



**Senate March 29, 2022
FOIA Hearings**

**“DOJ’s Lack of Enforcement”
+
Malfeasance
+
Open the Government
Statement for the Record**

**PUBLIC COMMENT
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**Copy to: Senate Judiciary, House Oversight,
Vanita Gupta (DOJ), Debra Wall (NARA)**

Outline

1. Opening Comments

- [Hammond Recommendations to FOIA Advisory Committee & Chief FOIA Officers Council](#)
- [Case for Recommendations - DOD Malfeasance?](#)
 - Case of Walter Reed's FY 2013 Annual FOIA Report and raw data to BUMED involving seemingly: false official statements, admitted alteration of records during litigation, admitted destruction of records, materially false quarterly and annual FOIA reports, and more.
- [Acknowledgments](#)
 - FOIA Advisory Committee
 - "Saving FOIA" - Margaret Kwoka
 - Muckrock.com - Best FOIA Portal

2. [News Media Alliance - DOJ's Lack of Enforcement](#)

3. [Statement of Lisa Rosenberg @ Open The Government](#)

Hammond Recommendations

Recommendations to FOIA Advisory Committee & Chief FOIA Officers Council

Related to All

1. Require contemporaneous posting of FOIA raw data logs.
 - a. See “Case for Contemporaneous FOIA raw data logs.”
 - b. Some DOD entities seemingly lie, alter and destroy FOIA raw data records after annual FOIA reports, knowingly submit massively false reports, and their quarterly data does not match annual FOIA reports. (e.g., Walter Reed, Navy, BUMED, Defense Health Agency).
2. Require agencies to amend past quarterly and Annual FOIA Reports.
 - a. See [Hammond, Robert](#) **DOD Massive False FOIA Reporting. Part 1. Letter to SECDEF, Complaint to DOJ OIG**
 - b. They are grossly inaccurate every year; some FOIA requests and appeals will never be reported; FOIA.gov data is materially inaccurate (DOJ and OGIS own this mess).
3. Evaluate admitted, incontrovertible alteration and massive destruction of FOIA records, despite being advised countless times to preserve them. Evaluate the inadequacy of funding and mission accomplishment of

NARA's Unauthorized Dispositions (UD) unit wrt alteration and destruction of FOIA records.

- a. DOD admits to altering FOIA processing log raw data and routinely admits to destroying records despite being advised countless times to preserve them for judicial review.
 - b. DOD's position in litigation (supported by DOJ) is that "nothing in FOIA requires records to be preserved."
 - i. The Chief FOIA Officers Council & FOIA Advisory Committee must address preservation of FOIA records & relevant federal statutes.
 - c. DOJ OIP sends me correspondence wherein DOD admits to destroying FOIA records subject to NARA GRS retention and to specific notices to preserve them. Yet DOJ OIP is oblivious to what their own compliance inquiry responses say (copy & past from agency), and DOJ OIP has done nothing whatsoever about this.
4. Require all agencies participating in FOIAonline.gov to produce plans to preserve all FOIAonline records, which are unique and subject to FOIA.
 5. Issue guidance discouraging/preventing automated destruction of FOIA case processing records and seeking a change to NARA GRS to make FOIA case processing records permanent.
 - a. DOD admits to (errantly/unlawfully) destroying potentially hundreds of thousands of records over a short time (Navy records schedule).

- b. NARA GRS 4.2 requires that FOIA and Privacy Act case files be retained for 6 years after final agency action or 3 years after final adjudication by the courts, whichever is later.
 - i. But requesters, unsatisfied with a FOIA response, often seek case records of prior FOIA request extending retention further.
 - ii. FOIA Officer has no idea of when FOIA case records are eligible for destruction.
 - iii. NARA now requires all that records be submitted digitally.
 - iv. FOIA case records should be permanent. Virtually no cost.

