

**Statement of Meredith Fuchs
General Counsel,
National Security Archive
at a hearing on
Advancing Freedom of Information in the New Era of Responsibility
Before the United States Senate Committee on the Judiciary
September 30, 2009 at 10 a.m.
Dirksen Senate Office Building Room 226**

Mr. Chairman, Ranking Member Sessions, and members of the Committee, thank you for once again inviting me to testify about the Freedom of Information Act (FOIA).

I am General Counsel to the National Security Archive (the “Archive”), a non-governmental, non-profit research institute. The Archive is one of the most active and successful non-profit users of the Freedom of Information Act and the Mandatory Declassification Review (MDR) system. We have published more than half a million pages of released government records, and our staff and fellows have published more than 40 books on matters of foreign, military, and intelligence policy. In 1999, we won the prestigious George Polk journalism award for “piercing self-serving veils of government secrecy” and, in 2005, an Emmy award for outstanding news research.

Things are quite different today than they were when I last appeared before this Committee in March 2007. Thanks to the initiative of members of this Committee, the FOIA has been substantially amended. In addition, there is a new administration in place. Before I begin discussing the state of the Freedom of Information Act, I want to thank this Committee for supporting the OPEN Government Act of 2007. That law is improving FOIA implementation today and several of its provisions hold great promise for better administration of the FOIA going forward. In addition, this Committee’s oversight activities have contributed to the improvement of FOIA administration at agencies throughout the Executive Branch. For a statute that is enforced through litigation by private attorneys’ general, this kind of regular and sustained attention by Congress can have a dramatic impact. So, I thank you for that.

Today I want to provide a sense of how FOIA implementation looks to FOIA requesters. I will start with the positive developments.

Office of Government Information Services

One of the potentially transformative provisions of the OPEN Government Act was the creation of the Office of Government Information Services (OGIS) at the National Archives and Records Administration (NARA). OGIS is empowered to review agency policies and practices, recommend policy changes, and to mediate FOIA disputes.

With the appointment of Miriam Nisbet as Director, OGIS can finally begin having an impact on FOIA implementation. Ms. Nisbet is today reporting to you on her

first few weeks and her goals. We are hopeful that this Committee will continue to strongly support OGIS as it becomes firmly established within the federal system.

Further, we hope this Committee will use its influence to ensure that the federal administrative agencies commit to good faith mediation of every dispute that OGIS determines is appropriate for its services. As OGIS reaches its full staffing levels, we are hopeful that its recommendatory role will be facilitated by the cooperation of the Office of Management and Budget, the Department of Justice, and the agency Chief FOIA Officers, and we urge this Committee to consider this issue in its future oversight activities.

Annual Reports and Backlogs

The OPEN Government Act required agencies to begin providing in Fiscal Year 2008 much more detailed reports about their FOIA processing, requester waiting time, and backlogs. Unfortunately, because agencies lacked adequate tracking mechanisms at the time the law was enacted, the first set of annual FOIA reports issued under the new provisions do not yet fully describe the state of FOIA at federal agencies.

What they do report clearly is that agencies still have substantial backlogs of pending FOIA requests. Based on the most recent annual reports, which cover Fiscal Year 2008, there was still a FOIA request that was 17 years old.¹ In fact four agencies had requests older than 15 years.² Nine more had requests between 15 and 10 years old.³ I could continue, but I think those examples are sufficient to illustrate the problem. Indeed, because we have been tracking the ten oldest pending FOIA requests at federal agencies since 2003 – prior to the requirement that agencies report their ten-oldest pending requests – we were able to compare the Fiscal Year 2008 results with those from 2003. We found that in several instances agencies had kept up with the passage of years, but had not made significant progress completing processing of their oldest requests.

One area where the new reporting provides a more fulsome picture of agencies' activities is the response time statistics. The OPEN Government Act required agencies to begin reporting both median and average response times along with the lowest and highest response times. The Fiscal Year 2008 reports demonstrate how these statistics can reveal whether an agency has a systemic delay problem or simply significant outliers that skew their statistics.

I hesitate to say more about agency responsiveness because the available data is one year old. Agencies are scheduled to file their Fiscal Year 2009 annual reports in February 2010, however, and I urge the Committee to take a close look at whether there have been any progress eliminating backlogs and improving response times.

¹ Central Intelligence Agency.

² Central Intelligence Agency, Department of Defense, National Archives and Records Administration, and National Security Agency.

