

**OPEN GOVERNMENT: REINVIGORATING THE
FREEDOM OF INFORMATION ACT**

HEARING
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
ONE HUNDRED TENTH CONGRESS

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OPEN GOVERNMENT: REINVIGORATING THE FREEDOM OF INFORMATION ACT

WEDNESDAY, MARCH 14, 2007

UNITED STATES SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Committee met, pursuant to notice, at 10:07 a.m., in room SD-226, Dirksen Senate Office Building, Hon. Patrick J. Leahy, Chairman of the Committee, presiding.

Present: Senators Leahy, Feingold, Cardin, Specter, Cornyn, and Coburn.

OPENING STATEMENT OF HON. PATRICK J. LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT

Chairman LEAHY. Good morning. Today, our Committee will hold an important hearing on reinvigorating the Freedom of Information Act. I believe the enactment of the FOIA 40 years ago was a watershed moment for our democracy. FOIA guarantees the right of all Americans to obtain information from their Government and to know what their Government is doing.

Now in its fourth decade, it has become an indispensable tool in protecting the people's right to know. It sheds light on bad government policies and government waste, fraud, and abuse. Every administration, Democratic or Republican, will send out plenty of press releases when they are proud of things. It takes FOIA to find out when they have made mistakes.

Just this week, amid the growing scandal regarding the firing of several of the Nation's U.S. Attorneys, we witnessed the importance of openness in our Government. We have also witnessed the importance in sunshine laws with the Justice Department's Inspector General's report on the FBI's abuse of National Security Letters. That was a report required by the sunshine provisions that Senator Specter, myself, and others in Congress worked hard to include in the PATRIOT Act reauthorization bill.

Openness is a cornerstone of our democracy. FOIA lets us know what is happening. Whether it is human rights abuses in Iraq, Afghanistan, and Guantanamo Bay, environmental violations at home, public corruption, information about many of the important issues of our time has been obtained through FOIA. But FOIA is facing challenges like it never has before.

During the past 6 years, the administration has allowed lax FOIA enforcement and a near obsession with Government secrecy to dangerously weaken FOIA and undercut the public's right to know. That is because currently Federal agencies operate under a

2001 directive from then Attorney General Ashcroft that reverses the presumption of compliance with FOIA requests that had been issued by the former Attorney General. The administration has sought to erode FOIA by including a broad FOIA waiver for critical infrastructure information in the charter for the Department of Homeland Security, the biggest roll back of FOIA in its 40-year history.

The setbacks to FOIA are coupled with the expanding use of Government secrecy stamps to over classify Government information. Billions of dollars of taxpayers' money is spent every year to classify things that sometimes have been on Government web sites for months before they are classified. We have the unprecedented use of presidential signing statements and the state secrets privilege and so on. These plague FOIA.

In fact, I was checking with the Federal Government, and I said, "What is the oldest FOIA request that is pending and has not been answered?" 1989. That was before the collapse of the Soviet Empire. Things have changed. I praised the President for issuing a directive last year to move forward for Government agencies to improve their FOIA services, but today, more than a year later, they are less apt to get answers than they were before.

The Government Accountability Office found that Federal agencies had 43 a Representatives in Congress from the State of percent more FOIA requests pending and outstanding in 2006 than they had in 2002. As the number of FOIA requests continues to rise, the agencies are not keeping pace. OpenTheGovernment.org says the number of FOIA requests submitted annually has increased by more than 65,000 requests, but, of course, when you do not answer them, they are just pending and are carried forward.

And then you have the exemptions under Section (b)(3) of FOIA that has allowed FOIA exemptions to be snuck into legislation, sometimes with no debate whatsoever, and passed. Then we have a new report by the National Security Archive stating that, 10 years after Congress passed the Electronic Freedom of Information Act—E-FOIA—which I co-authored in 1996, Federal agencies still do not comply with it.

Earlier this week, Senator Cornyn and I reintroduced the OPEN Government Act. We drafted this bill after a long and thoughtful process of consultation with a whole lot of people.

I appreciate the strong partnership that I have with Senator Cornyn on open government issues. The thing we both came to conclude is that the temptation to withhold information can be either in Democratic or Republican administrations. Neither of us knows who is going to be in the new administration not quite 2 years from now. But we do know, both of us, that if we put in strong FOIA legislation, they are going to have to answer questions, and we are all going to be better for it. After all, Government is there to serve all of us, not the other way around. And the only way we can know that is if they answer questions.

[The prepared statement of Senator Leahy appears as a submission for the record.]

Senator Specter?

**STATEMENT OF HON. ARLEN SPECTER, A U.S. SENATOR FROM
THE STATE OF PENNSYLVANIA**

Senator SPECTER. Thank you, Mr. Chairman. I agree with your basic premise that transparency and openness is the very basis of a democracy, and the Freedom of Information Act, which was passed more than 40 years ago, could be a very major step forward in providing that transparency, providing it is followed or it is enforced. To see the statistics which have been published recently that, out of 149 Federal agencies, only 1 in 5 posts on its website all records which are required is very disturbing. And websites today are a principal, if not the principal way of transmitting that sort of information.

I have noted the work which is done by the National Security Archives, talking to Ms. Fuchs for a few moments before we started here. To look at the name of the National Security Archives, you would think it was some high-powered Federal agency, and it is a nonprofit. But they know the questions to ask, and there is much of national security which is outdated or can be disclosed to the public safely. And as I said to Ms. Fuchs, she knows the questions to ask. And she needs help from a statute which can be enforced.

