



**SENATE FOIA HEARING MARCH 13, 2018
WHAT HAS CHANGED?**

**SENATOR GRASSLEY:
DOJ OIP'S POSITION DOESN'T PASS THE
"COMMON-SENSE TEST"**

**Chief FOIA Officers Council
Public Comment**

**by Robert Hammond
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October 22, 2021**

It has been three years. What has changed?

1. [Extract](#): Summary Article by [Lauren Harper](#)
2. [Prepared Statement](#) by Senator Chuck Grassley of Iowa Senate Judiciary Committee
3. [April 7, 2021 OPEN LETTER](#) TO SENATE JUDICIARY. Re: Oversight Hearing on FOIA at Federal Agencies

In an open letter to Senators Durbin and Grassley, several organizations are seeking Senate Judiciary FOIA Oversight Hearings. I am collaborating with them to seek additional funding for OGIS and DOJ OIP, and that those hearings address:

- The effectiveness/ineffectiveness of OGIS in executing its statutorily mandated dual FOIA Compliance and Mediation missions and adequacy/inadequacy of funding for doing so.
- The effectiveness/ineffectiveness of DOJ OIP in executing its statutorily mandated FOIA Compliance mission and adequacy/inadequacy of funding for doing so.
- The inaccuracy of Annual FOIA Reporting and FOIA Abuses – Requester Perspective.

Sen. Grassley Sums-Up Sunshine Week Sentiment, Says FOIA Posting Delays Don't "Meet the Common-Sense Test": FRINFORMSUM 3/15/2018

MARCH 15, 2018

by [Lauren Harper](#)



Senator Grassley tells OIP their explanation doesn't pass the common sense test.

OIP's Position Doesn't Pass the "Common-Sense Test"

This week the Senate Judiciary Committee held a hearing on "[The Freedom of Information Act: Examining the Administration's Progress on Reforms and Looking Ahead.](#)" The hearing consisted of one panel, all government witnesses – the Justice Department Office of Information Policy's Melanie Pustay, the Office of Government Information Services Alina Semo, and the Government Accountability Office's David Powner.

Pustay, predictably, reiterated OIP's misleading FOIA statistics – citing a 90% release rate even though this number **excludes a large swath of requests** that are not processed for disclosure because the requests were denied for anything from fee reasons to referrals, and counts the release of merely one word as “a partial release.” Pustay also touted the newly unveiled- FOIA portal, although didn't address the need for the portal to improve the processing of FOIA requests on the back end to live up to its potential.



Senator Leahy expresses disbelief at OIP's insistence that 508 should hold up posting documents online.

Most of the eyebrow-raising moments came during the question and answer period, which saw senators underwhelmed by Pustay's responses to their questions. At one point Senator Grassley told Pustay that her explanation for why the “release to one, release to all” policy had yet to be finalized (Pustay said “agencies have concerns about the time and

resources it would take to properly code and upload documents online after a single request”) didn’t pass “the common-sense test.”

Pustay later dug in her heels by saying 508 compliance concerns – a section of the Rehabilitation Act that has required agencies to ensure that persons with disabilities have comparable access to government information as persons without disabilities since 1998 – were a valid reason for agencies to hesitate posting documents online.

Senator Patrick Leahy disagreed, and failed to see how posting an OCR’d version of a PDF wasn’t a better alternative than posting nothing at all. The FOIA Federal Advisory Committee recommends that, instead of either not posting documents or even removing previously posted documents, agencies “remediate documents that are not currently 508 compliant—documents that have optical character recognition are also much easier for all individuals to search through and utilize,” and “ensure that their FOIA reading rooms include contact information that individuals with disabilities can use if they encounter inaccessible documents.”

Leahy also pushed back on Pustay’s claims that OIP has robust FOIA training and guidance program; saying “I don’t care about the robust training. The word robust has become the biggest misused cliché in government.”

GAO's David Powner had an excellent observation towards the end of the hearing, particularly in light of OIP's seeming ongoing unwillingness to compel agencies to follow the law. Powner told the committee that "If you don't have the backing of the [Executive Office of the President] and the Office of Management and Budget, it's very hard to get the right openness and progress moving the ball forward."



NSArchive FOIA Audit Shows Agencies Struggling to Respond to FOIA Requests for Email

Two out of five federal agencies [claimed that they were either unable or not required](#) to respond to a targeted Freedom of Information Act (FOIA) request for agency emails submitted by the National Security Archive. The responses to the Archive's FOIA request show that a year after agencies were required to manage email electronically, FOIA requesters are often not seeing the benefit of any improved email management.

