

SEN. CORNYN: Out of --

MS. PUSTAY: Out of --

SEN. CORNYN: Out of the 7,538 --

MS. PUSTAY: Yes, exactly. Exactly. Our backlog is only 204.

SEN. CORNYN: Following up on Senator Grassley's questions, is it ever appropriate for political decisions to

stall or block a FOIA request, Ms. Pustay?

MS. PUSTAY: No, not to stall or block. I certainly wouldn't agree with those words.

SEN. CORNYN: I mean, it's simply not the law.

MS. PUSTAY: No. No.

SEN. CORNYN: As you pointed out, it's irrelevant who the requester is.

MS. PUSTAY: It's irrelevant who the requester is, and --

SEN. CORNYN: Or the purpose for which the information is being requested, correct?

MS. PUSTAY: Absolutely. Absolutely.

SEN. CORNYN: And don't you agree that if we were able to create a system whereby there were more timely responses by federal agencies to FOIA requests, there would perhaps be a greater sense of trust and confidence among requesters that everybody was being treated exactly the same?

In other words, when there is such a large backlog in requests or delays in producing the documents, it seems to me that that gives rise to concerns that maybe people aren't being treated on an equal basis and the law is not being uniformly applied. Would you agree with that concern?

MS. PUSTAY: It's not at all my experience that that is a concern. And I have regular contact with requesters. I have a lot of outreach with the requester community. And, of course, just by working with agencies day in and day out, we see first-hand across the government that on many, many occasions, agency officials are communicating with FOIA requesters, explaining what the situation is, explaining what the backlog is, where a request might be in a queue.

And in my experience, overwhelmingly requesters are understanding of the process. We have long since -- we have long had a policy of asking agencies to give contact information to requesters so that there can be a dialogue. This is not something that's new. And it's a process that really does help increase understanding between requesters and agencies. So my experience would not at all -- is not at all in line with the concern that you're raising.

SEN. CORNYN: So everybody's happy with the --

MS. PUSTAY: Well, I'm sure everyone's not happy. (Laughs.) But they're accepting of the situation. Again, 600,000 FOIA requests across the government is an incredible crush, an incredible workload. And it went up this past year.

SEN. CORNYN: Well, it shouldn't be just looked at as a crush or a workload. It's the responsibility --

MS. PUSTAY: Oh, sure.

SEN. CORNYN: -- under the law to respond --

MS. PUSTAY: Sure, sure.

SEN. CORNYN: -- on a timely basis. Correct?

MS. PUSTAY: I say -- I use those words -- no, I absolutely agree. I use those words just to convey the magnitude of the interest in making requests.

SEN. CORNYN: And Director Nisbet, I just have one final question of you. If I understand the record correctly, you were the one who mediated the Associated Press FOIA request of the Department of Homeland Security that resulted in the revelation of political screening. Can you tell us what your reaction was to the DHS conduct that was revealed in that story?

MS. NISBET: Well, our part in that was that the Associated Press came to us because it had not gotten the response to its FOIA request for the e-mails on that subject. We were very pleased that we were able to help in that case and to help get those records released to the Associated Press, as a result of which the stories were written that Senator Grassley referred to.

I have to say that is the only request that I can recall of that nature. You're asking about requesters complaining about that. But certainly that was a significant concern in that case. And we were glad that we were able to help.

SEN. CORNYN: And you shared that concern of political screening.

MS. NISBET: Certainly if the allegations are as written, that is a concern. And I believe that's certainly -- my colleague from the Justice Department would agree with that.

SEN. CORNYN: Thank you.

SEN. GRASSLEY: Could I have 15 seconds for an observation as we close this panel? I don't --

SEN. LEAHY: Go ahead.

SEN. GRASSLEY: I don't dispute anything that you've told me, because you said, well, it's not a whole lot different than it's been for 20 years. But, you see, that's what's wrong, whether it's 20 years under a Republican or 20 years under a Democrat.

But also, it also tells me what I -- the point I tried to make in my opening comment, that the president set a very high benchmark. And if we're doing the same thing after two and a half years of this administration, the same as we've been doing for 20 years, the president's benchmark isn't being followed by the people he appoints.

Thank you very much.

SEN. LEAHY: Do you want to respond?

MS. PUSTAY: Yes, if you --

SEN. LEAHY: It's OK. We'll take time out of the next panel. Go ahead.

MS. PUSTAY: Really, really quickly, my comment about things being the same was completely connected to the idea of review or alerting political officials of FOIA requests. That stayed the same. The process of FOIA has changed dramatically. I really have never seen transparency as fulsome and as robustly worked on as I have now. I think we're the most transparent that we've ever been. I think it's quite a different day now.

SEN. LEAHY: Thank you.

I thank you very much. And we'll take a two-minute recess while we change panels.

(Recess.)

SEN. LEAHY: Thank you.

The first witness will be John Podesta. I feel this is somebody who knows this room very well. He's my former chief of staff, formerly counsel here in this committee, and currently serves as the president and CEO of the Center for American Progress.