I was talking to Mr. Tom Curley of the Associated Press about the subject of investigative reporting. It has changed a lot in the past several decades. When I was district attorney of Philadelphia many years ago, there was very heavy investigative reporting by the Philadelphia Inquirer and the Philadelphia Bulletin. Today, there is no more Philadelphia Bulletin, as so many afternoon newspapers have ceased to exist. And the Inquirer has changed hands as a result of many cutbacks in staff, and investigative reporting is gone. So that the access to Federal records through the Freedom of Information Act is really a very, very important item. And I believe it has become even more so in the course of the past several weeks as we have seen the heavy intrusion into sources for newspaper reporters, with a parade of reporters taking the stand in a highly unusual fashion in the Libby trial.

I hope that we will move ahead with the legislation which will provide on the Federal level a reporter's privilege. There is a split in the circuits. It is a very unclear, muddy situation. There should be an exception on national security cases, but I believe that before you put a reporter in jail, especially for a long period of time, like Judith Miller was for 85 days, there ought to be a very, very serious national security interest involved. And in that matter, what started out as the outing of a CIA agent, which is an important national security matter, that element was dropped early on. And then the leaker was discovered to be Richard Armitage, the Deputy Secretary of State. So it is a little hard to see why so many reporters were pursued with so much intensity, and especially leading to the incarceration of Ms. Miller for a very long period of time. So I think the alternative here of having some real action under the Freedom of Information Act is very, very important.

In the 42 seconds I have left on a 5-minute opening, I want to commend Senator Leahy and Senator Cornyn for their leadership on this matter, on the legislation. I did not get through the pile of requests yesterday in time to be an original cosponsor, so I will be an un-original cosponsor.

[Laughter.]

Senator SPECTER. And add my name to that legislation today.

Chairman LEAHY. Without objection.

Senator SPECTER. And, Mr. Chairman, I want to yield back my 14 seconds.

Chairman LEAHY. Thank you. Normally we would get right into this, but with Senator Cornyn as one of the two main sponsors of this, I do want to hear from him.

Senator SPECTER. If I may say one more word, I am going to yield to my distinguished colleague, Senator Cornyn, who will take the lead on this side of the aisle. We are very heavily engaged in the U.S. Attorneys issue, and—

Chairman LEAHY. I read about that.

[Laughter.]

Senator SPECTER. And with Senator Leahy occupied, I better go take care of some other Committee business.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you.

We have a few things on the agenda, but, Senator Cornyn?

**STATEMENT OF HON. JOHN CORNYN, A U.S. SENATOR FROM
THE STATE OF TEXAS**

Senator CORNYN. Thank you, Mr. Chairman. I appreciate your comments and your leadership on this important issue, and I am proud to join you in what I think will be very beneficial legislation, which will create greater transparency. Almost as importantly, this will create some procedures with real consequences for the handling of Freedom of Information requests.

I would note Senator Leahy is one of the few members of this Committee who actually participated in the passage of Freedom of Information Act legislation. My experience and my passion for this issue really came from my service as Texas Attorney General, and I would just note that in that capacity I was responsible for enforcing our own State Sunshine Laws, our own State open government legislation. And, you know, I think the Federal Government can learn a lot from the States, and in this area in particular. And I am proud that Missy Cary, who was my right arm on so many of these open government issues, is going to be testifying today and perhaps providing some helpful information to Congress on how we might embrace some of the experience of the States in improving our transparency and the procedures by which we handle open government requests.

I have a longer statement, which I would ask to be made part of the record.

Chairman LEAHY. Without objection.

Senator CORNYN. Thank you. I will keep this short and sweet so we can hear from the witnesses. But I do want to quote from a portion of Ms. Cary's statement, which itself quotes the policy statement that introduces the Texas Public Information Act, because I think it so concisely and so accurately states the issue.

It says, "The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on

remaining informed so that they may retain control over the instruments they have created.”

To me, that very concisely states the issue, and I would just close by saying the entire legitimacy of our form of Government and self-determination is premised upon consent of the governed. We, the people, are in charge. The instruments, in the words of the Texas Public Information Act, the Government, do not tell us what is good for us. We tell the Government what we want. But the only way we can do that knowledgeably is to know what is going on. And with so much temptation to hide the ball—and we all understand that human nature is the same whether it is Republican or Democrat, the temptation is to trumpet your successes and to hide your failures, and we all understand why people do that. But it is important to recognize that the very legitimacy of our form of Government is premised upon consent of the governed. And the people cannot consent to what they do not know, and that is why this legislation and this hearing are so important.

Thank you very much.

[The prepared statement of Senator Cornyn appears as a submission for the record.]

Chairman LEAHY. Thank you. And, Senator Cornyn, Senator Specter is not coming back, if you are going to take the role of the senior Republican here, come on down. You may have difficulty getting re-elected in Texas if we all move down.

I would ask the witnesses to please stand and raise your right hand. Do you solemnly swear that the testimony you are about to give before this Committee will be the truth, the whole truth, and nothing but the truth, so help you God?

Ms. FUCHS. I do.

Ms. HASKELL. I do.

Mr. CURLEY. I do.

Ms. CARY. I do.

Senator COBURN. Mr. Chairman, might I have the privilege of just a few comments?

Chairman LEAHY. Of course.

**STATEMENT OF HON. TOM COBURN, A U.S. SENATOR FROM
THE STATE OF OKLAHOMA**

Senator COBURN. I have another hearing I have to go to.

You know, it is interesting that we have a letter in my office from somebody who has been trying to get information through FOIA for 18 years—18 years. In this past Congress, we passed the Accountability and Transparency Act, which is going to help.

But one of the reasons there is a crisis of confidence in this country over the Government is because there is not transparency. Without transparency, accountability cannot be carried out.

I hope to eventually become a cosponsor of this legislation. There are a couple of small areas in it that I have concerns with, but the more information the American public has, it builds confidence, and it also corrects errors. And it is something we ought to all be engaged in.