The Archive's Audit team filed the same FOIA request with all 100 federal agency FOIA offices that are required to submit an annual FOIA report to the Department of Justice's Office of Information Policy. The request sought all emails received between January 20, 2017, through April 28, 2017, from any Republican National Committee domain, including but not limited to [rnchq.org](#). The Archive wanted to see which agencies were receiving emails from [rnchq.org](#) email accounts in light of reporting that prominent members of President Trump's administration were inappropriately using their RNC email accounts rather than their White House addresses.

Check out the posting at the [National Security Archive](#) for the audit results.

GAO Report: Agency FOIA Shops Need to Take Additional Steps

A recent Government Accountability Office (GAO) report, "[Agencies Are Implementing Requirements but Need to Take Additional Actions](#)," analyzed the extent to which 18

federal agencies have implemented six FOIA requirements. Specifically, GAO looked for whether the agencies had 1) updated response letters to inform requesters of the right to seek assistance from FOIA public liaisons, 2) implemented request tracking systems, 3) provided training to FOIA personnel, 4) provided online access to records, including frequently requested records, 5) designated chief FOIA officers, and 6) published updated FOIA regulations as required by the 2016 FOIA Improvement Act.

GAO found six agencies have yet to appoint a chief FOIA officer and only five had updated their FOIA regulations, noting that “Until these agencies address all of the requirements, they increase the risk that the public will lack information that ensures transparency and accountability in government operations.”

Regarding agencies’ growing backlogs the report also noted that agencies with the largest backlogs – which the agencies attributed to more and more complicated FOIA requests – that “these agencies lacked plans that described how they intend to implement best practices to reduce backlogs,” going on to say that “Until agencies develop such plans, they will likely continue to struggle to reduce backlogs to a manageable level.”

MARCH 13, 2018

Grassley at FOIA Hearing: Transparency brings Accountability

**Prepared Statement by Senator Chuck Grassley of Iowa
Chairman, Senate Committee on the Judiciary Hearing
on “The Freedom of Information Act:**

Examining the Administration’s Progress on Reforms and Looking Ahead”

March 13, 2018

Today, the Committee focuses its attention on the Freedom of Information Act (FOIA). We have a responsibility to ensure that both the letter and spirit of FOIA are being faithfully carried out.

It’s also Sunshine Week—an annual recognition of the importance of government openness and transparency.

It’s always good to focus on transparency. As I’ve said time and again, transparency

brings accountability.

But, I've learned over the years that transparency doesn't come easy. It requires constant oversight and pressure from the public, the press, and Congress. So, we're here today in the midst of Sunshine Week to do just that.

FOIA is our nation's premier transparency law, giving the public a statutory right to access government records. Before FOIA, countless stories of government waste, fraud, and abuse could've remained under the rug. Thanks to FOIA, it's the right of the People to know what their government is up to.

But no one can say with a straight face that FOIA always works as intended. Some agencies are still working on requests from 10 to 15 years ago. Keep in mind that FOIA requires a response within 20 days. And anyone who's made a FOIA request only to receive a page full of redactions, or be charged an absurd processing fee—or to simply get no response at all— knows we have work to do.

This Committee has a bipartisan history of confronting these challenges and strengthening the public's 'right to know.' Recently, this bipartisan work led to the

enactment of the *FOIA Improvement Act of 2016*. I was proud to work with Senators Cornyn and Leahy on that bill. In fact, when I took over as Chairman in 2015, the *FOIA Improvement Act* was the first bill that I listed on the Committee agenda.

The *FOIA Improvement Act* was the result of years of bipartisan work, collaboration with the open government community, and good faith negotiations. But it was no easy task.

We all remember the promises made under President Obama. He touted a new era of government openness. Yet, it was the Obama administration that tried to defeat FOIA reform efforts in Congress. Under President Obama, White House review of politically sensitive FOIA requests became official policy. And more than one of his top officials used personal or alias email accounts to conduct official business, undermining transparency and accountability.

So, when I hear any administration make promises of improved transparency, I take it with a grain of salt.

Some things have changed since this Committee last convened to examine FOIA. A

new administration is in place, and with that, the responsibility for ensuring openness and transparency is in new hands. But as you know, I take my oversight job seriously--no matter who's in the White House. And there are things that concern me.