Related to Office of Government Information Services (OGIS)

- 6. Allow OGIS and DJO OIP to make referrals to Special Council in egregious compliance violations or willful withholding.
- 7. Allow OGIS to review records in camera and to release them.
- 8. Affirm that OGIS may use binding and non-binding arbitration as part of dispute resolution; else seek legislation to codify this.
- 9. Place OGIS under Congress with direct funding and reporting; eliminate Executive branch bias and OGIS conflict (particularly wrt NARA records).
- 10. Require OGIS to stipulate the annual funding it requires and study current OGIS funding shortfall and mission failure.

a. [Robert Hammond](#) - October 22, 2021 - NARA, Please Fund OGIS!!
(PART 1)

11. Require OGIS to properly report the number of times agencies or the FOIA public liaisons engaged in dispute resolution (as required by law), and to report the number of times OGIS or the Agency refused to participate.
12. Review OGIS apparent unlawful Public Comments Posting Policy and amend it as recommended.
 - a. [Robert Hammond](#) - October 22, 2021 - OGIS Posting Policy for Public Comments
13. Issue guidance on unlawful violations of the Americans with Disabilities Act in FOIA redactions (e.g., illegible 6-point red font against a black background (DOJ does this)).
14. Require OGIS to post contemporaneous ADR logs and closure letters as they did in the past.
 - a. OGIS annual reports appear materially false.
15. Require OGIS to conduct a statistically a significant sample of Annual FOIA report raw data to FOIA portal data to source records every year; else get GAO to do it.
 - a. OGIS essentially uses NARA Records Management support to review procedures and audits only limited sub-component data, such that it would take OGIS 400+ years to do a single statistically significant sample of one year's FOIA data.

b. [Robert Hammond](#) - January 16, 2022 - Failure - FOIA Compliance Oversight & Funding. Part 2. No Joking Matter.

16. Require OGIS to re-institute and post ADR satisfaction surveys.

Related to DOJ Office of Information Policy

1. Allow OGIS and DJO OIP to make referrals to Special Council in egregious compliance violations or willful withholding.
2. Require DOJ OIP to post contemporaneous compliance inquiry logs with issues and resolution.
 - a. DOJ IOP's annual Litigation and Compliance Reports appear massively false.
3. Require DOJ OIP to stipulate the annual funding it requires, and study current DOJ OIP funding shortfall and mission failure.
 - a. [Robert Hammond](#) - October 28, 2021 - Failure: FOIA Compliance Oversight & Funding.
4. Stipulate what costs must be included in litigation costs and require agencies to preserve contemporaneous records (e.g., time sheets) for six years.

Case for Recommendations - DOD Malfeasance?

CASE FOR RECOMMENDATIONS

- Posting Contemporaneous FOIA Logs
- OGIS Ability to Review Records in Camera and Release Them
- OGIS Binding Arbitration
- DOJ and OGIS Ability to Refer Egregious Cases to the Office of Special Council
- Amending Past Annual FOIA Reports and Raw data
- OGIS Statistically Significant Samples of FOIA Raw Data
- Increased Funding and Authority for OGIS and DOJ OIP

My examples relate to DOD, Navy, Bureau of Medicine (BUMED), Defense Health Agency (DHA) and Walter Reed but may be extrapolated across DOD and other departments/agencies.

See my Public Comments [Hammond, Robert](#) **DOD Massive False FOIA Reporting. Part 1. Letter to SECDEF, Complaint to DOJ OIG**

Case of Walter Reed's FY 2013 Annual FOIA Report DOD Malfeasance?

[Based on available records. Ready to correct any errors.]

Case of Walter Reed's FY 2013 Annual FOIA Report and Raw Data to BUMED involving seeming: false official statements, false sworn declarations, admitted alteration of records during litigation, entering of such as court documents, admitted destruction of records, materially false quarterly and annual FOIA reports, and more is below.

In response to my April 1, 2014 FOIA request to Navy BUMED seeking Walter Reed's FY 2013 Annual FOIA report, raw data and forwarding correspondence, BUMED **falsely stated** it did not receive Walter Reed FOIA reports or raw data.

