

Testimony of Kevin M. Goldberg

On behalf of

Sunshine in Government Initiative
American Society of News Editors

on

"History Museum or Records Access Agency? Defining and Fulfilling
the Mission of the National Archives and Records Administration"

Before the

Information Policy, Census and National Archives Subcommittee of the
Oversight and Government Reform Committee of the United States
House of Representatives

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Chairman Clay, Ranking Member McHenry and Members of the Subcommittee on Information Policy, Census and National Archives of the Committee on Oversight and Government Reform, I want to thank you for the opportunity to testify today on behalf of the Sunshine in Government Initiative ("SGI"), a coalition of nine media organizations dedicated to promoting policies that ensure government is accessible, accountable and open.

I am especially proud to be here as Legal Counsel to one of those organizations, the American Society of News Editors ("ASNE"). With some 600 members, ASNE is an organization that includes directing editors of daily news entities throughout the Americas. Founded in 1922, as the American Society of Newspaper Editors, ASNE is active in a number of areas of interest to top editors with priorities on improving freedom of information, diversity, readership and credibility of newspapers.

ASNE members and other journalists are affected by the work of the National Archives and Records Administration ("NARA") in many ways, from their need to directly access records in NARA's possession, to the declassification work of the Information Security Oversight Office ("ISOO"), to NARA's implementation of the Presidential Records Act. We hope that these journalists also will be among those who will reap the benefits of the important new Office of Government Information Services ("OGIS") which has recently been created within NARA.

Mr. Chairman, as you well know, SGI and ASNE have a long history of working with this Subcommittee, and the full Committee, on issues relating to the proper management and distribution of government information. In 2007, ASNE member Clark Hoyt testified before this

Subcommittee at one of the earliest hearings on a bill that eventually would be enacted into law as the Open Government Act of 2007. That bill began its House journey in your Subcommittee, Mr. Chairman. We owe you a debt of gratitude for your help.

We are here today to define the challenges facing NARA in fulfilling its mission. The timing of this hearing could not be more apt. Long viewed as the main repository of government information, the agency is clearly one which distributes those records. The agency estimated in 2006 that it "has up to 9 billion pages of textual records among its holdings." In Fiscal Year 2005, it answered 1,124,066 written non-FOIA reference requests for access to archival and operational records and 9,494 FOIA requests for records housed at the main NARA repository, at regional facilities, at non-NARA repositories, and at the eleven Presidential Libraries.

NARA's website describes the agency as "the nation's record keeper", a designation that suggests NARA views itself primarily as another museum on the Mall. But what purpose is served by keeping records if those records never see the light of day? Even a museum exists primarily to display its acquisitions. So NARA must equally be considered the "nation's record distributor".

NARA's mission mandates that the agency "ensur[es] that the people can discover, use, and learn from this documentary heritage." The democracy, civic education and historical understanding functions that the mission statement also sets forth are impossible without the information contained in records created not just decades ago, but on a continuing basis.

A much quoted visionary for government transparency, Justice Louis Brandeis, saw an active and informed public as critical to a healthy democracy. "Those who won our independence," Brandeis wrote, "believed that public discussion is a political duty; and that this should be a fundamental principle of the American government." Having previously declared that "Sunlight is said to be the best of disinfectants", he also clearly saw access to government information as "democracy's oxygen"; cut off its supply and democracy dies.

The roles of keepers and disseminators of history have long been discussed. Safeguarding access to information is central to SGI's mission. It is one of ASNE's core values. Harold Cross, one of my predecessors as ASNE Legal Counsel, once wrote of access to government information:

It is not enough merely to recognize philosophically or to pay lip service to the important political justification for freedom of information. It is not enough that by virtue of official grace and incentive some information, even in large aggregate volume, does somehow become available. It is not enough that, thanks to the industry and resourcefulness of newsmen, information of governmental activity becomes available to the people speedily, in volume and at low cost.

Mr. Cross wrote these words in a book called The People's Right to Know. It was published in 1953, some thirteen years before FOIA's enactment. That book is largely credited as the genesis of the federal FOIA movement. But fifty-six years later -- and forty-three years after FOIA was passed -- his words still ring true. If anything, the situation might be worse. For the "newsmen" (and newswomen) comprising the membership of ASNE and the other SGI organizations, obtaining government information in any manner resembling a speedy or low cost fashion can still be difficult, if not impossible. And if a reporter from a major daily newspaper invokes the Freedom of Information Act and cannot obtain this information in a timely fashion, what chances does the average citizen have?

That is why today's hearing is so important. NARA now has a dual role in record distribution. The agency holds an enormous amount of records which are sought by journalists, researchers and the public, but it appears to be falling short of desired goals for the distribution of this information. There is also the agency's newly-vested ability to judge other executive branch agencies' to disclosure decisions. Ensuring NARA's dedication to both is vital to our democracy.

NARA needs to perfect its own access policies and activities. The agency, like many others, has significant processing backlogs.