He's also been White House chief of staff to President Bill Clinton. He's held several other positions in the Clinton administration, including assistant to the president, deputy chief of staff, staff secretary and senior policy advisor and government information, privacy, telecommunications, security, regulatory policy. He's served numerous positions on Capitol Hill.

I apologize for the laryngitis this morning.

He served as co-chair of President Obama's transition, where he laid the groundwork for President Obama's historic FOIA memorandum, which restored the presumption of disclosure for government information. He's a graduate of Knox College, Georgetown University Law Center, where he's currently a visiting professor of law.

Mr. Podesta, it's great to have you here; great to see you.

MR. PODESTA: Thank you, Mr. Chairman and Senator Grassley. It's great to be back in the committee. And it couldn't be led by two greater champions of openness and accountability, so it's a pleasure to be here during sunshine week.

I think this hearing comes at a momentous time for the Freedom of Information Act, as it comes on the heels of last week's Supreme Court ruling in Milner, which has been referred to, versus the Department of the Navy, which properly narrowed the scope of the B-2 exemption, and the recent AT&T decision finding that corporations don't have a right of personal privacy under the act.

We should celebrate these victories, but there's more work to do. While President Obama has delivered, in many

respects, on his promise to have the most transparent administration in the nation's history, the results on FOIA, while improving, I think, still have a long way to go.

The problem, I think, Senators, isn't one of policy. I think Attorney General Holder's FOIA memorandum tells federal agencies, in the face of doubt, openness prevails. And the Office of Management & Budget's open government directive instructs agencies to reduce backlogs by 10 percent a year.

The problem, I think, as this committee has noted this morning, isn't implementation. Federal agencies in the year after the Holder memo increased their use of legal exemptions to keep more records secret, according to the Associated Press, and the Justice Department continues to defend expansive agency interpretations of FOIA exemptions.

I would note, in the administration's favor, they have reduced the use of the B-2 and B-5 exemptions in the past year, which I would characterize as we just don't want to give you the information exemptions in the act.

So the question today is how do we turn the good policy that's embedded in the president and attorney general's memoranda, OMB directives, into reality. And I offer three ideas.

First, along the lines of Senator Whitehouse, we should require automatic Internet disclosure for publicly useful data sets. FOIA, of course, rests on four key principles. Disclosure should be the general rule, not the exception. All individuals have equal right of access to information, as Senator Grassley has noted. The burden of disclosure should rest with the government, not with the people. And people denied access to documents have a right to relief through the courts.

As importantly as those four principles, when FOIA was passed, then-Attorney General Ramsey Clark added another, which is that there needed to be a fundamental shift in government attitude toward public records and the value of openness.

Those principles need to apply and that attitude needs to be updated for the digital age. You've done a good deal of that in the 2007 amendments that were processed by this committee and championed by the chairman and Senator Cornyn. But disclosure should be automatic, not just in response to requests, and it should be done through the Internet so everyone has easy and immediate access.

I think the recent experience of Recovery.gov and Data.gov provide useful models for Congress to expand automatic disclosure under 552(a) of the act. Congress can help by setting standards for exactly what should be automatically disclosed and disseminated.

Second, we should build a searchable online database where the public can track FOIA requests and view agency responses. The public in most cases cannot see what FOIA requests have been submitted to federal agencies or what information was provided in response to those requests.

The administration's planned FOIA.gov website will provide report cards on compliance. That's an important step in the right direction. It's not a great leap forward. I think we propose that if the federal government would automatically publish their FOIA requests as well as information provided in response through a centralized searchable online database, automating these functions will increase productivity. It will save money. It'll serve the

public better.

Third, we need to improve information use to assess FOIA implementation. Annual agency FOIA reports, as, again, the testimony this morning indicates, provide useful data on requests granted and denied, but the Department of Justice, for example, does not disclose the number and percentage of FOIA denials it chooses to defend, nor do agencies report what they have done to comply with the Holder memo. So I think more can be done in that arena too.

And if I could, Mr. Chairman, I'd like to call your attention to one other topic vital to openness and free debate. Two Senate bills introduced last month would criminalize the disclosure of classified information to unauthorized people.

Protecting properly classified government information from improper disclosure is an important priority. I think I've certainly earned my spurs trying to reduce the number of classified records while simultaneously better protecting classified information, but these proposals sweep too broadly. They create a chilling effect on legitimate government communication.

I think we've come too far without an official secrets act in our country, and we cannot afford to sacrifice that hard-won progress to shortsighted doubt. So I would ask you, Mr. Chairman, to take a look at those proposals. I don't think they'll meet with your high standards of openness.

Thank you.

SEN. LEAHY: Thank you very much.

Sarah Cohen is certainly familiar with this committee and our work up here. She's Knight professor of the practice of journalism in public policy, Duke University Sanford School of Public Policy. She joined the School of Public Policy in 2009.

