

Testimony of Daniel J. Metcalfe
Adjunct Professor of Law and Executive Director, Collaboration on Government Secrecy
American University Washington College of Law
Before the House Committee on Oversight and Government Reform

March 17, 2011

Good morning, Mr. Chairman and Members of the Committee. As someone who has worked with the Freedom of Information Act (“FOIA”) for almost thirty-five years now, I am pleased to be here to provide an academic perspective on the Act and its governmentwide administration.

My own views today are rooted in my work at American University’s Washington College of Law in recent years, where I teach courses in government information law and direct the Collaboration on Government Secrecy (“CGS”). CGS came into existence in 2007 as the first academic center at any law school in the world to focus on this subject area; three more have been established since then. In addition to maintaining an extensive Web site as an academic resource for all those who are interested in government secrecy and transparency (as two sides of the same coin), we have conducted a dozen day-long programs on the subject, with particularly heavy focus on the FOIA.¹ Next month, on April 27, we will hold our fifteenth program, an academic conference on the protection of homeland security information.

This academic perspective is also informed by decades of experience in leading the component of the Department of Justice that discharges the Attorney General’s responsibility to guide all agencies of the Executive Branch on the complexities of the FOIA’s administration. I know first-hand both the difficulties to federal agencies that FOIA requests can pose and the challenges met in encouraging proper compliance with the Act, including new policy conformity, by all agencies notwithstanding those difficulties. Simply put, I have “been there, done that,” through several presidential administrations, time and again.

Obama/Holder FOIA Policy Implementation

So it is through that lens that I view the many ways in which the openness-in-government community has been disappointed by the surprising slowness and incompleteness

¹ CGS’s Web site is found at <http://www.wcl.american.edu/lawandgov/cgs/>. It is a non-partisan educational project devoted to openness in government, freedom of information, government transparency, and the study of “government secrecy” in the United States and internationally. Its mission is to, among other things, foster both academic and public understanding of these subjects by serving as a center of expertise, scholarly research, and information resources; promote the accurate delineation and development of legal and policy issues arising in this subject area; conduct educational programs and related activities for interested members of the academic and openness-in-government communities; and become the premier clearinghouse for this area of law both in the United States and worldwide. It engages in no lobbying activity but rather provides expertise at congressional request.

of the Obama Administration's new FOIA policy implementation during these past two years.² This began with the Holder FOIA Memorandum itself, quickly issued as it was. Contrary to all expectations, and despite the precedent established by Attorney General Janet Reno not long before, the Holder FOIA Memorandum did not by its terms apply its new "foreseeable harm" standard to all pending litigation cases -- where it could have had an immediate, highly consequential impact.³ Rather, it contained a series of lawyerly hedges that appear to have effectively insulated pending cases from it.⁴ As one of the speakers at CGS's FOIA Community Conference in January pointedly observed,⁵ the FOIA-requester community is still waiting to see a list of any litigation cases in which the "foreseeable harm" standard has been applied to yield greater disclosure, and there is a very strong suspicion that there are few at best and perhaps even

² Actually, the specific policy standard employed by Attorney General Eric Holder is not "new," in that he adopted the same "foreseeable harm" standard that was established by the Reno FOIA Memorandum in October 1993 and used during the Clinton Administration. This standard is designed to govern both litigation and agency decisionmaking at the administrative level, and it works hand in hand with a strong emphasis on the making of discretionary disclosures wherever possible under the Act.

³ As an example, when the "foreseeable harm" standard was applied to all pending litigation cases under the Reno FOIA Memorandum, the Justice Department applied it even to a litigation case that had recently concluded, one in which the courts already had upheld nondisclosure for a Justice Department report investigating the Nazi past of former U.N. Secretary-General Kurt Waldheim. See *FOIA Update*, Vol. XV, No. 2, at 1 (noting that the new policy "triggered a decision to disclose the report entirely as a matter of administrative discretion . . . [even] though there was a substantial legal basis for withholding, affirmed by the court of appeals"), available at http://www.justice.gov/oip/foia_updates/Vol_XV_2/page1.htm. Ironically, the subject matter of that case was the same as that of the "Nazi-hunter" report that the Justice Department inexplicably withheld large portions of during this past year, even after that report's "leakage" to the *New York Times* revealed the seeming non-sensitivity of the many portions withheld. One could not ask for a more striking direct contrast between Reno and Holder FOIA policy implementation than that.