In response to Executive Order 13,392 ("Improving Agency Disclosure of Information"), NARA issued a "FOIA Improvement Plan" on October 16, 2006 in which it claimed that it responded to 76% of all FOIA requests within the statutorily-mandated twenty day response period. While that represented a fifteen percent improvement over the agency's FOIA processing in Fiscal Year 2004, it still falls into what most people would consider the "C" range on a 100 point grading scale. Furthermore, the 76% "success" rate was based on the total of 9,494 FOIA requests mentioned above. That is a relatively small amount of FOIA requests for an agency handling so many records. The bulk of the agency's interaction with the public -- ten times the amount of FOIA requests -- come for reference requests to "archival and operational records" that are much easier to process because they are already publicly available. One would expect that an agency with that much experience in handling and distributing government records would be able to handle that volume of FOIA requests much more efficiently.

Part of the problem is that the agency does not appear to have implemented its own recommendations that emphasize nine practices: affirmative disclosures; proactive disclosure of information; improvements of agency's FOIA Reference Guide; multi-track processing; forms of communication with requesters; acknowledgment letters; a system of handling referrals; additional training; backlog reduction; automated processing; and expedited processing.

One stark example lies in the lack of implementation of the 1996 "EFOIA" amendments which require that requests which "because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records" are affirmatively posted online. There are several links to reference guides and to the "Archival Research Catalog", but direct access to actual records via NARA's "electronic reading room" is somewhat limited. Links exist to highly requested records relating to the JFK Assassination Records Collection Database, Holocaust Era Assets, UFOs and a Letter from the 9/11 Commission Report, as well as some of the agency's own spending records. Unfortunately, these are the same records that were identified in the 2006 FOIA Improvement Plan as the records being proactively disclosed by the agency.¹

It is important to clarify that NARA is not entirely to blame. The agency identified a lack of resources as a key problem in 2006, noting that "the number of FOIA requests NARA receives for archival records increases each year, while our staffing levels are decreasing. There is no

¹ Causing particular pain to ASNE and other SGI members is NARA web page with information for press or journalists, which consists of nothing more than a series of press releases that offer little to no real insight on the agency's activities.

expectation that NARA will receive additional resources designated for FOIA processing of our archival records."²

But it is still troubling that, given the room for improvement and an acknowledgment that "we will continue to look toward revising our processes to ensure maximum efficiency in light of current priorities", the self-reflection appears to have stopped in 2006. The release of the required FOIA improvement plan on October 16, 2006 is the most recent evidence of any internal review by NARA of its FOIA policies and processing.

The need for NARA to get its own house in order is more significant now that Congress has entrusted the agency with a new office designed to deal with the public and other agencies to make the Freedom of Information Act work better. NARA must lead by example as OIGIS becomes the public face of FOIA and the main point of contact for a member of the press or public that has a FOIA-related problem, and as OIGIS review other agencies' FOIA compliance.

OIGIS faces challenges in fulfilling its mandate to evaluate agency compliance with FOIA and media disputes between requesters and agencies. At best, it will help the public obtain information from government (or help reassure wary requesters that an agency denying a request is acting properly) and help agencies fulfill their FOIA obligations. There is equal potential that

² The need for maximum funding of FOIA is not limited to NARA. FOIA processing problems government-wide will be reduced through the dedication of additional funds to allow agencies to hire more FOIA-specific employees, purchase better processing software and, ideally, digitize records which currently exist in paper format. This final part of the puzzle will reap longer term benefits as digital records are easier to search and produce than paper records. In other words, an investment of funding now is likely to save time and money for years to come.

it simply becomes another layer of bureaucracy, adding to the problem it is intended to solve.

We hope today's hearing and the Archivist's future efforts will help ensure this office's success.

We also believe the challenges facing the Archivist and the OGIS staff to make OGIS work are challenges the entire National Archives and Records Administration faces in fulfilling its mission. Like OGIS, NARA has two significant stakeholders: other agencies and the public. OGIS will have to work effectively with other agencies, none more than the Department of Justice's Office of Information Policy ("OIP"), which helps administrations create and implement FOIA policy.³ OGIS ensures these FOIA policies and activities conform to and improve the law.

The task of reviewing the policies and procedures of administrative agencies will require significant OGIS engagement with agencies. To mediate disputes between requesters and agencies, OGIS will have to make itself highly visible to agencies and FOIA requesters, build a reputation as an independent, credible broker of the Freedom of Information Act, and have the resources necessary to do the job. For OGIS to be effective, the Archivist of the United States must embrace OGIS's active engagement with other agencies and the public.

NARA has faced these challenges before. In some respects, the Information Security Oversight Office, about which I will say more in a moment, is charged with managing the classification system across the executive branch, is a model for how well OGIS could work. ISOO works

³ The Department of Justice serves as the government's lawyer when an adverse FOIA decision is appealed to federal court. OIP, as a part of the Department of Justice, is therefore not an unquestionably independent overseer of FOIA policy. OGIS, on the other hand, is the only entity within government that can properly serve as the policeman that ensures agency compliance with Congressionally stated goals for FOIA. Only OGIS can forcefully and credibly say when an agency is falling short of its mandate.

with other agencies to ensure those agencies are complying with their classification requirements and consider public requests for declassification of documents.