She worked nearly 20 years as a reporter and editor. She earned many of the major awards in journalism, including the Pulitzer Prize, the Goldsmith Prize, the Selden Ring Award, the Investigative Reporters and Editors Gold Medal. (Inaudible.) She earned a bachelor's degree from the University of North Carolina-Chapel Hill, a master's degree from the University of Maryland. And she's testifying today in behalf of the Sunshine In Government Initiative.

Ms. Cohen, good to have you here.

MS. COHEN: Thank you very much, Chairman Leahy, Senator Grassley, and members of the committee. Thank you so much for the invitation to talk about the Freedom of Information Act in the digital age.

In my reporting career, I depended frequently on the act, and I appreciate this committee's longstanding commitment to accountability and open records.

In the past two years, President Obama's policies to promote accountability through open government has resulted in some policy changes that are beginning to affect day-to-day practice. But they're still not happening on the

ground.

Just one example is looser guidelines for releasing internal e-mails, which contributed to our understanding of the Deepwater Horizon oil spill and its aftermath. But administrations change. These actions can be reversed as quickly as they began. And many of the president's initiatives are aimed at helping consumers find data and that collaborative government.

Public affairs journalism requires more than the products of a well-planned public information effort. It also requires access to the artifacts of governing. So FOIA remains a vital tool, and it's a tool that simply just doesn't meet its promise.

You've heard in the past of problems that still haven't been resolved, such as agencies' overuse of personal privacy exemptions. I know this committee has worked hard to reduce the proliferation of special B-3 amendments, but they remain a concern.

Today I'd like to describe two of the biggest impediments to the effective use of FOIA among journalists, and I detail others in my written statement. But at core, they all suggest a widespread but wrong default position that records belong to the government and not to the public.

This position turns FOIA upside down. Instead of the government convincing the public that certain information must be kept secret, in practice the public must convince officials that it should be released.

The biggest problem in journalists' use of FOIA, as has been suggested here, is timeliness. Agencies are reporting improved response times, but we're not seeing them yet. Admittedly, reporters' requests are often broad and difficult to fulfill, and the subjects are quite naturally politically sensitive. But I've never received a final answer to a FOIA within the deadline.

Some reporters joke about sending birthday cards to their FOIAs because response is measured in years, not days. And when asked, the Office of Government Information Services can prod agencies to respond, but so far we've seen little in the progress on delays.

I wanted to highlight one consistent and growing source of delay. That's the requirement to vet contracts and other documents with the originator to identify trade secrets and other commercially confidential information. The records are then held hostage to the subject of the request. It gets to run the clock, and it often is granted extensive redactions if it responds at all.

The second point I wanted to make is that agency websites are incomplete and incomprehensible. I and other journalists have used FOIA to obtain congressionally mandated reports on the use of funds in Iraq and Afghanistan, but they're not posted on the Defense Department or inspector general websites. Originally nursing-home inspections with reviewers' comments, a very common request among local reporters, requires individual FOIA requests.

And even if these kinds of common documents were posted, the chance of finding them is slim.

In 2009, the Associated Press tried to identify all of the major agencies' reading rooms so it could monitor them. It

gave up after a week. The reporter had already found 97 reading rooms in just four departments.

So what can Congress do to improve the implementation? It might go further than in recent years to enforce reasonable deadlines and appropriate use of exemptions. It could build the current policy of the presumption of openness into the law. And it could require disclosure in a central virtual location by Cabinet-level agency of common public records such as correspondence logs, calendars and spending awards. And it could more specifically define frequently requested records. Any combination of these would reinforce the idea that our government holds transparency and accountability as a core value.

Mr. Chairman, I hear you called again the public's access to records a cornerstone of our democracy. I appreciate the efforts made by Congress and President Obama to open our government to scrutiny even when that effort may reflect poorly on its performance. But recent changes can't be considered complete until compliance with current policy and deadlines is more consistent and a structure is erected to prevent this or the next president from reverting to secrecy.

There are certainly times when the democratic need for open records conflicts with other vital priorities, such as privacy and national security. I believe journalists and their news organizations would be happy to work on these substantive issues if they could be assured that the law usually worked as it should.

Thank you so much for the opportunity to talk with you about this.

SEN. LEAHY: Thank you very much -- (inaudible).

Our next witness is Thomas Fitton. He's the president of Judicial Watch, a public interest group that is set up to investigate government corruption. He's been affiliated with Judicial Watch since 1998. He is a former talk radio and television host and analyst. He's the author of several published articles. He also previously worked at the International Policy Forum, Leadership Institute and Accuracy in Media. Mr. Fitton earned his bachelor's degree from George Washington University.

Mr. Fitton, welcome. Please go ahead.

MR. FITTON: Thank you, Mr. Chairman.

Thank you, Chairman Leahy and Senator Grassley, for hosting this hearing. It's an honor for me, on behalf of Judicial Watch, to appear before this committee. And I want to take some time to extend personal thanks to you both, the chairman and Senator Grassley, for not only your leadership on government transparency, but your often unheralded work on behalf of government whistleblowers.