⁴ Specifically, the Holder FOIA Memorandum states as follows: "With regard to litigation pending on the date of the issuance of this memorandum, this guidance should be taken into account and applied if practicable when, in the judgment of the Department of Justice lawyers handling the matter and the relevant agency defendants, there is a substantial likelihood that application of the guidance would result in a material disclosure of additional information." One of the speakers at a recent CGS program, herself a former Justice Department FOIA litigator, described this as "a major loophole" continuing even to the present day.

⁵ This recent program, entitled "Transparency in the Obama Administration -- A Second-Year Assessment," is part of a series of such FOIA Community Conferences that have been conducted by CGS in January of each year (i.e., in 2009, 2010, 2011), and one is likewise planned for January 20 of next year. CGS's Web site contains a compilation of all of its programs to date, which is available at this link: <http://www.wcl.american.edu/lawandgov/cgs/programs.cfm>.

“no such cases.”⁶ Thus, the best possible opportunity to press for full adoption of this standard throughout the Executive Branch -- in a concrete, exemplary fashion -- was lost.

Neither did the Holder FOIA Memorandum or its initial implementation guidance take the expected step of directing agencies to reduce their backlogs of pending FOIA requests.⁷ Whereas the Reno FOIA Memorandum and its implementing guidance had immediately confronted that difficult subject, their 2009 counterparts contained hardly a word about it, let alone a direction to reduce any backlog; that did not come until the broader Open Government Directive was issued in December 2009. This led to the Justice Department straining at this time last year to claim governmentwide backlog-reduction “progress” based upon new annual FOIA report statistics that could hardly be connected to what the Obama Administration actually had done.⁸

This remains a matter of concern today for more than one reason. First, there is the awkward fact that the Justice Department’s own FOIA backlog has not been reduced in the past year; rather, it has been allowed to worsen. When the “lead” government agency for the FOIA fails in its entirety to reduce its own backlog (and, worse yet, fails in this first truly relevant statistical year), it makes it much harder to press other departments and agencies to do so. And this “do as I say, not as I do” problem is exacerbated by the fact that the Department’s high-visibility leadership offices saw their own numbers of pending requests increase in this past year,

⁶ This speaker, an expert FOIA litigator, elaborated as follows: “We have asked the Justice Department on several occasions to consider publishing a list of cases in which a decision has been made based on the Holder guidance that the Department is not going to defend a FOIA lawsuit and they consistently refuse to make that information public -- and I believe it is because there are no such cases.” CGS produces Webcasts of all of its programs, and this comment can be found at the 48th minute of the part of the program Webcast that is available directly at this link: <http://media.wcl.american.edu/Mediasite/SilverlightPlayer/Default.aspx?peid=84bf0e08-c5fc-4d67-8ce4-82d841c7e53e>.

⁷ Also perplexing, to say the least, was the Holder FOIA Memorandum’s primary emphasis, as an “important implication” of its openness policy, on the making of “partial disclosures” of records that cannot be disclosed in full -- as if agencies were not already doing so to begin with. In fact, all federal agencies have been following this practice, without question, since the mid-1970s, as matter of clear statutory command, not policy. Yet even as recently as this past week, the Justice Department was still stating as if with significance that Attorney General Holder “directed agencies to make partial disclosures of records whenever full releases are not possible.” It would be far better to place concentrated emphasis on implementation of the renewed “foreseeable harm” standard than on a decades-old statutory requirement, as if the latter were something new.

⁸ If one looks closely at the nature and context of those statistics, including the fact that they reflected activity during a reporting year (Fiscal Year 2009) that began on October 1, 2008, it becomes clear that they bore no evident connection to new policy activity.

by an aggregate figure of nearly 33%.⁹ This makes it impossible to lead by example.¹⁰

And on the subject of leading by example, there is the matter of White House “visitor logs,” which for decades were regarded as “agency records” of the United States Secret Service and subject to the FOIA as a matter of law. Recently, the White House established a new, “voluntary disclosure policy” for such records that is highly commendable insofar as it involves automatic disclosures of them at regular intervals and in far greater numbers than ever before. But hidden beneath that policy, and its very “voluntariness,” is the highly questionable notion that the FOIA no longer applies to those records -- which means that they are fully shielded from the Act’s accountability mechanisms. It also means that, within this “voluntary” scheme of things, the White House can effectively withhold from the public any White House visitor information it chooses, whenever it chooses, invisibly. We have focused on this at one of our recent CGS programs as an area of considerable concern.¹¹