The other thing I would caution my fellow Senators is just because we pass a law does not mean it is going to happen. You saw that evidenced yesterday on the floor vote. There is a law called the

Improper Payments Act. It mandates every agency of the Government to do a review of where they are at risk and report to Congress. The Senate refused to force once agency to comply with that law yesterday, which means none of the other agencies have to comply with it either, since now we have voted that Homeland Security does not have to comply with it.

So it is important for us to be realistic. We can pass all the laws we want, but unless Congress is going to put teeth into the laws with consequences, a FOIA change is not going to happen unless there is teeth behind it.

So I thank the Chairman for having this hearing. I am very impressed and excited about the bill, and hopefully the small changes that we would like to see in it will allow us to cosponsor it.

Chairman LEAHY. Thank you. Thank you very much.

Our first witness will be Meredith Fuchs. She is General Counsel for the National Security Archive. During the time she has been there, she supervised five governmentwide audits of Federal agency FOIA performances, including an audit released this week entitled "File Not Found: Ten Years After E-FOIA, Most Agencies Are Delinquent." That gives some indication what the report says. Previously, she was a partner at the Washington, D.C., law firm of Wiley, Rein & Fielding and served as a law clerk to Hon. Patricia Wald of the U.S. Court of Appeals for the District of Columbia Circuit and the Honorable Paul Friedman, U.S. District Court for the District of Columbia. She graduated from the London School of Economics and Political Science with a Bachelor's of Science degree and received her J.D. cum laude from the New York University Law School.

Please go ahead.

STATEMENT OF MEREDITH FUCHS, GENERAL COUNSEL, NATIONAL SECURITY ARCHIVE, GEORGE WASHINGTON UNIVERSITY, WASHINGTON, D.C.

Ms. FUCHS. Chairman Leahy, Ranking Member Specter, and members of the Senate Committee on the Judiciary, I am pleased to appear before you to support efforts to improve the Freedom of Information Act.

Senator Leahy already talked about the National Security Archive. We are a nonprofit research institute and leading user of the FOIA. I have attached to my written statement our E-FOIA report that was issued this week, and I would be happy to talk about it in questions. But I want to touch on a few other issues about why it is so important today for Congress to act.

There are many ways to measure the role of the Freedom of Information Act in our Nation. One way is to look at the work of the news organization headed by Mr. Curley, who sits on this witness panel. The AP has reported remarkable news stories based on records released under FOIA, but this would not have been possible if the AP had not been willing to litigate in court to enforce its rights to information.

This illustrates a significant problem. While the FOIA has been a powerful tool to advance honesty, integrity, and accountability in Government, there is still a culture of resistance to the law in many Federal agencies. Instead of viewing the public as the cus-

tomers or part of the team, the handling of FOIA programs at some agencies suggests that the public is considered the enemy and any effort to obstruct or interfere with the meddlesome public will be tolerated.

The FOIA is a unique law. There is no Federal, State, or local agency that enforces it. It depends on the public to make it work with the tools provided by Congress and an independent judiciary that is willing to remind agencies of their obligations. Based on their own reporting, we know agencies will not make FOIA a tool for timely education about Government activities.

Each agency is required to submit an annual report that provides FOIA processing statistics as well as information on the agency's progress in achieving goals that they set themselves under FOIA improvement plans that were mandated by Executive Order 13392. The reports for fiscal year 2006 were due by February 1, 2007. As of this past Monday, the reports of only 8 out of 15 Federal departments and only 51 out of 75 Federal agencies were available.

The Department of Justice has taken the lead on guiding agencies through the Executive order process. Its own annual report acknowledges that DOJ components have failed to meet 30 different goals set out in its FOIA improvement plan. Most striking to me is the Federal Bureau of Investigation section, which indicates that eight of the FBI's FOIA improvement goals were not met. For some of these goals, the FBI simply pushed back its deadlines by 1 year. For example, they reported that they had 60 vacancies in their FBI FOIA staff and set a goal to fill those vacancies by September 30, 2006. They did not do it, and instead the goal has now been moved to September 30, 2007. They set a goal to review and update their website by December 31, 2006, and as you can see from our E-FOIA report, it is much needed. They failed to do it, and instead moved the deadline to December 31, 2007.

As you know, the FOIA requires a response to FOIA requests within 20 business days. Attached to my testimony is a compilation of the date ranges of pending FOIA requests at Federal agencies. The list was compiled from the agency annual reports referenced above.

As you can see from the charts, at least seven departments have FOIA requests still pending that are more than 10 years old. An additional seven have requests that are more than 5 years old. And 28 more have requests that are more than a year old. And those are just the agencies whose reports are already available.

At a hearing held in the House of Representatives on February 14, 2007, Melanie Pustay from the Department of Justice testified that agencies have made great progress handling their backlogs. While this certainly may be true, I want to give you an example of how they are eliminating backlogs.

The story begins in 2001 when my organization, the National Security Archive, received a series of letters from the Department of the Treasury asking us whether we would continue to be interested in 31 individual FOIA requests that had been submitted throughout the mid-1990's. We indicated that we continue to be interested.

Then in December 2005, President Bush issued Executive Order 13392, which specifically directed agencies to set goals designed to reduce or eliminate their backlogs. Here is what happened next.

On June 14, 2006, the Department of Treasury set a goal to reduce its FOIA backlog by 10 percent by January 1, 2007. Starting in August 2006, we began to get letters from Treasury asking if we continued to be interested in our FOIA requests. The letters warned “if we do not receive a reply...within 14 business days...we will close our files regarding this matter.”

On January 9th, I wrote a letter to Treasury in which I wrote: “In many instances, we have received two or three letters [threatening to close] a particular FOIA request despite the fact that we already advised the Department of our continued interest...” I concluded, “I request that you do not close any Archive FOIA request or appeal without processing it.”