In contradiction, **BUMED** recently told NARA's Unauthorized Disposition (UD) unit that it had received the report/raw data but **DESTROYED it**, even though it was subject to FOIA and retention under NARA GRS (and remains so today). NARA has opened a second UD case related to all BUMED FOIA case processing records and communications for my April 1, 2014 FOIA request.

[Contrary to denials, Navy records show Walter Reed submitted the FY13 report to BUMED. BUMED and Navy's DON-FOIA/PA Officer received FY 13 FOIA quarterly reports and BUMED received past unredacted FOIA report logs.]

After denying my April 1, 2014 request under B5 (deliberative process), DOD provided a **Vaughn Index citing a 17-page log** with withholding in entirety under B5 and B6 (privacy), **but later produced a 16-page log during litigation.**

After being caught, **Walter Reed's FOIA Officer admitted during litigation to altering the 16-page log.** Her account of only font size changes to improve the appearance of the log does not comport with DOD filings citing deleted rows and case numbers. Extent of alterations unknown. Unaltered log never produced.

[How do known altered records get into litigation? Who knew what and when?]

What is more, the **after-the-fact materially altered Log** contains dated alterations 365 days AFTER the close of FY 2013 (B5?), after my April 1, 2014 FOIA request to BUMED, after my May 27, 2014 appeal (due to no reply) and my September 15, 2014 appeal addendum following B5 denial.

[I am not a lawyer, but I don't think you are supposed to alter final report records (particularly after they are sought under FOIA, appealed & seemingly during litigation) or alter Vaughn Index material. Also, BUMED - destroy records??]

The after-the-fact materially altered 16-page FY 2013 Log contains dated alterations as late as 30 Sep 2014, blank spaces, missing sequential numbers,

potentially removed content, etc.

[DHA Appellate Authority (also Agency Council) knew this? Who else?]

See *also* after-the-fact materially altered log cases 13-53, 13-54 & 13-56 citing litigation holds. Litigation filed March 2, 2016, meaning that dated alterations were apparently made after litigation (in addition to 16-page vs. 17-page log).

The after-the-fact materially altered 16-page log contains redactions under B7, which DOD never claimed in their Vaughn Index or filings. (13-35, 13-42)

The after-the-fact materially altered 16-page log also contains redactions under B4, which DOD never claimed in their Vaughn Index or filings. (13-12).

The after-the-fact materially altered 16-page log also contains redactions under B5. (13-10, 13-16). DOD/DOJ removed withholding the entire log under B5, but never cited in their filings any B5 redactions within the after-the fact materially altered log.

After stating [past tense] that she had removed B7 redactions and reduced B6 from fifty-three to fifteen cases, and after DOD/DOJ stated that said log had been or would shortly be produced, Judge Ketanji Brown Jackson ordered DOD to produce said log (and other similar records), which DOD never did.

[Yes, now Supreme Court Justice Ketanji Brown Jackson.]

While falsely stating that BUMED had not received Walter Reed FOIA reports since 2009, BUMED and Navy's DON-FOIA/PA Officer (Robin Patterson) were getting FY 2013 FOIA quarterly reports from Walter Reed that do not match the numbers in the after-the-fact materially altered 16-page log/Annual FOIA report.

BUMED also received Walter Reed's FY 2012 FOIA report (released on appeal with no B6 redactions of requester identities after DOD denied the FY 2013 FOIA report under B5).

Apart from NARA's GRS requiring FOIA case processing records preservation for "6 years after final agency action or 3 years after final adjudication by the courts, whichever is later," I sent numerous correspondences to Walter Reed's FOIA Officer, chain of command and those holding responsive records to preserve them for judicial review.

DOD's response, "Immaterial. FOIA does not require preservation of records."

So, after eight years and six years of litigation, I still do not have Walter Reed's unaltered, FY 2013 FOIA report and raw data as Walter Reed sent it to

BUMED to fully document DOD massive false FOIA reporting.