Exemption 2

Turning to the FOIA’s exemptions, the one that cries out for immediate attention is of course Exemption 2. This is because federal agencies have for nearly three decades been using the so-called “High 2” aspect of this exemption to withhold sensitive information the disclosure of which could reasonably be expected to enable someone to circumvent the law, especially in a post-9/11 context. Ten days ago, however, the Supreme Court firmly ruled that this longstanding interpretation of Exemption 2 is incorrect; as of that date, “High 2” simply ceased to exist. See *Milner v. Dep’t of the Navy*, No. 09-1163 (Mar. 7, 2011).¹² This means that the large amounts of information that agencies have regularly withheld under Exemption 2 alone are no longer properly withheld on that basis, and it places agencies in an immediate quandary over how to

⁹ According to the Department’s most recent annual FOIA report, the numbers of FOIA requests that remained pending as of the beginning and end of that reporting year (Fiscal Year 2010) increased by 34.8% in the Office of the Attorney General, 31.8% in the Office of the Deputy Attorney General, and 26% in the Office of the Associate Attorney General.

¹⁰ This of course connects to the fact that the “Leahy/Cornyn Faster FOIA” bill, which focuses solely on the subject of backlog reduction and was passed by the Senate in the last Congress, is expected to be re-introduced this week.

¹¹ The Webcast for this particular program session can be found at this direct link: <http://media.wcl.american.edu/Mediasite/SilverlightPlayer/Default.aspx?peid=ba4d8b58-78b5-483b-95af-bc876063678e>. See also *From FOIA Service to Lip Service: The Unexpected Story of White House Visitor Logs*, 36 Admin. & Reg. Law News 3 (Spring 2011).

¹² It should be noted that with this, Exemption 2 in its entirety is now a “dead letter,” at least as a matter of policy under the Holder FOIA Memorandum. This is because the exemption’s other aspect, known as “Low 2,” uniquely is not based on any expected harm from disclosure but rather shields an agency from the mere burden of responding to requests for low-level administrative information of no real significance. As such, any “Low 2” information readily fails the “foreseeable harm” policy standard and could not properly be withheld in accordance with it.

handle sensitive such information both at the administrative level and (in some cases most immediately) in FOIA cases that are presently pending in court.

Justice Kagan, in her opinion for the Court in *Milner*, observed with some understatement that the Court's decision "may force considerable adjustments," and she suggested FOIA Exemptions 1, 3, and 7(F) as "tools at hand" for that. Slip op. at 18. Justice Alito, writing separately, took pains to suggest likewise as to Exemption 7(F) "[i]n particular."¹³ Slip op. at 1 (Alito, J. concurring). No doubt some part of the *Milner* "adjustment" will involve at least two of these three FOIA exemptions, but there also should be no doubt that federal agencies now maintain highly sensitive records -- computer system vulnerability assessments, for example -- with respect to which remedial legislation will be necessary.¹⁴ And with due respect to Justice Kagan's suggestion that Congress might possibly address this through Exemption 3, it appears that nothing less than a wholesale rewrite of Exemption 2, carefully contoured to protect security-sensitive information with a firm harm standard, is now warranted.¹⁵

Exemption 3

Speaking of Exemption 3, I think the Committee will want to carefully consider the proliferation and use of other statutes to withhold information under the FOIA, which has been a matter of growing concern in recent years. I know that it struggles almost daily, as does its Senate counterpart, to identify for full attention any proposed new "Exemption 3 statute," a process made only somewhat easier by the 2009 amendment of Exemption 3 on that point. But beyond that, there is the matter of the many existing statutes that are used by agencies to withhold information from FOIA requesters on a daily basis. This past year, CGS conducted an academic study of this by first compiling all of the different statutes that are relied upon by

¹³ To be sure, some portion of the highly sensitive information previously withheld by agencies on an "anti-circumvention" basis may well qualify for protection under Exemption 7(F) in lieu of it. The compilation of cases in the "Post-9/11" FOIA Litigation section of CGS's Web site indicates that. See: <http://www.wcl.american.edu/lawandgov/cgs/post911foia.cfm#ex7f> (citing, e.g., *Living Rivers, Inc. v. U.S. Bureau of Reclamation*, 272 F. Supp. 2d 1313 (D. Utah 2003)). It also is foreseeable that some small portion will qualify under Exemption 7(E) of the Act as well. See *id.* As to the viability of Exemption 1 toward that end, such an approach, to any degree, would run directly contrary to the current policy imperatives favoring less national security classification rather than more.