On February 23rd, Treasury sent another letter asking whether we continue to be interested in several additional old FOIA requests. In it, they acknowledged they received my letter. “We received a letter from Meredith Fuchs of the National Security Archive...[but] we are in the process of reducing [Treasury’s] significant backlog by communicating with requesters as to which of those requests have gone stale.”

We received those letters for the same 31 requests that we were asked to abandon in 2001. But that is not the punch line.

The punch line is that some of the letters that we received since August also indicated that the original requests—which were submitted in the mid-1990’s—have been destroyed, and they asked if we could send them new copies of our FOIA requests. Well, I wonder what the Department of Treasury FOIA program has done in the last 6 years after they first asked us to abandon our requests. And it certainly be interesting to know how many requests they are able to close in this manner under the Executive order’s mandate to reduce backlogs. While this may be one way to eliminate backlogs, it cannot possibly be what Congress intended from FOIA.

There are several provisions of the OPEN Government Act of 2007, introduced yesterday, that I think are critical for improving the functioning of FOIA. Most critical are the provisions that restore the catalyst theory for attorneys’ fees awards and the provisions for better reporting. I detail the benefits of these and other provisions in my written testimony, and I am happy to respond to your questions.

[The prepared statement of Ms. Fuchs appears as a submission for the record.]

Chairman LEAHY. Thank you very much. You should probably send them a copy of “Catch-22” in response to the requests.

[Laughter.]

Chairman LEAHY. Sabina Haskell is the editor of the Brattleboro Reformer located in Brattleboro, Vermont, in Windham County, a very pretty part of our State. But she is also the President of the Vermont Press Association which is statewide; a founding member of the newly created Vermont Coalition for Open Government, a nonprofit consortium of organizations and individuals who want to enhance the performance of Vermont’s right-to-know laws; has 10 years experience in Vermont journalism as a reporter, assignment editor, city editor, and editor of the Bennington Banner, Rutland Herald, and Brattleboro Reformer. Just pure coincidence we have someone from Vermont here.

Ms. HASKELL. Pure coincidence.

[Laughter.]

Chairman LEAHY. Please go ahead, Ms. Haskell.

**STATEMENT OF SABINA HASKELL, EDITOR, BRATTLEBORO
REFORMER, BRATTLEBORO, VERMONT**

Ms. HASKELL. Good morning. First of all, thank you for inviting me to speak here today and to talk to you about the needed forms to the Freedom of Information Act. I am Sabina Haskell, and I am the editor of the Brattleboro Reformer, and we are a circulation 10,000 paper in southeastern Vermont.

Even at that small size, we are the third largest newspaper in Vermont, and we are in good company. Eighty-five percent of the newspapers in the United States have circulations of 50,000 or less. The smaller newspapers generally pursue public records from the State and local officials, not the Federal sources, but our efforts to do so are a quagmire, and they are getting worse.

As President of the Vermont Press Association, I can tell you that we are very frustrated with the de facto sentiment of secrecy that seems to be appearing at every level of government, and I think it begins at the top, where we are getting stripped of our constitutional rights.

The fear-mongering that is exposed at the Federal level where questions and requests for information are viewed as suspect is being replayed time and time again at the State and local level. And I believe the effort to seal off the Federal Government is the primary reason that there are increased efforts to close the doors on transparent Government at the State and local level.

The anecdotes I am going to share with you come from the dozen dailies and the four dozen non-dailies that are members of our association. If you multiply us in Vermont by all 50 States and 1,500 newspapers, you can understand the problem.

The Freedom of Information Act is supposed to allow anybody, regardless of citizenship, whether they are a person or a business, to get a record without explanation or justification. We are supposed to get those records with little effort and in a timely manner. Only yesterday, we were told by the Vernon Fire Department that we could not have the records to their books. And, in fact, the fire chief took my reporter and said to him, "If you publish this, I can assure you there is going to be retaliation."

Chairman LEAHY. I should note that the Vernon Fire Department is in a town where there is a nuclear reactor.

Ms. HASKELL. Yes, thank you, Senator. And we went ahead and we started the legal process, and we will be fighting this, as you can imagine.

When we asked for a copy of the Brattleboro police chief's contract and a record of how many days he spent at the station, we were rebuffed. "Why do you want that? What do you need that information for?" We were told that we would get the contract when we gave them those answers, and we still do not have the contract.

In northeastern Vermont, a little non-daily wanted to do a story about a new handicapped-accessible ramp outside of the town hall, built of pressure-treated lumber. And when they asked for an illustration, an architect's rendering to go with the illustration, they

were told they could not have it because of homeland security reasons.

In Winooski, the school board made a sweetheart deal with the superintendent and bought out his contract. The Burlington Free Press sued. It took them 18 months to win the case, and in that time, everybody's interest had gone on to something else, and the attorney said to the Free Press, "You don't think we lost, do you?"

And in Jamaica, a town official asked for some documents about the sheriff's department. He wanted time sheets for her. He wanted time sheets for a deputy and for a detective. He wanted the records to show what expenses had been reimbursed, and he asked for records to show their whereabouts for 3 days. Two of them were dismissed under public records law, and the third she outright told a lie. And, in fact, she was convicted of embezzlement and resigned in disgrace, obviously. So he paid for that all by himself and had to do it, and he still lost.

The amendments that you propose will go a long way to make the Freedom of Information Act stronger. We do not get the records we want within the allotted time, we have to chase them on our own dime, and enforcement is lax. And the amendments that you will do will help us at the local and the State level.

Thank you.

[The prepared statement of Ms. Haskell appears as a submission for the record.]

Chairman LEAHY. Thank you very much, and I apologize. Your first name is pronounced "Sabina."

Ms. HASKELL. That is okay. Everybody does it wrong.

Chairman LEAHY. I had it wrong.