You helped at least one of our clients many years ago, and I'm sure you've helped many other whistleblowers over the years. And these brave folk are often alone in their efforts to expose government wrongdoing. So your help is crucial and has been crucial to saving jobs and careers.

Essential to Judicial Watch's anti-corruption and transparency mission, obviously, is the Freedom of Information Act. We're probably the only group on the right that uses it the way we do. We've used this tool effectively to root out corruption in the Clinton administration and to take on the Bush administration's penchant for improper

secrecy. We have nearly 17 years' experience using FOIA to advance the public interest. And without a doubt, we're the most active FOIA requester and litigator operating today.

The American people were promised a new era of transparency with the Obama administration. Unfortunately, this promise has not been kept. To be clear, the Obama administration is less transparent than the Bush administration. We've filed over 325 FOIA requests with the Obama administration, and we've been forced to file 44 FOIA lawsuits to enforce the law against the Obama administration.

Administratively, Obama administration agencies have built additional hurdles and stonewalled even the most basic FOIA requests. The Bush administration was tough and tricky in this era, but the Obama administration is tougher and trickier. And once we're forced to go to federal court, the Obama administration continues to fight us tooth and nail. The Obama administration's litigious approach to FOIA is exactly the same as the Bush administration's, so one can imagine the difficulties we encounter litigating these issues in court against the Obama Justice Department.

You know, we've been investigating the bailouts of particularly Fannie and Freddie, trying to find out about political contributions and other key documents. The Obama administration has taken the position that despite the fact that Fannie and Freddie putting taxpayers on the hook for trillions of dollars, including over at least, in the current number, is \$153 billion in funds expended for Fannie and Freddie. The Obama administration has taken the position that not one of those documents is subject to the Freedom of Information Act.

These agencies have been taken over completely by the Federal Housing and Finance Administration (sic), and yet they say none of these are -- (inaudible) -- agency records, nor will they be subject to disclosure. And we're at the appellate stage on that in terms of litigating that.

In addition to walling off the control of our nation's mortgage markets through Fannie and Freddie from public accountability, the Obama Treasury Department has been seemingly incapable of disclosing even basic information on the various government bailouts. So I can't quite fathom how this administration can laud a new era of transparency while over \$1 trillion in government spending on the bailouts is shielded from practical oversight and scrutiny by the American people.

You know, this committee may also be interested to learn the truth behind the Obama White House's repeated trumpeting of the release of Secret Service White House visitor logs. In fact, the Obama administration is refusing to release tens of thousands of visitor logs and insists, following the Bush administration legal policy developed at the end of the administration, that they're not subject to the Freedom of Information Act. Obviously the Secret Service is part of the Department of Homeland Security. Those records are subject to the Secret Service -- to the Freedom of Information Act.

In 2009 we were invited to the White House to visit with Norm Eisen, then special counsel to the president for ethics and government there, to discuss Judicial Watch's pursuit of these visitor logs. And we were told by the Obama White House in no uncertain terms that they wanted us to encourage -- publicly encourage and praise them for being transparent, saying it would be good for them and good for us. Well, they refused to release these records, as they're supposed to, to us under FOIA, and we were forced to sue in court.

On top of this, we have the issue of the idea that now White House officials are meeting across the street at the

White House Conference Center and in Caribou Coffee with lobbyists and others to avoid disclosing their names under this voluntary disclosure policy they've put out related to visitor logs. So rather than visiting people at the White House, where the names might be subject to disclosure, they're meeting outside the White House. How does that comport with the president's commitment to transparency?

We've been reading about the 1,000-plus "Obamacare" waivers that have been issued by the Department of Health and Human Services. We have yet to receive one document in response to our request, and now a lawsuit after five months about any of those waivers; not one document.

And my final example, briefly, is the Department of Homeland Security. We had asked for a report about this illegal alien who was accused of running into and killing a nun. The report was sent, according to reports, to the Department of Homeland Security's Secretary Napolitano last year. We asked for this final report. They said, "We'll give it to you." And then they said to us in the court, "By the way, that report is not final. It's draft, and you can't have it. We're still working on the final report." Well, we just got it last month and the report was dated November 24th.

That to me is an indication -- that ham-handedness -- only political appointees could be involved in that sort of process.

So that's the concerns we have --

SEN. LEAHY: You did get the report?

MR. FITTON: We did get a report dated November 24th. But I don't know how a report dated November 24th could still be being worked on in January, February and March.

SEN. LEAHY: I just wanted to make sure --

MR. FITTON: That's right.

SEN. LEAHY: I'm sorry you haven't been able to get the records of the visits during the Bush administration and I wasn't able to either.

Let me go back to Mr. Podesta. You led the effort during the Clinton administration to restore the presumption disclosure for government information. And it has been testified that policy change under the next administration -- the Bush administration -- you worked to make it more open under the Obama administration.

Now, these are presidential policies that could change from president to president. Should we enact some legislation to codify the presumption disclosure -- whether it's a Democratic or Republican administration?