I sent Walter Reed 39 FOIA/PA requests in FY 2013, nearly all of which remain open but not reported in DOD's quarterly or annual FOIA reports. Walter Reed's after-the-fact materially altered FY 2013 FOIA processing log contains nine case numbers for my requests.

I may place hundreds of examples of DOD False Reporting and potential malfeasance into the public domain, along with my correspondence to the entire DOD chain of command from the FOIA officer, through the public liaison, agency heads, service/agency secretaries, DOJ OIP, OGIS, and the former Secretary of Defense, if that is what it takes to effect meaningful change.

Meanwhile, I will work with DOD's Chief FOIA Officer, Joo Chung, and staff to improve FOIA. I will work with anyone who has a compelling interest in improving FOIA: Walter Reed's FOIA Officer, FOIA mail orderly, mail services, healthcare resolutions, BUMED's FOIA Officer, DHA's current FPL, DON-FOIA/PA's FOIA Officer, agency heads, service/agency secretaries, the Secretary of Defense & staff.

I may also work with whistleblower oversight/investigative bodies as appropriate.

Also, pls let me know of any inaccuracies herein. I will correct.

Acknowledgements

For years I have been complaining about the complete lack of compliance oversight by Department of Justice Office of Information Policy (DOJ OIP) and the NARA Office of Government Information Services.

It is encouraging that so many FOIA advocacy groups are saying the same thing & that Congress strongly agrees. See related presentation, “Senators Unite to Slam FOIA Compliance.”

FOIA Advisory Committee

The FOIA Advisory Committee has done fabulous work in its 2020 – 2022 term draft recommendations.

Wow! “**OGIS 2.0: Reimagining FOIA Oversight**” recommendations are the most consequential of any made by the Committee. Thank you, **David Cuillier, A.Jay Wagner, Thomas M. Susman, Patricia A. Weth!!!**

Direct funding from Congress (\$1.8M to start) and the ability for OGIS to review records in camera and release them would dramatically improve FOIA and save agencies and requesters time and money.

The FOIA Advisory Committee is the premier venue for making improvements.

Some of the smartest people on the planet! If you have a passion for FOIA or are just drowning at your agency and want to make things better, pls consider seeking appointment to next year's FOIA Advisory Committee.

The next FOIA Advisory Committee meeting is May 5, 2022.

Saving FOIA!

Also, congratulations to author **Margaret Kwoka** on her book, "Saving the Freedom of Information Act." An engaged free press is vital to our Democracy. Margaret, you ROCK!

Looking forward to "Saving FOIA Part II" & happy to contribute.

Muckrock.com - Best FOIA Portal

Best FOIA Portal is Muckrock.com. Correctly sends request to state & fed or you give address. Auto follow-up. File appeals. You can share request with the world or embargo until you are ready. Join others in "projects."

I hope Muckrock has someone on the FOIA Advisory Committee next year. Huge issue is replacement for FOIAonline and Muckrock has the expertise to help.



Senate Holds FOIA Hearing

By *Staff* March 31, 2022

On March 29, the Senate Committee on the Judiciary [held a hearing](#) on the Freedom of Information Act (FOIA) and how to improve transparency in the 21st century. All of the Senators were in agreement that FOIA needs work. They discussed that despite a decrease in FOIA requests, there has been an increase in backlog, as well as the incredibly long agency response time. The Alliance's coalition partner Open the Government submitted a [statement for the record](#) that highlighted some of FOIA's serious issues and potential solutions, including providing agencies resources and maximizing affirmative disclosures. The statement also points out how the [DOJ's recent FOIA guidelines](#) do relatively little to help the issues FOIA requesters are facing, despite taking over a year to release the memo. The hearing also showed the DOJ's lack of enforcement mechanisms, as the DOJ witness could only point to training and guidance as ways to ensure compliance with FOIA guidelines. [Read more here.](#)

Statement of Lisa Rosenberg @ Open The Government

Statement of Lisa Rosenberg
Executive Director at Open The Government
Before the Senate Judiciary Committee
On “The Freedom of Information Act: Improving Transparency and the
American Public’s
Right to Know for the 21st Century”
March 29, 2022

