Written Testimony of Gabe Rottman on behalf of the American Civil Liberties Union Before the U.S. House of Representatives Committee on Oversight and Reform

Hearing on

"Ensuring Transparency through the Freedom of Information Act"

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Submitted by the
ACLU Washington Legislative Office

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The American Civil Liberties Union ("ACLU") welcomes this opportunity to testify before the House Committee on Oversight and Government Reform on "Ensuring Transparency through the Freedom of Information Act."

We urge members of the committee to support a number of common sense reforms to the Freedom of Information Act ("FOIA") both to bring this essential law further into the digital age and to close a number of loopholes that threaten transparency and, consequently, accountability.

For nearly 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures and communities to defend and preserve the individual rights and liberties that the Constitution and laws of the United States guarantee everyone in this country. With more than a million members, activists and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico and Washington, D.C., to preserve American democracy and an open government.

FOIA, which will celebrate its half-century birthday next year, embodies James Madison's warning that "[a] popular government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy – or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own Governors must arm themselves with the power which knowledge gives." We strongly support an expansive application of the law, and fear, among other things, excessive and unnecessary secrecy in the name of "national security."

Accordingly, we offer the committee a series of recommendations, both substantive and procedural, that would increase the effectiveness and consistency of FOIA compliance across government. In brief, Congress should:

- Mandate the creation of a government-wide automated portal that would provide a "one-stop shop" for the submission of FOIA requests to any agency, track all requests and allow requesters to easily check the status of their requests;

- Require posting of all disclosed documents online in an easily text-searchable format and require agencies to store all electronic documents, including emails, also in an easily searchable format;

- Clarify that agencies are not permitted to claim falsely that no responsive documents have been located when, in fact, they could assert a "Glomar" response (i.e., the existence of the documents is itself classified and the agency is neither "confirming nor denying" the presence of responsive documents) or could give notice that is truthful and informative, yet does not confirm that possibly excluded records exist under the narrow exclusions set forth in 5 U.S.C. § 552(c) (2006);

- Resist the creation of new exemptions, such as those proposed in the cybersecurity legislation that recently passed the House of Representatives and is pending in the Senate;

- Pass the FOIA reform legislation currently pending in both chambers, and reintroduce from earlier reform bills the public interest balancing test for exemption 5, which has been repeatedly misused to resist disclosure of governing law for law enforcement and national security agencies; and

- Address the growing problem of secret law, which is antithetical to a participatory democracy and is embodied by, among other things, the classified opinions permitting "bulk" surveillance of innocent Americans under dubious legal reasoning and the unreleased opinions drafted by the Department of Justice's Office of Legal Counsel ("OLC") authorizing, for instance, torture or targeted killing.

We address each of these in turn below.

1. Create a Central FOIA Portal for Requesters

For several years now, various stakeholders, including the Office of Government Information Services ("OGIS"),[1] have recommended the creation of a "one-stop shop" for FOIA requesters that would provide a central portal for requests to any agency or agencies, track all requests and give requesters an easy way to check the status of their requests.[2] This portal would eliminate inefficiencies and duplication of both work and technology across different agencies. It would also encourage novice requesters to use the system and permit greater coordination and centralization of more complex searches involving, for instance, field office coordination or multi-agency responses.

Such a portal could also work hand-in-glove with new initiatives to improve coordination among various entities when preparing a FOIA response. The OGIS, for instance, could leverage the portal to serve its desired function as the central point-of-contact for multi-agency FOIA requests and for relaying information found to requesters as appropriate.[3]

Some limited progress has been made toward a central portal, most notably with FOIAOnline, a partnership among several government entities to permit a requester to submit requests to all relevant agencies, to search for other requests and to search material already released.[4]

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[1] OGIS Recommendations to Improve the FOIA Process, http://1.usa.gov/1EH8RHB.

[2] Please note that the FOIA reform bills pending in the House would mandate the creation of such a portal. *See* FOIA Act, H.R. 653, 114th Cong., 1st Session § 2(a) (2015). Though we recommend passage of FOIA reform legislation below, we address the need for a central portal separately given the ease with which it could be created and its potentially exceptional value in streamlining the FOIA process and making it more accessible and user-friendly to novice requesters.