Tom Curley, who is going to be our next witness, was named President and Chief Executive Officer of the Associated Press in June 2003. Mr. Curley has—and I say this as a compliment—deepened the Associated Press' longstanding commitment to the people's right to know. He serves as one of the country's most aggressive advocates for open government. He previously served as President and publisher of USA Today. He holds a political science degree from Philadelphia's LaSalle University, a master's degree in business administration from Rochester Institute of Technology. And, Mr. Curley, thank you very much for coming here today.

STATEMENT OF TOM CURLEY, PRESIDENT AND CHIEF EXECUTIVE OFFICER, THE ASSOCIATED PRESS, REPRESENTING THE SUNSHINE IN GOVERNMENT INITIATIVE, NEW YORK, NEW YORK

Mr. CURLEY. Mr. Chairman, Senator Cornyn, thank you. Your efforts to strengthen the Freedom of Information Act show an absolutely courageous and timely commitment to the essence of our democratic values.

FOIA was a promise to the people that, whatever they might want to know about their Government, they could find out and that the law would back them in all but a few kinds of highly sensitive or confidential matters. Well, the law does back them, but in too many cases, the Government does not back the law.

I know you are aware that the FOIA backlog requests are rising every year. The failure is costly in ways the numbers cannot show.

When agencies respond, as the law says they should, the information they reveal can provoke public response that improves Government operations, curbs waste and fraud, and even saves lives. When agencies do not respond, those opportunities are delayed or lost entirely.

I can tell you about one such opportunity. In 2005, Government scientists tested 60 school lunchboxes for toxic lead. Afterward, the Consumer Product Safety Commission told the public it found, in these words, “no instances of hazardous levels.” The Associated Press filed a FOIA request and learned several boxes had more than 10 times the maximum acceptable level.

You might have expected to read our report more than a year ago, when we filed our first expedited FOIA request. But our story was just published last month. It took us an entire year to get the documents. Apparently, the Commission still thinks the boxes are safe. They told us children do not use their lunchboxes in a way that exposes them to the lead found in the tests. Maybe they are right, but maybe they are not.

We talked to expert researchers that told us the lead levels were cause for serious concern, and when the Food and Drug Administration saw the test results, they warned lunchbox manufacturers they could face penalties. One major store chain quietly pulled the boxes off its shelves nationwide.

Evidently, reasonable people can disagree, and that is the point. Reasonable people can disagree, but only if they know.

Why did it take a year for the Commission to respond to a relatively simple request that FOIA says it was supposed to answer in 20 working days? It took a year because FOIA imposes no penalty for ignoring deadlines. The OPEN Government Act legislation, introduced yesterday by Senators Leahy and Cornyn, includes real FOIA enforcement provisions. The Sunshine in Government Initiative urges enactment of the legislation this year.

The predisposition to deny has grown steadily worse in recent years. Federal officials who used to provide information for the asking now say you have to file a time-consuming FOIA request. If the request is denied, administrative appeals are often no more than occasion for further broken deadlines and ritual denials. And the requester finally ends up with a choice between giving up or commencing litigation that can easily cost well into six figures. Even AP has to choose its fights carefully.

Another problem with the law as it stands is that we can litigate a FOIA denial for years and still not get our legal fees reimbursed if an agency turns over the goods before a court actually orders it to do so. How many of your small business or private constituents just have to give up because they cannot afford to sue?

There could easily be a third way. A strong FOIA ombudsman within the Federal Government could help requesters around some of the most unreasonable obstacles without forcing them to go to court. This is a legislative priority for our media coalition.

By no means is the news from the FOIA front all bad. I can tell you FOIA success stories, too, which illustrate why FOIA is such a cornerstone of our democracy. Thanks to FOIA, AP last year was able to report for the first time the extent of deaths and injuries among private contract workers in Iraq. And FOIA requests were

a crucial part of AP's reporting which showed that highly publicized Federal fines against companies that break the law are increasingly being written down afterwards, sometimes by more than 90 percent.

It is a tribute to the professionalism and respect for the rule of law of so many agency FOIA officers that they respond correctly to thousands of requests each year. But their achievements are too often undermined by others who think obstructing information flow is a national policy. The Ashcroft memorandum advising agencies that the Justice Department was ready to back any plausible argument for denying a FOIA request continues to set the tone for access.

When Government has trained itself to believe that the risks from openness are substantial while the risks from keeping secrets are negligible, you begin to get the kind of Government nobody wants—a Government that believes its job is to do the thinking for all of us.

You get, for example, the Consumer Product Safety Commission that decides on its own, for all of us, that a little bit of toxic lead in a lunchbox is okay and the matter needs no further discussion. "Further discussion" is the essence of a free society. We need a strong and effective Freedom of Information Act to make sure that discussion flourishes.

We are grateful for this opportunity to appear before you today. The Sunshine in Government Initiative wants to work with you to deliver the Open Government Initiative legislation this year.

Thank you, Senators.

[The prepared statement of Mr. Curley appears as a submission for the record.]

Chairman LEAHY. Thank you very much.

Katherine Cary is an Assistant Attorney General with the Texas Office of the Attorney General. Like the coincidence of Ms. Haskell being from Vermont, we have the coincidence of Ms. Cary being from Texas. She served 6 years as Chief of the Open Records Division for that office. She studied at Hollins College in Roanoke, Virginia, received a B.A. from Texas A&M in 1987, and a J.D. degree at St. Mary's University in 1990. And as Senator Cornyn has pointed out, she was honored with the James Madison Award in 2003 by the Freedom of Information Foundation of Texas for her work to protect the public's right to know. And while this is not a normal thing we do because the transcript of this will someday be in the Cary archives, I know you have several members of your family here. Would you just mention their names so they could be also in the record?