Chairman Durbin, Ranking Member Grassley, and Members of the Committee, thank you for the opportunity to submit a statement for the record regarding the Freedom of Information Act (FOIA). My name is Lisa Rosenberg and I serve as the Executive Director at Open The Government. Open The Government is an inclusive, nonpartisan coalition that works to strengthen our democracy and empower the public by advancing policies that create a more open, accountable, and responsive government. Open The Government and many of our coalition partners have long worked with this Committee to monitor trends in government transparency and to respond to challenges with agency compliance with the FOIA statute.

We write you today to discuss three key issues for the Senate Judiciary Committee to investigate while providing oversight on the FOIA: Increasing agency resources to support FOIA operations; maximizing affirmative disclosure; and the Attorney General’s recent memo on FOIA.

I. Increasing Agency Resources to Support FOIA Operations

A central obstacle that plagues FOIA offices across the federal government is a lack of dedicated funding and resources. Advocates—both inside and outside of government—have long cited deficient resources as the primary reason agencies are unable to meet FOIA’s statutory timelines for completing requests. The Department of Justice’s Office of Information Policy (OIP), which is required to monitor compliance with FOIA across the federal government, noted this concern over a dozen years ago and to date Congress has failed to address the issue.¹

Congress must demonstrate its commitment to access to information by providing the necessary resources that will allow agencies to comply with the FOIA statute. First, rather than funding FOIA operations out of agencies’ general administrative budgets, Congress must provide specific “line-item” budgets for agencies’ FOIA operations, just as they do for Inspectors General offices. Second, Congress should ensure agencies are addressing their FOIA backlogs and increase funding if necessary to reduce the backlogs. When Congress increased funding to the Department of Interior to reduce its FOIA

¹ Department of Justice. (1990, January 1). FOIA Update: FOIA Affected by Budget Restraints. <https://www.justice.gov/oip/blog/foia-update-foia-affected-budget-constraints>

backlogs, it achieved an impressive 10% reduction in a single year. Similarly, the Appropriations Committee is working with the Department of Homeland Security to monitor its long-term compliance with a court-mandated requirement to keep its FOIA backlog clear and increase funding to the Department if needed.²

Finally, Congress should invest in new and emerging technology, such as e-discovery tools, to improve staff efficiencies and the public’s user experience.³ This recommendation has been endorsed by the FOIA Advisory Committee and accepted by the Archivist of the United States.

II. Maximizing Affirmative Disclosure

In FY 2020, government agencies received nearly eight hundred thousand FOIA requests.⁴ In order to return records to the public within the statutorily mandated twenty business days, Congress requires agencies maximize “affirmative disclosure”—mandating the release of specific documents without the need for a FOIA request. For example, when the Environmental Protection Agency unveiled its “MyProperty” tool, which allows the public to find commonly

² *Nightingale v USCIS*, No. 19-03512, 2020 WL 7640547 (N.D. Cal. Dec. 17, 2020)

³ National Archives. (2020, July 9). Report to the Archivist of the United States.

<https://www.archives.gov/files/ogis/assets/foiaac-final-report-and-recs-2020-07-09.pdf>

⁴ Department of Justice, Office of Information Policy. Summary of Annual FOIA Reports for Fiscal Year 2020

requested records on an online portal, its FOIA volume decreased by 33%.⁵ Under the FOIA Improvement Act of 2016, Congress required agency officials to search their records and begin to proactively disclose large categories of records. Unfortunately, agencies have treated these new obligations as a mere recommendation instead of an actual obligation and as a consequence the volume of FOIA requests continues to increase.