MR. PODESTA: (Off mic.) Well, I would certainly support that, Mr. Chairman.

I'm sorry. It was pressed?

Let me say that I think the structure of the act -- as I noted at the -- in my opening statement -- really does create

at some level the presumption of openness because as the FOIA changed the previous law in 1966, the right of every person to every record subject to narrow exemptions and the right to go to court does embed in the FOIA itself the right and presumption of openness and disclosure.

I think there's one place that is in particular need of legislative attention and that is with respect to classified information. I was able to serve with -- on Senator Moynihan's commission that studied the problems of government secrecy. He suggested and had bipartisan support across the political spectrum for a set of recommendations that included codifying the presumption of openness -- particularly in the (b)(1) exemption. And that has been subject to change back and forth with the passage of administrations. And I think that's something that the committee did consider when that report was issued in the 1990s, but should take a second look at. It's an extremely important report on government secrecy.

SEN. LEAHY: I'd like to see a better understanding of what should be classified and what's not. I mean, we had some strange new classifications that came up a few years ago that no one ever heard of. I remember being in a closed-door, top-secret briefing. And the first two items that came up -- our top secret was either a Time or Newsweek cover and the other was something else that has been published in a scholarly paper that had been available for several years.

There was some discussion among those who were there -- and I'm trying to be vague about what the subject was we were discussing -- that perhaps the briefers had lost some credibility by beginning with those two.

It reminds me of a long time ago another head of the CIA who had come running to the Hill every time the press had disclosed something and say, well, I meant to have told you about this. And I told him that he should take The New York Times -- instead of coming up for a briefing -- mark it top secret and deliver to each of us. We'd get the information in a more timely fashion; we'd certainly get probably greater detail than he ever gave and we get that wonderful crossword puzzle.

So Ms. Cohen, I know you're here today representing the Sunshine in Government Initiative. I alluded my story to this former director of CIA about The New York Times could be said about many other newspapers just to point out that we often times -- including people here in Congress -- rely more on the media to get this information than we do from whoever's in government.

The producers recently of an award-winning documentary film about Lyme Disease entitled, "Under our Skin" reported that the Freedom of Information Act request they submitted to the Centers for Disease Control back during the last administration in 2007 is still outstanding. And you've testified that during your time as an investigatory reporter you never received a timely response to a FOIA request.

So what does that do if you're trying to report on something -- say a health scare where parents may be wanting to read about something that may affect their children's health or a medication that a cancer patient is taking or whatever it might be -- and the press often is the one that blows the whistle first? Well, what happens if you can't get timely FOIA?

MS. COHEN: Well, there's two issues that happen, I think.

The first one is in a case of a public event -- a health scare. Frankly, you get the documents unofficially. You're

going to find a way to report that story. And if you have to get them through leaks or through some other way, you'll get them that way.

I think the more frightening thing are the stories that are never done that the public never hears about. There's a reporter in Texas who after a year and a half gave up on doing a story on private security contractors at -- who are protecting federal courthouses, because he was convinced he was never going to get those records. And he's never done that story.

And the problem is that most reporters go in with questions, not answers. And if you can't even ask the question, you can never even find out whether or not you're going to get the answer. So I think that's the more frightening part of that.

SEN. LEAHY: After you've been stonewalled long enough, your editor is going to say, hey, we're paying you. I'm going to put on something else.

MS. COHEN: Well, yeah. You move on. I mean, there are plenty of stories to be done and if it's futile and you're not sure of what the answers going to be, it may be that there's no problem and so you move on.

SEN. LEAHY: My time is used up.

Senator Grassley.

SEN. GRASSLEY: Thank you.

Mr. Fitton, AP published yesterday: "Promises, promises: Little transparency progress" -- concluding that in year two, the administration's performance was mixed and that it was struggling to fulfill the president's promises on transparency.

First question: Very briefly, based on your first-hand experience, do you agree with the evaluation of the Obama's administration performance in the first year, which was rated at C or lower?

MR. FITTON: Yes. I would give it a failing grade.

SEN. GRASSLEY: Two: How would you grade the Obama administration's performance during the second year?

MR. FITTON: It's still failing.

To be specific, when -- we appreciate the increase availability of government material on the Internet. But about matters of public interest and controversy, in terms of getting information from the administration it is as difficult if not more difficult than ever.

SEN. GRASSLEY: You're familiar with Ted Bridis's investigative report for AP? According to the report, 2009 and '10, the Homeland Security diverted requests for records to senior political advisers who often delayed the release of records they considered politically sensitive. The political vetting often delayed the release of information for weeks beyond the usual wait. According to AP report, Homeland Security rescinded the rule prior to political -

- for prior political approval.

In July of last year -- supposedly under new policy -- records are now submitted to the secretary's political advisers three days before they're made public, but can't be released without their approval.

Based on your experience, are President Obama's appointees still engaging in politicized approach to handling requests for information under FOIA and to litigating lawsuits under the act?