[3] *OGIS Recommendations* at 1.

[4] FOIAOnline, foiaonline.regulations.gov. Current participants include the Environmental Protection Agency, the Department of Commerce (except the U.S. Patent & Trademark Office), the U.S. Customs and Border Protection, the Office of General Counsel at the National Archives and Records Administration, the Merit Systems Protection Board, the Federal Labor Relations Authority, the Pension Guaranty Corporation, the Department of the Navy, the General Services Administration, the Small

FOIAOnline, though limited to more recent records and participating agencies, could serve as a model for a future government-wide portal, which would significantly reduce duplicative efforts and technology and would facilitate the submission process for novice and experienced requesters alike.

2. Require the Posting of All Releasable Records in Text-Searchable Format, and Mandate that Agencies Store Electronic Documents also in an Easily Searchable Format

The FOIA Act, currently pending in this chamber, would require agencies to post "frequently requested" documents (those that have been sought three or more times) online "regardless of form or format."[5] This would be a helpful reform, but we urge Congress and the relevant agencies to explore the posting online of all documents and records found to be releasable, in an easily searchable format. In addition to providing an easily searchable repository of records for the original requester, an online database with all FOIA releasable records would present efficiencies and cost savings for government.

Relatedly, agencies should also not wait for specific FOIA requests before releasing and posting documents of clear interest to the public, including, for instance, records detailing agency operations or procedures. In other words, agencies should take an expansive view of the mandatory disclosure requirements in the so-called "Reading Room" provisions of 5 U.S.C. § 552(a)(1)-(2) (2006).

Finally, agencies should be required to store all electronic documents, including emails, in an easily searchable format. Agencies have resisted ACLU FOIA requests on the grounds that it would be too burdensome to search archived documents.

3. Clarify That Agencies May Not Falsely Deny that Records Exist When Truthful Alternatives to Disclosure Exist

In 2011, the Department of Justice proposed a set of new FOIA regulations, one of which would have allowed components of the department to effectively lie when faced with requests that they determine are covered under the exclusions of 5 U.S.C. § 552(c) (2006).[6]

This section, enacted as an amendment to FOIA in 1986, was meant to cover the very limited set of circumstances where acknowledging whether responsive documents existed could imperil an ongoing law enforcement action. That is, the statute authorizes the government to "treat records as not subject to the requirements of FOIA" in three narrow circumstances: (1) where the request concerns an investigation into the requester and the requester is not yet aware of the

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Business Administration and the Federal Communications Commission. Privacy Act requests must be sent directly to the appropriate agency.

[5] H.R. 653, 114th Cong. § (a)(1)(A)(iii) (2015).

[6] Freedom of Information Act Regulations, Proposed Rule, 76 Fed. Reg. 15,236, 15,239 § 16.6(f)(2) (March 21, 2011) (to be codified at 28 C.F.R. pt. 16).

investigation (and where disclosure could impair the investigation);[7] (2) where the requester seeks information about a specific informant and the informant's identity has not been publicly confirmed;[8] and (3) where the request seeks FBI records pertaining to foreign intelligence or counterintelligence, or international terrorism, and the existence of the records is classified information.[9]

As proposed, the new regulation would have mandated that the DOJ component "respond to the request as if the excluded records did not exist. This response should not differ in wording from any other response given by the component."[10]

As detailed in comments submitted by the ACLU, Citizens for Responsibility and Ethics in Washington ("CREW") and Openthegovernment.org, nowhere in the legislative history of FOIA or its amendments, or in any of the governing case law, is there authority for the agency to lie to a requester. Rather, the appropriate response to a legitimate § 552(c) exclusion could mirror the appropriate response in a legitimate "Glomar" case, in which an agency claims that the existence of the records itself is classified and responds that it will therefore neither confirm nor deny the existence of the records.[11] As articulated in these joint comments, agencies responding to a request implicating the exclusions should say so: "we interpret all or part of your request as a request for records that, if they exist, would not be subject to the disclosure requirements of FOIA pursuant to section 552(c), and we therefore will not process that portion of your request."[12]

Such a response would protect the government's interests by neither confirming nor denying the existence of the records. At the same time, it would permit a FOIA requester to challenge an agency's claim that, as a legal matter, the subject matter of the request falls within one of the exclusions. (Some agencies subsequently provided similar notice, but it is not at all clear that all agencies have adopted a uniform policy that bars false representations to FOIA requestors (and, potentially, the courts)).[13]

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7 5 U.S.C. § 552(c)(1)(A)-(B) (2006).