**STATEMENT OF KATHERINE CARY, GENERAL COUNSEL,
TEXAS OFFICE OF THE ATTORNEY GENERAL, AUSTIN, TEXAS**

Ms. CARY. Thank you very much, Senator Leahy. I appreciate that.

This is my father, Alan Minter; my mother, Patricia Minter; my son, Everett Cary, who helped me with my remarks today; and my daughter, Katie Cary. My husband is in court today in Texas. He is also a lawyer, and so he would send his greetings to the Senate via a Texas connection.

Thank you for the opportunity to testify today. I appreciate it. As Senator Cornyn said, most people who know me well call me “Missy.” My real name is Katherine Cary. I am the General Counsel of the Texas Attorney General’s Office, and I do appreciate the high honor of appearing before you today.

First, on behalf of Attorney General Greg Abbott, let me convey his strong support for the bipartisan OPEN Government Act of 2007. Attorney General Abbott, like Senator Cornyn before him, has a strong record on open government and believes that as stewards of the public trust, Government officials have a duty of transparency when governing. They both often quote Supreme Court Justice Louis D. Brandeis, who said, “Sunshine is the best disinfectant.”

As the leading open government expert in the Office of the Attorney General, I work daily to apply, educate, and enforce one of the most proficient open government laws in the United States. As I have said before to this Committee, unfettered access to government is a principled—and an achievable—reality. But it takes the right mix—the right mix of legal authority and the right mix of vigilance.

Texas is a big State. We have more than 2,500 governmental bodies that span 268,801 square miles. From El Paso to the Panhandle and from Texarkana to Brownsville, the Texas Public Information Act ensures that information is placed into the public’s hands every day without dispute.

Under the Texas Public Information Act, just like the Federal Freedom of Information Act, information is supposed to be promptly released. Texas law defines this to mean as soon as possible, within a reasonable time, without delay. Any governmental body that wants to withhold information from the public must, within 10 business days, seek a ruling from the Texas Attorney General’s Office.

In Texas, a governmental body that fails to take that simple procedural step to keep information closed waives any required exceptions to disclosure unless the information is made confidential by law. It is this waiver provision that provides the meaningful consequences that prevent Government from benefiting from its own inaction. Under the Texas Public Information Act, if an entity disregards the law and fails to invoke the provisions that specifically protect certain categories from disclosure, it has forfeited its rights to use those exceptions. The OPEN Government Act would institute a very similar waiver provision. The Texas experience shows that striking this balance is fair and practical. Simply stated, it works.

In 1999, with Senator Cornyn as Attorney General, governmental bodies in Texas sought roughly 4,000 rulings from the Texas Attorney General. Last year, we issued about 15,000 such rulings. This is staggering when you consider that these rulings are a mere fraction of the number of requests for information that are promptly fulfilled every single day.

But what I have found is that education is vital. A noncompliance with open government laws often results from a misunderstanding of what the law requires rather than a true malicious intent. For this reason, our office asked the Texas Legislature to re-

quire mandatory open government training for public officials in Texas. They agreed, requiring a course of training that must either be done by or approved by the Attorney General's Office. We offer the training by free video or DVD that is available on the Attorney General's Office website. To date, our office has issued completed training certificates to almost 40,000 people in Texas.

In addition to open government training, our office provides an open government handbook, similar to the Federal handbook—much smaller but similar—an extensive open government website, and an open government hotline that is toll-free staffed by attorneys who help clarify the law and make open government information readily available to any caller. This service includes updating callers on where a request for ruling is in the process. That probably sounds a little familiar to the OPEN Government Act that you proposed. It answers about 10,000 calls a year. This provides citizens with customer service, attention, and access that they deserve from their public servants.

My office also handles citizen complaints. The Open Records Division's attorneys attempt, with a 99-percent success rate, to mediate compliance with open records requirements. The OPEN Government Act would create a similar system that Texas has already demonstrated successfully. Resolving matters efficiently certainly underscores the usefulness of a dispute resolution function.

We have learned that it only requires a few legal actions by the Attorney General for word to get out that we are serious about enforcing compliance. We have enforced compliance in several instances sounding very similar to those that were mentioned by Ms. Haskell from Vermont. It appears that the proposed Special Counsel will be in a comparable position to achieve positive results on the Federal level.

Finally, Texas has a legal presumption that all information collected, assembled, or maintained by or for a governmental body by a third party is open to the public. Records kept by third parties on behalf of Texas governmental bodies remain accessible by request to the governmental body, as long as the governmental body enjoys a "right of access" to that information.

Moreover, Texas law does not allow the Government to contract away agency access to public records. The OPEN Government Act would appropriately extend the availability of Federal Government records to non-governmental third parties.

As Senator Cornyn said, the policy statement that introduces the Texas Public Information Act I believe is on point. I think it bears repeating.

The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist upon remaining informed so that they may retain control over the instruments they have created.

The United States Supreme Court has held that the Freedom of Information Act's ideals are analogous, stating:

The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption, and to hold the Governors accountable to the governed.

Thank you for the privilege of appearing before you today. Thank you for recognizing my family, and thank you for helping to ensure that my children, who sit behind me, will live in a society where they are the Governors of the government.

Thank you.

[The prepared statement of Ms. Cary appears as a submission for the record.]

Chairman LEAHY. Thank you, Ms. Cary. And I kind of whispered to Senator Cornyn, as I listened to the description of your Freedom of Information Act, no wonder he is so passionate about this.

Let me also ask, does anybody else have family members here? I do not mean to—okay.

Ms. FUCHS. My husband is here.

Chairman LEAHY. There you go. Let me start with you.

The National Security Archive is one of the most active users of FOIA. So I am interested in your views about the Bush administration's efforts to address the problems of lax FOIA enforcement, and the President did issue Executive Order 13392 asking agencies to submit FOIA improvement plans by June of 2006. Both Senator Cornyn and I applauded that effort.