OGIS was originally conceived to unburden the entire system of FOIA processing by enhancing requester understanding of the FOIA process, creating uniformity among the agencies, and serving as a valuable alternative to litigation.

OGIS can first help unburden agencies from their FOIA requests by pushing agencies to place more information online without waiting for a request, as the law has required for more than a decade. More information online means fewer burdensome requests. Yet, a review of various agency websites makes one thing clear: NARA is not the only agency falling short in compliance with this requirement, nor is there any clarity in the implementation of this requirement.

As requesters understand they have an ally, they will reach out to OGIS for assistance and education. This will result in better requests. A more informal mediatory role by OGIS will quickly resolve impediments to access and speed up processing by resolving imprecise or misconstrued requests. OGIS can ensure that an agency does not repeatedly deny requests for similar records or that agencies do not reach disparate conclusions regarding the release of the same or similar records.

OGIS may also be able to head off litigation when the parties are simply at an impasse. Clark Hoyt's testimony representing the Sunshine in Government Initiative before this committee almost three years ago recounted the trials and travails of Knight Ridder in extracting valuable documents from the Veterans Administration. He described the many hurdles that Knight

Ridder was forced to overcome in publishing a series of news stories which led to important reforms in the distribution of veterans' benefits. This portion has always stuck with me:

As for Knight Ridder, in addition to the awards and the satisfaction of knowing we did our duty by persevering in the quest to examine the performance of a federal agency that affects millions of Americans, we got legal bills that totaled more than \$100,000.

Very few major news organizations can pursue an adverse FOIA decision to the federal courts. Most FOIA requesters don't even consider litigation a possibility. That's why the stick of an increased likelihood of attorney fees had to be paired with the carrot of avoiding litigation altogether. The 2007 amendments to FOIA made it easier for requesters to recover attorney fees when they prevail and created an alternative to litigation with OGIS.

OGIS' effectiveness in making FOIA work better for federal agencies and the public will hinge in the short term and the long term on whether the office receives the proper support from the National Archive as a whole. That support rests on two key components: funding and independence.

OGIS was appropriated \$ 1 million in Fiscal Year 2009 to get the office started and a budget of \$ 1.4 million for Fiscal Year 2010 that has yet to be approved by Congress. That money has allowed the office to hire a total of 6 employees. We are skeptical that OGIS can achieve the ambitious set of goals and tasks we describe above without more employees and more resources. The office will eventually need more staff to adequately review and synthesize information across ninety-plus agencies, mediate disputes through the use of technology for dispute resolution, interact with the Chief FOIA Officer of each agency and, ideally, assist in the creation and maintenance of proper online "reading rooms" containing frequently requested information.

By contrast, the state of Connecticut's equivalent to OGIS has more than twenty full-time equivalent positions; Pennsylvania's new office has 10. This is why the Congressional Budget Office estimated OGIS would require a budget of \$ 3 million in its first year to set up the office and about \$ 6 million thereafter to be fully functional.⁴

As important as proper funding is a commitment to OGIS independence. As I noted earlier, Miriam Nisbet reports directly to the Archivist himself (for that reason, we also need to find away to move this office from College Park to the downtown NARA location).

The combination of independence and record-keeping acumen is the reason Congress housed this office within the National Archive. The success of the Information Security Oversight Office ("ISOO") influenced this choice. ISOO is considered by the requester community to be highly successful at balancing record maintenance and record distribution functions. ISOO is seen as the independent voice needed to improve the classification system by ensuring that classification rules were being followed, forcing secrecy to be an exception rather than the rule, and leading declassification efforts. Many of the same characteristics driving ISOO's success can be found in the early stages of OGIS.

ISOO is acknowledged as an efficient office that balances the interests of the government and information seekers. Its success was driven by the strong leadership of Steven Garfinkel from 1980-2002 and William Leonard, who was ISOO director from 2002-2008.

We believe the hiring of Miriam Nisbet as OGIS Director is best described as a "coup" (her first Attorney Advisor Corinna Zarek -- formerly the Director of the Freedom of Information Service Center for the Reporters Committee for Freedom of the Press, an SGI member -- is another great addition to the OGIS team). We hope that Ms. Nisbet and her staff will be given the same trust and leeway as the ISOO directors in developing OGIS.

We thank you for the opportunity to present our views on the future of the National Archives and the importance of the new OGIS office to the agency's mission. FOIA is clearly at a crossroads as it moves into its forties.

While it receives periodic checkups and treatment through Congressional oversight and fixes such as the Open Government Act, it is sorely lacking in day-to-day attention. As part of its mission, NARA, through OGIS, will help strengthen FOIA and deliver more information to the public, including the media.

Thank you.