¹⁴ This will figure prominently in the academic conference on the subject of homeland security protection that CGS is holding on April 27.

¹⁵ Such a remedial legislative process would of course involve taking the rare step of "opening up the FOIA's exemptions," something that has not been done since the mid-1980s and which historically is viewed with anxiety on both sides of the FOIA divide. In such an event, for instance, Congress conceivably could be pressed to legislatively overrule some or all aspects of the Supreme Court's landmark *Reporters Committee* decision with respect to Exemptions 6 and 7(C). See, e.g., *O'Kane v. U.S. Customs Serv.*, 169 F.3d 1308, 1310 (11th Cir. 1999) (describing efforts to overrule *Reporters Committee* indirectly through 1996 FOIA Amendments).

agencies for Exemption 3 withholding, more than 300 in total, and then analyzing them for technical compliance with Exemption 3's substantive standards. We found that less than half of them, just slightly more than 150, do properly qualify for use under Exemption 3 -- which means that by their own admissions (in their annual FOIA reports) agencies are employing roughly twice as many statutes in this way as they ought to and withholding untold amounts of information from FOIA requesters in so doing.

The Committee could take this groundwork and readily build upon it, simply by asking each agency that reports using a questionable statute under Exemption 3 to look into why and how it is doing so.¹⁶ Perhaps some agencies would try to take issue with CGS's substantive evaluation of one or more of the statutes that they use (and that would be only fair), but I daresay that if the Committee were to take such a step it would at a minimum result in dozens of agencies realizing that many dozens of the statutes they now regularly use are not truly Exemption 3 statutes at all. (See the Exemption 3 section of CGS's Web site, which can be reached directly at this link: <http://www.wcl.american.edu/lawandgov/cgs/about.cfm#exemption3>.)

In sum, there certainly is much reason to look askance at the implementation of new FOIA policy over the course of the past two years, to put it mildly, all rosy characterizations of it notwithstanding. Perhaps in time the public will be shown some real, concrete examples of this policy at work, both in litigation and at the administrative level. But to those who have good reason to expect better, it already is a disappointing case of too little too late at best.

Thank you for the opportunity to testify today and I look forward to answering your questions.

¹⁶ On the Committee's part, this would require no more than taking an agency's annual FOIA report, comparing its required list of Exemption 3 statutes used that year against the CGS-vetted list (found at http://www.wcl.american.edu/lawandgov/cgs/existing_exemption_3_statutes.cfm), and then inquiring about any statute found on the former but not the latter. For the agency's part, such a congressional inquiry would necessarily consume resources that otherwise would be available to handle pending FOIA requests more quickly, but should not be overly burdensome in that regard.

Daniel J. Metcalfe

Dan Metcalfe joined the faculty of WCL in 2007 as a Faculty Fellow in Law and Government upon retiring from a career in government service that began at the Department of Justice in 1971, and he now is an adjunct professor as well as executive director of the school's Collaboration on Government Secrecy. In 1981, after a judicial clerkship and serving as a Justice Department trial attorney, he was appointed as a founding director of the Department's Office of Information and Privacy (OIP). For more than a quarter-century, he guided all federal agencies on the government-wide administration of the Freedom of Information Act, directly supervised the defense of more than 500 FOIA and Privacy Act lawsuits in district and appellate courts, and met with representatives of nearly 100 nations and international governing bodies as they considered the development and implementation of their own government transparency laws. He became a career member of the Senior Executive Service in 1984, the youngest Justice Department attorney then and since to hold such a position.

In 2010, he was appointed by World Bank President Robert B. Zoellick to be a member of the World Bank's Access to Information Appeals Board, an independent tribunal that makes final decisions on appeals taken under the Bank's newly adopted worldwide information disclosure policy; he serves with board members from India and France, and together they hold final authority to order the public disclosure of World Bank records. In 2009, he was a member of the U.S. delegation to the Inaugural Sino-U.S. Dialogue on Rule of Law and Human Rights in China, followed up by further dialogues in Xiemen and Beijing in 2010, and he has given dozens of presentations on international transparency around the world. He also holds positions as an Honorary Senior Research Fellow at University College London, as a consultant to the Administrative Conference of the United States (ACUS), and as a contributing editor of the *Administrative Law & Regulatory News* publication of the American Bar Association's Section of Administrative Law.