³ Air Force, Interior, Army, Homeland Security, Defense Intelligence Agency, Department of Justice, Federal Aviation Authority, Navy and Treasury.

Office of Personnel Management Report on FOIA Personnel

One of the provisions of the OPEN Government Act of 2007 required the Office of Personnel Management to provide recommendations to Congress regarding a series of potential ways to improve personnel practices for employees who administer the Freedom of Information Act (FOIA) in the federal government. The report issued by OPM at the close of the Bush Administration, on December 18, 2008, fell short of the expectations of both government FOIA professionals and members of the public who regularly file FOIA requests. It concluded that there were no steps that OPM could take government-wide to enhance the quality and effectiveness of FOIA personnel. When news of the report reached FOIA personnel and members of the FOIA requester community several months later, it was greeted with significant disappointment.

The American Society of Access Professionals (ASAP) and a coalition of non-governmental organizations that regularly make FOIA requests each wrote directly to the new head of OPM, John Berry, requesting that OPM reconsider the report. Based on those letters, OPM leadership met with ASAP's Board of Directors and I am told that OPM will conduct additional analysis on the issues raised by Congress for that report. This Committee should consider asking OPM to communicate its conclusions directly to the Committee.

Attorneys' Fees Provisions

The OPEN Government Act changed the standard for when requesters who are forced to go to court to obtain information under FOIA are eligible for attorneys' fees. By reversing *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598 (2001), for FOIA cases and reinstating the catalyst theory, it prevents game-playing by agencies who deny a request until the requester sues, and then reverse their position and release records. Now that agencies must face the consequences of attorneys' fees for this type of behavior, it is our hope that they will make the right decision from the start.

Currently, however, the availability of attorneys' fees for some requesters remains in question because courts are divided on whether the new provision applies to cases pending at the time of the enactment of the OPEN Government Act. Several lower courts have addressed this question and, recently, the D.C. Circuit determined that the amendments to the FOIA do not apply to cases pending at the time of enactment.

Obama Administration FOIA Policy

Perhaps the most interesting issue to discuss is the impact of the Obama Administration policies on FOIA. In preparation for this testimony, I reviewed various report cards and assessments put out by a range of groups and I also contacted several lawyers and FOIA requesters at other non-governmental organizations to discuss their perspectives.

There is no doubt that the Obama Administration has changed the course that the prior administration had set in this area. On his first full day in office, the President issued a series of memoranda and executive orders setting forth his transparency agenda. One memorandum specifically directed a presumption in favor of the release of government information in response to FOIA requests and promised to “usher in a new era of open Government.”⁴ This was soon followed in March 2009 by Attorney General Eric Holder’s memorandum on FOIA policy. It rescinded Attorney General John Ashcroft’s FOIA policy⁵ and instructed that DOJ will only defend FOIA denials when disclosure is prohibited by law or when an “agency reasonably foresees that disclosure would harm an interest protected by one of the statutory exemptions” from disclosure.⁶ This was followed shortly thereafter by detailed guidance from the Office of Information Policy at the Department of Justice that describes in greater detail how to implement the presumption of openness and the foreseeable harm standard.⁷ The speed with which these memoranda were issued demonstrates the fundamental nature of this Administration’s commitment to open government.

Many of the requesters I have spoken to would say, however, that implementation of the discretionary release standard is more mixed.⁸

There have been many decisions to release information that had been withheld by the Bush Administration. These include, for example, Department of Justice Office of Legal Counsel (OLC) memoranda about interrogation techniques, a Central Intelligence Agency Inspector General Report on interrogation, a report prepared by the Intelligence Community Inspectors General on the warrantless surveillance program, the decision to permit pictures of the return of fallen soldiers at Dover Air Force base, and systematic release of White House visitor logs. The release of these types of records serves the core purpose of the FOIA because they inform the public about controversial and important government policies.

On the other side of the balance are several high profile refusals to release records, including the continued refusal to release OLC memoranda concerning the warrantless surveillance program and the continued effort to block release of images of detainees at Abu Ghraib that two courts have ruled must be released. Early litigation positions in a number of lawsuits, including suits involving missing White House e-mails,

⁴ Obama, Barack, “Memorandum for the Heads of executive Departments and Agencies: Freedom of Information Act,” (Jan. 21, 2009).

⁵ Ashcroft, John, “Memorandum for Heads of all Federal Departments and Agencies: The Freedom of Information Act,” (Oct. 12, 2001).