MR. FITTON: Yes. And certainly our experience with the Department of Homeland Security is consistent with that -- specifically the release of this final report that became a draft report -- that became a report in progress, that became a report that was finished in November of 2010.

SEN. GRASSLEY: Expand a little bit on your experiences: How widespread is the politicized approach to requests for information under FOIA?

MR. FITTON: Well, you see indications of the politicization when the response makes no sense to you. Where, as I say, with the DHS memo where you're told that we're not even going to look for documents, because nothing you're asking for would be subject to disclosure so we're not going to bother looking -- or with the -- frankly, the request more recently of the FBI files.

We asked for the documents related to Ted Kennedy's FBI file. And we had to push and push and push. And the FBI pushed back on us. And it turned out to be they did not want to release embarrassing information. They ended up releasing it to us in the end, but it came after five months of fighting.

And that to me was an example of the administration, for political reasons, withholding embarrassing information about -- well, a recently deceased friendly voice.

SEN. GRASSLEY: Your organization has extensive experience with tactics employed in this administration by political employees in handling FOIA.

Based on what you've seen, do you believe an independent investigation is warranted?

MR. FITTON: Yes.

SEN. GRASSLEY: And if so, do you have any suggestions or recommendations on who should investigate politicized compliance with Freedom of Information requests and what parameters of that investigation might meet?

MR. FITTON: Well, if you think the law is important, you would have an independent counsel of some type appointed by the agency or by the Justice Department. If you think the law is a law to be trifled with, that it's a big joke -- which I think it's -- that's how it's been treated administration to administration. The politicization of FOIA did not begin with the Obama administration, but we were told it would end and it has not.

SEN. GRASSLEY: My last question: As I noted before, your organization has significant experience. What is your evaluation of the Office of Government Information Services? What is the general impression of the requester community about the Office of Government Information Services?

MR. FITTON: That agency may be helpful to non-expert requesters -- in terms of helping them with the FOIA process. We've used it a little bit to try to speed along certain requests and we've been successful in that regard.

But when you're in a fight with or a dispute with an agency, the -- you're not going to rely on that, because you can go to court and get what you need or have a finality as to what the dispute is. You're not going to get finality through this agency.

SEN. GRASSLEY: My last question is whether or not you've got any suggestion for improving the Office of Government Information Services?

MR. FITTON: Well, I wouldn't focus on another layer of bureaucracy. Personally, I would focus on the agencies and the political appointees and making sure that there's a commitment to FOIA.

Our government, for better or for worse -- depending on your point of view -- is doing more than ever and FOIA has not caught up with it.

SEN. GRASSLEY: Thank you so much for this sort of hearing, but it's something that you just kind of got to keep your hands on all the time if we're ever going to beat down these roadblocks.

SEN. LEAHY: Been doing it for over 30 years.

SEN. GRASSLEY: I know it.

SEN. LEAHY: We'll continue.

SEN. GRASSLEY: All the more reason we ought to -- got to work hard.

SEN. LEAHY: Thank you.

Senator Whitehouse, then Senator Franken.

SEN. WHITEHOUSE: Were the panelists here when I asked my questions to the first panel?

Could I ask each of you to respond -- the topic being here we are in the Google age, the digital age, what are the best steps that we can do to make the FOIA banks more accessible to the public -- even people who just don't want to follow FOIA themselves, but just want to use it for research purposes?

MR. PODESTA: Yeah, Senator. My prepared testimony and my statement this morning go into that in some detail. I think there are two large baskets that you should be looking at. One is information that ought to be automatically disclosed without resort to FOIA requests.

The Obama administration's taken some criticism from Mr. Fitton. I don't think there's any question that it has gone further than any administration in history in putting out information -- particularly on recovery.gov, data.gov -- and putting up useful information to the public.

The Freedom of Information Act always had a provision that required certain information to be published as a pro forma matter. That's been expanded to include responses to FOIA requests in which people have -- the agency thought that it would be requested again, so they put it out there. But that could be taken much, much further. So that's one area to explicit and my written testimony goes into some areas where that might be particularly useful.

A second area is that FOIA requests themselves -- as a result of the legislation that was passed by the chairman and Senator Cornyn -- there is now a requirement that FOIA requests get a docket number. The requests themselves can be published into a common database. The responses can be put into a common database. That would actually be a more productive way to process requests, would save money in the long run and provide valuable information to the public.

SEN. WHITEHOUSE: Do you think the notion of a search engine on FOIA.gov that can go through the websites of different departments is adequate?

MR. PODESTA: Sure. I mean, you know, no. I think what FOIA.gov does is to try to have a common set of policies, give people some better tools to basically interact with federal agencies on FOIA. But I think it could definitely go further.

And again, I think recovery.gov's a good example in which if you put the data out there, people in the private sector will think of all kinds of interesting ways to utilize that data to create more productivity that can come from having open access to government information.

SEN. WHITEHOUSE: Ms. Cohen?

MS. COHEN: Yeah. There are a couple of things. I think your thoughts on the searchable FOIA is excellent. I just want to mention that when we've been talking about these frequently requested records or common records, it is so inconsistent whether or not those are ever posted.