We find now, more than a year after the President's Executive order, that Americans who seek information from FOIA, unless I am misinformed, remain less likely to obtain it. The Coalition of Journalists for Open Government has found that the percentage of FOIA requesters obtain at least some of the information that they request from the Government fell by 31 percent last year.

Do you think that the President's Executive order alone is enough to reduce the almost 200,000 backlog FOIA requests?

Ms. FUCHS. Thank you for the question. I believe that Executive Order 13392 was a useful exercise, and it did get agencies to look at their FOIA programs, and that was valuable. And for the agencies that took it seriously, they have good ideas and good goals that they would like to make. They are somewhat hampered by lack of leadership at some of those agencies and by lack of resources, but they are making an effort.

Some agencies, however, we found the Executive Order improvements plans showed, had made no effort in the past. For example, the VA had never even updated its regulations after the 1996 E-FOIA amendments. So those things were shown by that.

But I think that without Congress acting, the agencies are not on their own going to accomplish it.

Chairman LEAHY. You also have, do you not, the Executive order could be changed by the next Executive, whereas the legislation is the legislation.

Ms. FUCHS. Right. And the legislation has strong teeth in it that will hopefully change the culture at agencies.

Chairman LEAHY. That is also why we have been trying to do this before a new President takes office, so that it is clear that it applies.

Ms. Haskell, one, I am delighted to have somebody from one of Vermont's best newspapers here.

Ms. HASKELL. Oh.

Chairman LEAHY. I mean that. In your view, what is the biggest hurdle that reporters encounter when they try to use the Federal FOIA law to get information?

Ms. HASKELL. Our biggest hurdles are that people do not know whether or not they are allowed to give documents.

Chairman LEAHY. You mean the people being requested do not know whether they are allowed.

Ms. HASKELL. That is right. And we started the law, and Vermont started out with 36 exemptions. We have 207 and counting. They do not know what to do, and so they immediately say no before they will say yes, and then you have to convince them that—it is like you are guilty until you are proven innocent.

The other problem is that you cannot—there is no enforcement to the law at all. The Burlington Free Press spent about \$12,000 trying to get the hazing documents. Never saw a dime of it.

Chairman LEAHY. That is our State's largest newspaper, I should note.

Ms. HASKELL. Right. There was, you know, a town board in Barre that was fined for illegally holding an open meeting. They did not get fined, nor did they get the misdemeanor charges.

Chairman LEAHY. Do you think that if we passed the OPEN Government Act, some of the things we have here, do you think that that might help in Vermont? Has it been your experience that sometimes Vermont will follow these Federal laws or model after these Federal laws?

Ms. HASKELL. That is my experience, and sometimes we lead the way, too. But—

Chairman LEAHY. I know that.

Ms. HASKELL. But, yes, I think that the—it has to come from the top that, you know, we are an open government, because everybody sees it being hidden from the top on down.

Chairman LEAHY. And in that question—and I assure you I am not trying to—I try never to tell the Vermont Legislature in the vain hope that they would return the compliment.

[Laughter.]

Chairman LEAHY. They usually do not. Mr. Curley, you represent the Sunshine in Government Initiative. We all know some of the things that FOIA has found, contaminated ground turkey in plants in Minnesota, health risks with the birth control patch, unreported asbestos-related illnesses and so on.

Have members of the Sunshine in Government Coalition experienced a delay in reporting important information relating to public health and safety because of excessive delays in processing FOIA requests? I am talking about public health and safety now, not malfeasance in Government. Public health and safety.

Mr. CURLEY. Absolutely, Mr. Chairman. I think the most dramatic example was a story that was published about February 1st. AP, USA Today, and a number of other organizations had filed FOIA requests and found out that there were 122 levees across the country, from Maryland to California, that could be overwhelmed by heavy flooding. A story that hit the AP wire yesterday was that the pumps in New Orleans that had been put in trying to make the deadline before the hurricane season last summer were defective and many have to be overhauled or replaced.

So this is an area of ongoing and, I think, incredible public interest concern.

Chairman LEAHY. My time is up, and if you will allow an editorial comment, you should not have had to drag that out. Our Government should have been trumpeting it and saying, "Look, we have got a problem." I mean, if Katrina taught us anything, it is that.

Senator Cornyn?

Senator CORNYN. Thank you, Mr. Chairman.

I want to start with the proposition, Ms. Cary, that you talked about in terms of elected officials, Government officials, perhaps not being well informed of what their responsibilities are under the law, and then move down to Ms. Fuchs to talk about attorneys' fees and the importance of that provision in this legislation.

But it strikes me, Ms. Cary, that, you know, most of the so-called Government officials are citizens who for a period of time may offer themselves to serve in public office, whether a school board or city council or something like that. They are not necessarily professional politicians, nor are they lawyers, necessarily, and aware of what their obligations are under the law.

But can you expound just briefly on why you believe it is so important that, whatever we do, we provide the means to educate agency officials about their responsibilities and how that can avoid some of the problems?

Ms. CARY. Of course, Senator. What I found after I got started working in this area is really that most governmental entities are made up of just regular people. Like you said, they are volunteer school board members; they are sometimes elected sheriffs. But there are a lot of public officials, and most often the law is complicated. As Ms. Haskell says, the same in Texas, every year the Texas Public Information Act when the legislature is in session is amended—new requirements, requirements change. And they need a go-to source. They need to know what they can go to and where they can go to find accurate advice about what is open and what is closed, because the human response is always to say it is closed, because there are criminal penalties, at least in the Texas Public Information Act, for releasing information that is confidential by law, for example, information that is private or information that is related to security.