Moreover, rather than shining a light on government actions, FOIA has instead become a tool for individuals seeking information about themselves which the government holds. For example, 81 percent of requests to the Department of Veterans Affairs come from veterans seeking their own medical records. Such “first-party” requests dominate the FOIA requests received by the majority of agencies which receive a high volume of FOIA requests. As Professor Margaret Kwoka wrote in her book, *Saving the Freedom of Information Act*, 67 percent of the FOIA requests reviewed across the federal government (387,625 of 577,982) were for persons seeking records for themselves and not for the purpose of government oversight.⁶

These statistics reveal that agencies are not taking seriously their obligations to find ways to proactively disclose records and are instead using FOIA for

⁵ Kwoka, M. *Saving the Freedom of Information Act*. Cambridge University Press, 2021 (page 181)

⁶ Id.

purposes for which it was not designed. Further, the public commonly requests records such as visitor logs, calendars for agency heads, and reports submitted to Congress which are also not affirmatively disclosed by agencies. At the same time, the Department of Justice's Office of Information Policy provides agencies some training and guidance but does not have strong oversight on compliance. For example, when OIP found the Department of Housing and Urban Development (HUD) made zero proactive disclosures for two years, it only asked HUD if its numbers were accurate but didn't provide oversight on *why* HUD was not proactively disclosing documents.⁷

By all these measures, it is clear that FOIA's affirmative disclosure requirements are being ignored by agencies across the federal government.

III. The Attorney General's Recent Memo on FOIA

For well over a year, members of civil society raised serious concerns about the slow pace at which the Department of Justice (DOJ) was issuing its FOIA guidelines. These concerns caused the Senate Judiciary Committee to send a bipartisan letter to the DOJ to inquire why the guidelines were so delayed.⁸ It

⁷ Government Accountability Office. (2021). Freedom of Information: Actions Needed to Improve Agency Compliance with Proactive Disclosure. (GAO Publication No. 21-254). Washington, D.C.: U.S. Government Printing Office. <https://www.gao.gov/assets/gao-21-254.pdf>

⁸ Mattela, T. (2022, February 23). Lawmakers Press Garland on Access to Documents for Public, Congress, Wall Street

was only after numerous inquiries by Congress that DOJ released the current guidelines which should be viewed with deep skepticism as there are few substantive changes from prior FOIA memos. The new guidelines are, at best, a mere recitation of what agencies should already be doing under existing legislation. For example, Attorney General Garland’s guidelines state that agencies should apply a “presumption of openness” to records, which has been DOJ’s FOIA policy since 1993.⁹ Similarly, the FOIA memo states agencies should avoid using exemptions merely because information could *technically* be withheld. This position was articulated by Attorney General Holder in 2014 and has been largely unimplemented by agencies. Finally, the Garland memo directs agencies to maximize proactive disclosure, which, as noted above, is already mandated yet is not being implemented.

Another major deficiency of the Garland FOIA memo is its lack of any creative, new policy initiatives. Attorney General Janet Reno issued FOIA guidance that included a “presumption of openness,” a novel approach by the Department of Justice that embraced the public’s right-to-know. The Garland memo offers no new ways to improve agency compliance with FOIA and seems to have been an exercise in “checking the box” rather than a meaningful attempt to improve

Journal. <https://www.wsj.com/articles/lawmakers-press-garland-on-access-to-documents-for-public-congress-11645649962>

⁹ Department of Justice. (1993). FOIA Update: Attorney General Reno’s FOIA Memorandum. <https://www.justice.gov/oip/blog/foia-update-attorney-general-renos-foia-memorandum>

access to information.

When Congress enacted the Freedom of Information Act, it embarked on a bold experiment in government transparency and accountability. The statute has been effective in exposing malfeasance, waste, fraud, and abuse by bad actors. However, FOIA operations are strained due to neglect, particularly with funding and technology. Agencies are inundated with requests and struggle to process them because of a large volume of “first-party” requests which are not being affirmatively disclosed. And the Office of Information Policy, which ostensibly monitors compliance with FOIA, has abdicated its responsibilities with inaction.

Congress has the ability to address many of the obstacles to creating a more open government. We appreciate the commitment of this Committee to strengthening the public’s right to know and are committed to working with you to reform FOIA to fulfill its original mission.

We thank the Committee for allowing us the opportunity to provide this testimony.