8 § 552(c)(2).

9 § 552(c)(3).

10 76 Fed. Reg. at 15,239 § 16.6(f)(2).

11 Comments from the ACLU et al. to Caroline A. Smith, Office of Information Policy, Dep't of Justice, Re: Docket No. OAG 140; AG Order No. 3259-2011; RIN 1105-AB27 (Oct. 19, 2011) [hereinafter *ACLU Comments*].

12 *Id.* at 2.

13 *See Islamic Shura Council of S. California v. F.B.I.*, 779 F. Supp. 2d 1114, 1117 (C.D. Cal. 2011) (finding that FBI made "blatantly false" statements to FOIA requestor and the court when it apparently relied on section 552(c) and denied the existence of responsive documents). Notice to FOIA requestors and the courts is necessary to facilitate judicial review. *Id.* at 1166 ("The FOIA does not permit the

Following public outcry over the proposed regulation, the Justice Department pulled the offending provision. Unfortunately, in recent months, the ACLU received a response from the Bureau of Prisons ("BOP"), a DOJ component, that we have reason to believe is a false claim that records do not exist.

Earlier this year, the ACLU submitted a FOIA request to the BOP in connection with an episode detailed in the executive summary of the Senate Select Committee on Intelligence's report on the CIA's interrogation program post 9/11 ("SSCI Executive Summary"). According to the summary, BOP personnel inspected and assessed a "black site" prison in Afghanistan known as Detention Facility Cobalt or the "Salt Pit" on or around November 2002.[14]

In response, the BOP flatly stated that no responsive records were found, and did not invoke any of the exemptions, any of the exclusions under § 552(c) or provide a "Glomar" response.[15] Such a response is deeply concerning given the implausibility of there being no responsive records of the BOP visit. According to the SSCI Executive Summary, in November 2002, a delegation of BOP personnel visited Cobalt for a multi-day inspection and provided "recommendations and training" to CIA personnel.[16] The executive summary further cites a series of emails with the subject line "Meeting with SO & Federal Bureau of Prisons."[17]

At the very least, such a delegation would have produced travel planning documents, internal discussions of who should attend and interagency communications with the CIA to coordinate the logistics of the trip, as well as more substantive documents like assessments, briefings and debriefings, training documents and notes from visiting personnel. Accordingly, we have reason to believe that the BOP's claim that no responsive records exist is false. Rather than asserting a false claim, which violates FOIA, to the extent the agency believes the existence or non-existence of responsive records is itself not subject to disclosure, it should be required to assert either a Glomar response or invoke notice language indicating that to the extent § 552(c) applies, it is being invoked.[18] These alternatives permit judicial review of the agency's claims in keeping with FOIA and its object and purpose.

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government to withhold information from the court. Indeed, engaging in such omissions is antithetical to FOIA's structure which presumes district court oversight.").

[14] *Id.* at 1.

[15] Glomar responses were first articulated in *Phillippi v. CIA*, 546 F.2d 1009 (D.C. Cir. 1976), in response to a FOIA request to the CIA seeking records on the Glomar Explorer, a deep sea drilling vessel built secretly for the CIA to recover the Soviet submarine K-129.

[16] Executive Summary of the Senate Select Committee on Intelligence's Study of the Central Intelligence Agency's Detention and Interrogation Program 60 ("SSCI Report").

[17] *Id.* at 60 nn. 299-301.

[18] The ACLU believes that neither would be appropriate given the public disclosure of the BOP's visit in the SSCI Executive Summary, but a false response certainly is a violation of the FOIA.

Congress should clarify that false responses reporting that no documents exist are absolutely forbidden. Such responses have no place in a democratic society, especially in cases involving national security issues, which are already often cloaked in unmerited secrecy and overclassification. Further, were such falsehoods to become routine, they would have the perverse result of encouraging needless FOIA litigation. Groups like the ACLU would increasingly be unwilling to take "no responsive documents" responses at face value and would be forced to go to court to "look behind" the asserted "no responsive documents" claim each and every time.