I know that virtually every FOIA request I've ever made has never shown up on a government website -- except when it was posted before it was responded to -- (laughter) -- to me. So those sites have a long way to go, but you do need a search engine to go through them. I think there must be several hundred of those sites out there.

And the second thing that I've mentioned in my written testimony is to also spend some time administratively looking at the systems that are used to generate records. One of the real problems here is that the record system still can't be searched in a way that then produces an efficient system. So that the review of how agencies are redoing their record systems I think might be -- might include a review of whether or not there's transparency in those records systems built in, because there really isn't right now.

SEN. WHITEHOUSE: Mr. Fitton?

MR. FITTON: Yes, Senator. Some folks specialize in "FOIA-ing" FOIAs. Give me the lists of all the FOIAs and look for the juicy ones and then pursue those a little bit more.

Obviously, putting out large slots of information is good and there has been progress in that regard. There has been

some concern that a lot of the information -- it was reported last week -- was not correctly inputted. I think that's more a matter of competency than anything else.

But as I noted, in matters of public controversy, the Internet is not going to be where you find that. For instance, the decision whether or not to put Fannie or Freddie into conservatorship -- you know, we're litigating that right now. Decisions about the bailout, about why these decisions were made -- the deliberative process type of decisions -- that's where you get into disputes and obviously, that's where the interest is in terms of the public of matters of controversy where there may be concerns about the decision making and what went into it. And that is unlikely to get onto the Internet. And if it does get onto the Internet, right now you're going to have difficulty finding it.

SEN. WHITEHOUSE: But it would at least enable the resources that these agencies have -- limited resources -- to respond to FOIA requests to be dedicated to those more challenging ones that you're suggesting, rather than chasing around the day-to-day stuff, because that could be more readily access automatically. And so it would be even helpful in that sense for the more challenging requests, no?

MR. FITTON: That's right. For instance, the BP oil spill -- many thousands of documents have been posted by the administration, appropriately so, on the Internet and we've got them separately. But we're happy to -- if we think they're there and we're confident that we're all there, that it would be responsive to a particular request, you know -- believe it or not, we don't want to sue if we can avoid it and we'd be happy to avoid litigation.

SEN. LEAHY: Thank you.

And I'm going to turn the gavel over to Senator Franken, who's been extraordinarily patient, but has also been very valuable to this committee --

SENATOR AL FRANKEN (D-MN): Thank you.

I came from Indian Affairs and I just stepped out from some people from Minneapolis City Council to talk to them.

So I think -- picking up -- or I may not even be picking up, I may be just be repeating what Senator Whitehouse just said, so I kind of want to -- don't want to do that. But the gist of what I think I heard -- because I heard the last 15 seconds of Mr. Fitton's answer is that if you put online pretty much everything that -- I think the premise is your going to put -- Mr. Fitton's premise might have been -- I'm extrapolating from the last 15 seconds of your answer -- is that if the administration just puts everything online, that they're still not going to put online some of the most controversial stuff, which is the kind of stuff that you want. Is that right?

MR. FITTON: I would suspect that. (Chuckles.)

SEN. FRANKEN: So you would suspect that and probably have a reason to, right?

MR. FITTON: Well, there are privileges that -- you know, there are lawful reasons for withholding information and often discretionary.

SEN. FRANKEN: Sure.

MR. FITTON: Some administrations will be more willing to release information than others and that's where the litigation comes in.

SEN. FRANKEN: Right. But by putting on so much -- and like in the BP thing they put on stuff that was very helpful, right?

MR. FITTON: Mm-hmm. (In agreement.)

SEN. FRANKEN: They put up a whole BP site, basically, about the spill, right?

MR. FITTON: Right.

SEN. FRANKEN: OK. So that's very -- very helpful. And then it sort of makes it more efficient to go after the more controversial stuff if everything has been online.

That's what you've been suggesting, Mr. Podesta, right?

MR. PODESTA: That's right, Senator.

And you know, I think that -- as I said -- the kinds of things the government might think of as being useful in that data are probably small in comparison to what citizens could think of to make that data useful once it's up and once it's online. And that's where I think you can get -- you know, it's the power of Google. All of a sudden, you've got --

SEN. FRANKEN: Sounds like a Wiki -- Wikipedia kind of thing where citizens can go in and say, why don't you put this up and why don't you put that up? Is that what you're talking about?

MR. PODESTA: I think it's both what they put up, but also what you do to make that information useful.

I'll give you a specific example: We just did a return on investment of every school district in the country based on money that went into that district -- state and local and federal and return -- and what the return was on the outside.

Now, the Department of Education could have done that, but they didn't do it.

SEN. FRANKEN: You had --

MR. PODESTA: We found a way to do that. And I think once that data is available in good data sets, then people will think of imaginative ways that'll improve the productivity of government and you know, lead to breakthroughs in all kinds of ways.