⁶ Holder, Eric, “Memorandum for Heads of executive Departments and Agencies: Freedom of Information Act,” (March 19, 2009).

⁷ Department of Justice, FOIA Post, OIP Guidance: President Obama's FOIA Memorandum and Attorney General Holder's FOIA Guidelines - Creating a "New Era of Open Government," (April 17, 2009), <http://www.usdoj.gov/oip/foiapost/2009foiapost8.htm>.

⁸ My testimony today does not discuss the Administration’s policy on state secrets privilege or the broader open government directive process that also was initiated on January 21, 2009. In addition, this testimony only touches briefly on the issues of classification, declassification, controlled unclassified information, and sensitive but unclassified information, each of which have been under consideration by the Obama Administration.

the agency status of the White House Office of Administration, and the release of White House visitor logs, did not show a shift from prior administration policy, although several of those positions have changed or shifted in recent months.

Our experience with ordinary FOIA requests that are not the subject of litigation is that we are more frequently being asked whether we want draft and deliberative process material that would automatically have been denied under the prior administration policy. In one instance, we were provided with a re-review of a set of important records purportedly on the basis of the new policy. Those records, transcripts of FBI interviews with Saddam Hussein, offered a tremendous insight into important events and a central personality in recent foreign and military policy.

Having said that, many concerns remain among frequent FOIA requesters about the implementation of the Obama policies. In particular, the Holder memorandum does not instruct a case-by-case review of pending FOIA litigation. Although I am aware of a few cases in which additional records were released after the issuance of the Obama and Holder policies, in many instances formal motions or out-of-court requests by FOIA requesters that the government reconsider its withholdings rather than continue to litigate about the documents have been met with refusal. By contrast, under the FOIA policy established by Attorney General Janet Reno, the Department of Justice coordinated a merits review of all pending and prospective FOIA litigation handled by the Federal Programs Branch of the Department of Justice Civil Division, Civil Divisions of United States Attorneys' offices nationwide, and the Tax Division of the Department of Justice.⁹ The Department of Justice reported on the results of that review in 1994.¹⁰

Attorney General Reno also took a number of additional steps to reinforce the foreseeable harm standard after the October 4, 1993, issuance of President Clinton's and her FOIA memoranda: she made a series of public speeches about FOIA and openness,¹¹ she instituted FOIA-related performance standards throughout the Department of Justice,¹² and she reiterated the FOIA policy through a 1997 and a 1999 memorandum to the heads of all executive departments and agencies.¹³ We hope to see Attorney General Holder follow a similar path over the course of his tenure as Attorney General.

⁹ Department of Justice FOIA Update, Vol. XV, No. 2 (1994), http://www.usdoj.gov/oip/foia_updates/Vol_XV_2/page1.htm.

¹⁰ Department of Justice FOIA Update, Vol. XV, No. 4 (1994), http://www.usdoj.gov/oip/foia_updates/Vol_XV_4/foialit.htm.

¹¹ *Supra* n. 9 (honoring the annual Freedom of Information Day celebrated on James Madison's birthday at which she described a series of measures taken to instill open government values throughout the Department of Justice); Department of Justice FOIA Update, Vol. XVII, No. 3 (1996), http://www.usdoj.gov/oip/foia_updates/Vol_XVII_3/page3.htm (addressing American Society of Newspaper Editors); Department of Justice FOIA Update, Vol. XIX, No. 4 (1999), http://www.usdoj.gov/oip/foia_updates/Vol_XIX_4/page1.htm (addressing more than 6000 FOIA personnel from a range of departments and agencies at DOJ FOIA training).

¹² Department of Justice FOIA Update, Vol. XVI, No. 3 (1995), http://www.usdoj.gov/oip/foia_updates/Vol_XVI_3/page1.htm.

¹³ Department of Justice FOIA Update, Vol. XVIII, No. 2 (1997), http://www.usdoj.gov/oip/foia_updates/Vol_XVIII_2/page1.htm; Department of Justice FOIA Update, Vol. XIX, No. 4 (1999), http://www.usdoj.gov/oip/foia_updates/Vol_XIX_4/page3.htm.