4. Resist the Creation of New Exemptions to FOIA

In April, the House of Representatives passed two cybersecurity "information sharing" bills, the Protecting Cyber Networks Act ("PCNA")[19] and the National Cybersecurity Protection Advancement Act ("NCPAA"),[20] which were drafted by the House intelligence committee and House homeland security committee, respectively. Initially both included a broad new "exemption 10" for FOIA that would cover information shared with the government pursuant to the new laws, but also threatened to exempt from disclosure documents revealing misuse or abuse of the new information sharing authorities.

Fortunately, both committees stripped out the new blanket exemption 10 before final passage, though it still remains in the Senate's Cybersecurity Information Sharing Act ("CISA"),[21] currently pending before that chamber. Unfortunately, both the PCNA and NCPAA still include language specifying that "cyber threat indicators" (broadly defined) and defensive measures (also broadly defined) are exempt from disclosure "without discretion" under 5 U.S.C. § 552(b)(3) (2006), which may also exempt from disclosure documents that are clearly in the public interest and eliminate agencies' traditional discretion to disclose documents even if technically withholdable.

Both the blanket exemption 10 in CISA and the "without discretion" withholding under exemption 3 would set a dangerous precedent and could shield from public view documents disclosing fraud, wrongdoing, waste or illegality in the new cybersecurity information sharing regime proposed in these bills. Worse, these broad amendments to the existing exemptions—which have remained unmolested for many decades—are unnecessary given that the bills clarify that information shared with the government pursuant to the new law is done so voluntarily, which creates a legal presumption against disclosure as confidential business information under exemption 4.

Congress should resist any new exemptions unless proponents can compellingly demonstrate both a need unmet under existing FOIA exemptions and that the proposal is narrowly tailored to permit maximum disclosure of material in the public interest. Recklessly creating exemptions

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19 H.R. 1560, 114th Cong. (2015).

20 H.R. 1731, 114th Cong. (2015).

21 S. 754, 114th Cong. (2015).

would set a precedent that could lead to further exemptions, ultimately undercutting the broad intended scope of FOIA.

5. Narrow the Scope of Exemption 5 Through Passage of a Revised FOIA Act

Currently pending in the House of Representatives is the FOIA Oversight and Implementation Act of 2015 (also called the "FOIA Act"),[22] which contains a number of salutary and important reforms. We support the proposals in the bill, and are especially enthusiastic about a number of these proposed reforms. For instance, the bill would:

- Clarify that documents subject to mandatory disclosure under § 552(a)(1)-(2) must be made available to the public in an electronic, publicly accessible format;

- Post records online of general interest that inform the public of the operations and activities of the government or that have been requested three or more times;[23]

- Mandate that the Office of Management and Budget create an online centralized portal to permit a member of the public to submit a FOIA request to any agency from a single website;

- Codify the president's mandated presumption of openness by prohibiting an agency from withholding information under FOIA unless the agency reasonably foresees that disclosure would cause specific identifiable harm to an interest protected by an exemption to FOIA or unless the disclosure is prohibited by law;

- Create new auditing and reporting requirements to better assess compliance; and

- Clarify that agencies cannot assess search or duplication fees if they have failed to comply with the statutory deadline and have not submitted a written notice to the requester justifying the fees requested.

Although we continue to support FOIA reform legislation, including the FOIA Act, we strongly urge members to reinsert a provision that was stripped out of the previous versions of these bills last Congress that would have created a public interest balancing test for exemption 5. Exemption 5 has been interpreted to cover "deliberative process" and attorney-client privileges and the attorney work product doctrine but has been invoked to withhold government documents that effectively represent final decisions carrying the force of law on quintessential issues of public interest. For instance, exemption 5 was wrongly deployed in an attempt to block

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[22] H.R. 653, 114th Cong. (2015).