SEN. FRANKEN: Let me ask you about this, because you've been in an administration as chief of staff. And during the Clinton administration, I'm sure there was -- I mean, I know there is a tremendous number of FOIA

requests. And I'm, you know, very -- you know, I want FOIA to work and I want people to be able to get the -- I think the journalists should be able to get the stuff they want.

Did you ever get the feeling that there were just fishing expeditions during the Clinton administration?

MR. PODESTA: Of course. (Chuckles.)

)

SEN. FRANKEN: OK. And I --

MR. PODESTA: And by the way, there's nothing wrong with that. Sometimes you catch fish.

SEN. FRANKEN: OK. Let me ask you about that, though: When there -- as I recall, during that period there seemed to be an incredible amount of requests coming from the House of Representatives, from other places, that -- did that in a sense make it harder to comply with actual, real -- not only legitimate, but more serious kind of -- Ms. Cohen, why don't you answer this. Does that tend to make it harder for people like you who are really going after something?

MS. COHEN: Well, I think a lot of people would say that we go on fishing expeditions as well.

The nature of those kinds of requests -- whether they come from other branches of governments or from journalists -- is that they're very broad and they don't know exactly what they're looking for. And I think that's an important thing for both journalists and other people to be able to do.

It certainly is -- it does make it more difficult on the people who are trying to answer it, but I think those are also the kinds of requests that a place like Judicial Watch is doing.

I do think that if you put more of the things that you've already found on the Internet, it does free up some resources to get to those ones.

SEN. FRANKEN: OK, which is where we -- where Senator Whitehouse ended and where I started.

Let me take a couple moments -- Mr. Fitton, thank you for complimenting both the ranking member and the chairman on their -- on whistleblowers. I think it's very important to protect whistleblowers.

I was a little confused about the visitor logs at the White House and the Caribou Coffee thing. If they're not allowing the visiting logs, why would they go to Caribou Coffee?

MR. FITTON: Well, they are disclosing them voluntarily after, I think, August of 2009 -- anything before that you have to ask them specifically and they may withhold information.

The question is --

SEN. FRANKEN: Wait a minute. I'm sorry. I was very confused about that.

MR. FITTON: They're voluntarily disclosing the visitor logs, but they're saying it's a voluntary disclosure; it's not pursuant to the Freedom of Information Act.

SEN. FRANKEN: Oh, OK.

MR. FITTON: During the Bush administration, we had asked for the visitor logs related to Jack Abramoff. And we were given those logs pursuant to litigation, but also pursuant to the Freedom of Information Act. Then the left started asking the Bush administration for more interesting visitors, from their perspective. And the Bush administration said, enough of this. We're going to say that these logs are not subject to Freedom of Information. And the Obama administration continues with that legal position.

The voluntary disclosure is subject to caveats. They can release, withhold names based on -- for political reasons -- that they're meeting with appointees or someone they don't want to be disclosed within a certain amount of time. So they know they're voluntarily disclosing this information and then they're going across the street -- or so it's been reported in The New York Times -- at Caribou Coffee to avoid this voluntary disclosure.

So they're saying they're not subject to disclosure under the law. The disclosure is voluntary. And that can be reversed either by this president or any subsequent president. So we're kind of -- we're still in the position of trying to get information pursuant to the law and we're unable to do it.

MR. PODESTA: Senator, I think this is one of those examples of no good deed going unpunished. I think the administration has put more information about who goes in and out of the West Wing of the White House than, obviously, any administration in the past -- including the one in which I served.

And I think that, you know, so Mr. Fitton's complaint is -- and that's regularly updated. They did the process, I don't know, for the first six months of August of 2009. But now they regularly and routinely update who goes in and out of the White House. I think it will be difficult -- although certainly not impossible -- to reverse that decision and decide that -- particularly in this administration, but in subsequent administration's as well -- to decide that the public doesn't have a right to know who's walking in and out of the West Wing of the White House.

MR. FITTON: Well, just briefly: You know, the Office of Administration voluntarily complied with FOIA, even though it did not think it was subject to Freedom of Information. And that changed under the Bush administration. We used to get material from the OA, from the Clinton and during parts of the Bush administration. And then they shut it off and it hasn't been turned on again.

I spend a lot of -- it can stop.

MR. PODESTA: (Chuckles.) Mr. Fitton and I could go on about this. I spent many quality hours before Judge Lamberth explaining what our information practices were in the Clinton White House with Mr. Fitton's predecessor at Judicial Watch.

But I think that -- and he did note that I think good public practice comes into play and presidents change and they can move in the wrong direction. But I'm not sure exactly what Mr. Fitton's recommendation is for resolving this particular controversy.

SEN. FRANKEN: Well, I want to thank you both. And you can continue --

MR. PODESTA: Carry cameras in Caribou Coffee.

SEN. FRANKEN: I think you can continue the conversation in Caribou Coffee. (Laughter.)

Thank you all for coming today. The record will be held open for a week for additional material and questions. This hearing is adjourned. (Sounds gavel.)

LOAD-DATE: March 17, 2011