I hear of even more delays at certain agencies, and proposals to raise search fees or limit the number of FOIA requests from organizations. Further, according to a recent GAO audit, most of the agencies surveyed haven't updated their FOIA regulations as required under the 2016 amendments. And the agencies with the largest request backlogs lack concrete plans on how to reduce their backlogs.

Another GAO report found that FOIA litigation costs cannot be fully determined, which is troubling—particularly in cases when the government shouldn't have fought the requester in the first place.

Here's an idea: instead of litigating over a FOIA request, agencies should proactively release that information now for all to see.

So today, I expect to hear what the administration is doing to fix these problems and improve transparency for all.

President Trump should show leadership on this issue. I hope he's listening today. He promised to "drain the swamp." There's no better way to do that than by letting in the sunlight.

And on the issue of sunlight, I was pleased to work closely with Senator Leahy last fall in pushing for the administration's full release of the JFK assassination records.

I also introduced the *Disclosing Foreign Influence Act* last year to improve transparency and disclosure of foreign lobbying efforts under the Foreign Agents Registration Act. My bill includes numerous oversight and reporting provisions to improve transparency, all of which were issues I identified in leading this Committee's oversight work on the Foreign Agents Registration Act.

Finally, the Committee received a statement for the record from the Cause of Action Institute, which will be included in the record, without objection.

I thank the witnesses for being here, and I look forward to their testimony.

OPEN LETTER. RE: OVERSIGHT HEARING ON FOIA AT FEDERAL AGENCIES

April 7th, 2021

Senator Dick Durbin
Chairman, Senate Judiciary Committee
711 Hart Senate Building
Washington, D.C. 20510

Senator Chuck Grassley
Ranking Member, Senate Judiciary Committee
135 Hart Senate Building
Washington, D.C. 20510

Re: Oversight Hearing on FOIA at Federal Agencies

Dear Chairman Durbin,

The undersigned organizations write you to request the Judiciary Committee hold an oversight hearing on agency compliance with 5 U.S.C. § 552, the Freedom of Information Act (FOIA). The Judiciary Committee has a long history of working in a bipartisan manner to improve FOIA and to provide vigilant oversight of agencies' compliance with the Act. Unfortunately, despite the importance of FOIA to ensuring transparency in government, the last oversight hearing on FOIA was more than three years ago. It is imperative that the Committee provide oversight of agencies' compliance with FOIA, both to understand FOIA implementation by the Trump administration, as well as to seek commitments to comply with the law from the newly confirmed Biden administration officials.

We strongly encourage the Committee to include testimony from voices outside government, in order to obtain the crucial perspective of members of the public who use

FOIA often. It is vital that the Committee hear from those affected by months or even years long delays at agencies. In addition we recommend the Committee evaluate how agencies are implementing FOIA and explore the longstanding and worsening barriers to compliance. Topics which the Committee can explore include:

- The impact of COVID 19: Agencies struggle to administrate programs remotely, lack access to classified systems, or are burdened by a lack of electronic tools.
- Increased litigation: The number of FOIA cases on the dockets have more than doubled in the last decade.
- Over-redactions: The use of redactions, which are discretionary, remains excessive and often fails to comply with FOIA's presumption of openness.
- Excessive delays: FOIA requests may languish for years or even decades within agencies, and delays are worsening as agencies' request volume continues to grow.

We also urge the Committee to explore solutions to FOIA's pitfalls with recommendations from witnesses. Solutions include expanding proactive disclosures by agencies, reducing agency reliance on redactions, and strengthening judicial remedies. As the Judiciary Committee is preparing for an oversight hearing, we are available to assist in any way.

Thank you for your consideration of this matter. Please contact Freddy Martinez at fmartinez@openthegovernment.org for more information.

Sincerely,

American-Arab Anti-Discrimination Committee (ADC)
American Oversight
Citizens for Responsibility and Ethics in Washington (CREW)
Defending Rights & Dissent

Demand Progress
Digital Democracy Project
Electronic Privacy Information Center (EPIC)
Fix the Court
Government Accountability Project
Government Information Watch
Issue One
National Association of Broadcasters
National Freedom of Information Coalition (NFOIC)
National Security Archive
National Security Counselors
News Leaders Association
News Media Alliance
Open The Government
Project On Government Oversight
Public Citizen
Radio Television Digital News Association
Reporters Committee for the Freedom of the Press (RCFP)
Society of Professional Journalists
Special Libraries Association
Transactional Records Access Clearinghouse (TRAC)
Transparency International—U.S. Office
Union of Concerned Scientists