[23] Again, we would go further and suggest that all documents released under the law be made available in an electronic, publicly accessible format (though perhaps with exceptions where a requester seeking documents including sensitive information about him or herself would be able to opt out of posting online).

disclosure of OLC memorandums dealing with targeted killing and the collection of phone records without legal process.[24]

Another major exemption 5 problem is the use of the attorney work product doctrine to insulate controlling executive branch legal interpretations from disclosure under FOIA. For instance, the National Association of Criminal Defense Attorneys ("NACDL") is currently litigating to obtain the DOJ's criminal discovery manual—known as the "Bluebook"—which constitutes official guidance for prosecutors but remains secret law.[25]

Notably, the Bluebook was issued following the failed prosecution of Sen. Ted Stevens to head off legislation that would have imposed new requirements on criminal discovery procedure. Now, however, the DOJ will not let anyone see the rules it adopted, claiming they qualify as attorney work product. The ACLU has been litigating a similar case with respect to the notice policy for surveillance under the FISA Amendments Act (i.e., surveillance of communications between individuals in the United States and people abroad). The DOJ has failed to give notice of such surveillance as required by law but refuses to disclose the grounds for withholding notice or the policy governing notice under exemption 5.

Even without a narrowing of exemption 5, the FOIA reform bills currently pending in Congress offer important and needed reforms. That said, we strongly urge Congress to reintroduce the exemption 5 proposals to allow judges to order documents released that technically fall under exemption 5 if the public interest demands it.

6. Address the Ongoing Problem of Secret Executive and Judicial Branch Lawmaking

Secret lawmaking, by either quasi-judicial bodies in the executive branch like the OLC or by the judiciary itself, as with the Foreign Intelligence Surveillance Court ("FISC"), has no place in a modern democracy. Unfortunately, since the attacks of September 11, 2001, secret lawmaking has become de rigueur, and has been used—often backed by untested and therefore what many experts say is less than vigorous legal analysis—to justify, among many other things, torture, indefinite detention, targeted killing and suspicionless "bulk" surveillance.

In 1788, Alexander Hamilton said, "citizens . . . will stand ready to sound the alarm when necessary, and to point out the actors in any pernicious project." But they can only do so if the "public papers [are] expeditious messengers of intelligence to the most remote inhabitants of the Union." Secret lawmaking means that these public papers are kept private, and the issues with which they deal—including the preservation of basic civil liberties or their abrogation—are likewise kept from public view.

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[24] *See* Sophia Cope, *Congress Must Pass FOIA Reform Legislation*, Elec. Frontier Found., Mar. 19, 2015, http://bit.ly/1C8tC2h.

[25] *See* Memorandum in Support of Plaintiff's Cross Motion for Summary Judgment and Opposition to Defendants' Motion for Summary Judgment, Nat'l Assoc. of Criminal Defense Lawyers v. Dep't of Justice, Civil Action No. 14-cv-00269-CKK (D.D.C. filed July 23, 2014).

Congress should be wary of such secret lawmaking and should guarantee in law that any agency action that has the force of law should be disclosed and/or disclosable through FOIA. To the extent that the legal analysis is intertwined with sensitive factual material, the relevant agency should be required either to segregate the two and release an unredacted discussion of the legal analysis or to draft and disclose a summary of the legal analysis. Similar proposals were included in the original National Security Agency surveillance reform bills, and are an important first step in shining the "best disinfectant" of sunlight on secretive post-9/11 signals intelligence activities.[26]

We strongly urge Congress to continue to explore creative ways to combat secret lawmaking at all levels of government, which will serve to increase transparency, improve accountability, facilitate oversight by this body and the public and, ultimately, better perfect our union.[27]

7. Conclusion

Again, we thank the committee for its attention to this crucial issue and its dedication to principles of openness, transparency and accountability.

[26] *See, e.g.*, Uniting and Strengthening America by Fulfilling Rights and Ending Eavesdropping, Dragnet-Collection, and Online Monitoring Act ("USA Freedom Act"), H.R. 3361, 113th Cong. § 905 (2013).

[27] Relatedly, Congress should resist attempts to limit the decision of the Supreme Court in *Milner v. Dep't of the Navy*, 131 S. Ct. 1259 (2011), which eliminated the so-called "High 2" reading of exemption 2 that permitted agencies to withhold internal documents if release threatened to "circumvent" agency regulations or statutes and limited the scope of exemption 2 to internal personnel material, as it should be. *Id.* at [] ("Our construction of the statutory language simply makes clear that Low 2 is all of 2 (and that High 2 is not 2 at all) . . . .").