In addition, there are a series of steps that the new Administration could take to more actively implement President Obama and Attorney General Holder's guidelines. These include:

1. The Administration should direct agencies to issue regulations implementing the OPEN Government Act of 2007 and the Obama/Holder Guidance concerning discretionary releases of information. To date, only a small percentage of agencies have revised their regulations to reflect recent changes in law and policy. Thus, important matters such as new timing and fee provisions, tracking requirements, a new definition of a representative of the news media, and new reporting requirements are not spelled out in most agencies implementing regulations.
2. In order to make President Obama and Attorney General Holder's vision of affirmative disclosure a reality, the Department of Justice guidance on implementation of the E-FOIA Amendments of 1996 should be revised to direct agencies to use a broader approach to prospectively identifying records that are likely to be the subject of multiple requests.¹⁴
3. The Department of Justice, in conjunction with the Office of Management and Budget, should develop a plan to systematically review agency compliance with the E-FOIA's requirements.
4. All agencies should begin accepting requests and providing responses electronically through the Internet.
5. The Department of Justice should report publicly on the effect of the Holder FOIA guidelines, including specifically any cases in which it refused to defend a FOIA withholding and any cases in which the new guidelines had an impact on pending litigation.
6. The Department of Justice should commit to good faith mediation of all disputes before OGIS and direct federal agencies to submit to OGIS mediation.
7. Each agency should be required to report in March 2010 and March 2011 on steps taken to implement the President and the Attorney General's memoranda.
8. The White House should agree, as a matter of discretion, to treat the Office of Administration as an agency for the purpose of FOIA so that the Office accepts and processes FOIA requests.

Threats to FOIA

I want to end by noting several policies and programs that continue to threaten the reach of the FOIA. The nascent controlled unclassified information (CUI) framework and related use of sensitive but unclassified (SBU) labels raises concerns amongst the public. Although the CUI framework has as its purported purpose enhancement of information sharing, there are few protections for public access built into the framework. There is no Executive Branch effort of which we are aware to address the broader SBU

¹⁴ Although it is beyond the scope of this hearing, we believe that the Administration should aggressively address its electronic records preservation and management policies to ensure that records will not continue to disappear as agencies rely increasingly on electronic information.

problem. The Obama Administration has conducted a review of the CUI framework and a report apparently has been submitted to the White House that provides the results of that review.

A related issue is the national security classification and declassification program that currently is governed by Executive Order 12958, as amended. The Obama Administration conducted a review of these programs over the summer and recommendations have been submitted to the White House for revision of the Executive Order. In both instances the Administration sought out public input on the programs. Nonetheless, there has not been a public release of the resulting reports or any public notice process to receive comments on new policy recommendations.

Finally, new legislative proposals regularly include new specific exemptions from FOIA. These so called “(b)(3)” provisions are incorporated into the FOIA through 5 USC Section 552(b)(3). This Committee and others in the Senate and the House have been responsive to concerns about (b)(3) exemptions and have sought to focus and reformulate proposals to ensure that they do not unduly undermine the FOIA. I urge you to continue this work and to continue to advance the OPEN FOIA Act introduced by Senators Leahy and Cornyn that would require Congress to openly and clearly state its intention to provide for statutory exemptions to FOIA in proposed legislation.

I hope that these observations have been helpful and I am happy to respond to your questions.

Biographical Information for Meredith Fuchs

Meredith Fuchs serves as the General Counsel to the non-governmental National Security Archive at George Washington University. At the Archive, she oversees Freedom of Information Act and anti-secrecy litigation, advocates for open government, and frequently lectures on access to government information. She organized a coalition of more than 60 groups that made transparency recommendations adopted by President Obama on the first full day of his administration. She has supervised seven government-wide audits of federal agency FOIA implementation. Ms. Fuchs is the elected Secretary of the Board of Governors of the D.C. Bar, the mandatory bar association for over 90,000 attorneys licensed to practice law in the District of Columbia. She served for two years as the Secretary of the Board of Directors of the American Society of Access Professionals (ASAP). She is the author of “Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy,” 58 Admin. L. Rev. 131 (2006); and “Greasing the Wheels of Justice: Independent Experts in National Security Cases,” 28 Nat’l Sec. L. Rep. 1 (2006). Previously she was a Partner at the Washington, D.C. law firm Wiley Rein & Fielding LLP. Ms. Fuchs served as a law clerk to the Honorable Patricia M. Wald, U.S. Court of Appeals for the District of Columbia Circuit, and to the Honorable Paul L. Friedman, U. S. District Court for the District of Columbia. She received her J.D. from the New York University School of Law.