And so there are, you know, important balancing acts that must go on, but most of the time, public officials just simply do not know what the law is that day and, exactly, there are some malicious public officials in the world. But that is the clear minority.

And so what we have set out to try to do is to put out an excellent website so that people can read at their own leisure what the law is and what the requirements are, stated from the source, the Attorney General's Office. We have this training video which gives the basics so that even if they are out to hire local counsel or legal counsel, they understand the basic requirements and know whether the advice that they are getting is accurate at some basic level.

We also find that the hotline is an excellent resource. Senator Cornyn. Let me ask Mr. Curley about that issue. Mr. Curley, this bill attempts to introduce informal dispute resolution mechanisms that would allow an expeditious resolution of the kind of conflict

Ms. Cary mentioned where perhaps there are privacy laws that would prohibit the release of certain information, and so the custodian of the records is in some doubt. Do you think the working press would find it useful to have a person or a number they could call and go to to have an expeditious resolution of those disputes and perhaps get the information in a more timely way?

Mr. CURLEY. Senator, it would be helpful, but I think your point is right on target, that this really has to work for the people. And the press has to be a part of the people. When the press gets in trouble—and it deserves to get in trouble when it tries to do things on its own and separate itself from the public's right and the public's right to know. The underlying provisions here, to put in an ombudsman would benefit the people. And when you look at third-party requests, only 6 percent of the third-party requests are by the press. A third are by citizens or citizens groups about public interest matters.

So this whole area is about helping in what is increasingly becoming a sophisticated information-gathering operation, getting people some relief, and also, if we can put in some tracking provisions. You know, if Brown can do it, Red, White, and Blue should, too.

Senator CORNYN. Well said. Your point about this not being legislation "for the press" I think is an important one. This is for all of us as American citizens. This is about our right to know, and I think we need to recognize the transformation in both the technology and information gathering and in publication.

I remember, for example, the story in Thomas Friedman's book, "The World Is Flat," about the blogger who confronts Bob Schieffer outside of a morning news show and where he has been interviewed and says, "Can I ask you a few questions?" He asks him about national or international matters. He says, "May I take your picture?" Pulls out his telephone camera, takes his picture, and goes back and uploads that on his website. I mean, I think that individual needs to get access to information, too, as do individual citizens.

Finally—and my time is running out—has run out, but let me ask you, Ms. Fuchs, this issue of attorneys' fees, I suspect we are going to get significant pushback on this issue of recovery of attorneys' fees. But I just want to ask whether you are familiar with the example of the Pacific Fisheries versus IRS case, a FOIA request in 2004 to the IRS. The requester had to file a lawsuit, and then months later, the IRS responds to the lawsuit with a claim that all responsive documents are exempt. But then a year later, on the eve of the dispositive motion deadline, the IRS produced 313 pages of responsive documents. Under the prevailing attorneys' fees decisions by the United States Supreme Court, the Buchanan case, they would not be entitled to any attorneys' fees even though they had gone through litigation to get something that they should have gotten in the first place.

Could you just briefly address the importance of that provision?

Ms. FUCHS. Right. Well, what is particularly wonderful or interesting about that case is that it shows the Court itself was so irritated at how the Government handled the FOIA request that it found that the Government's delay was censurable and possibly

subject to sanctions. And what happened in that case was the Court ordered the Government to show cause why it should not be sanctioned, and the parties ultimately settled and they paid the attorneys' fees.

What is unique about FOIA cases and what this example shows is that they are easy to moot out, because what we are asking for is documents. And so we can litigate, we can file summary judgment motions, as long as the Government gives us the documents before the Court issues its order. Then the case is mooted out, and we have no recourse.

And, frankly, it is very expensive to bring this litigation, I mean, at least \$10,000, \$15,000 for an individual. I am sure the AP's cases, which have resulted in really remarkable releases, have cost even more than that.

Senator CORNYN. Thank you.

Chairman LEAHY. Thank you very much.

Senator Feingold?

**STATEMENT OF HON. RUSSELL D. FEINGOLD, A U.S. SENATOR
FROM THE STATE OF WISCONSIN**

Senator FEINGOLD. Thank you, Chairman Leahy, for holding this hearing on an issue of vital importance. The Freedom of Information Act is an essential piece of legislation for our democracy. It enables researchers, journalists and interested citizens to obtain executive branch documents at a reasonable cost.

At the same time, the Act protects certain documents from disclosure to shield national security, privacy, trade secrets and other privileges. A government that permits citizens access to records that document its day-to-day decisions is one that fulfills the promise of democracy in a particularly significant way. Congress should regularly review and update how the law that makes such access possible is working.

When the executive branch knows its actions are subject to public scrutiny, it has an added incentive to act in the public interest. And I fear that this important value of government openness has taken a back seat in the years since the terrible events of September 11th. Protecting our citizens from terrorist attacks must be the top priority of government. But we can do that while still showing the proper respect for the public's right to know.

Unfortunately, that has not been this administration's attitude. From the excessive secrecy surrounding the post-9/11 detainees to the lack of information about implementation of the controversial provisions of the USA PATRIOT Act, to instructions to Federal agencies issued by former Attorney General Ashcroft that tightened the standards for granting a FOIA request, this administration has too often tried to operate behind a veil of secrecy.

That is why I intend to cosponsor this bill that Senators Leahy and Cornyn introduced yesterday to strengthen the Freedom of Information Act. Thank you again, Mr. Chairman, for being such a tremendous leader on this issue. I am proud to join with you in working to empower individual citizens to obtain the information they need to hold their Government accountable. In so doing, we can help ensure that our democracy remains strong and vibrant. And I also want to talk a little bit about the attorneys' fees that

Senator Cornyn mentioned, but let me first thank him for his work on this bill, and in particular, for his comments about the attorneys' fees.

I have proposed legislation to correct the problem across the whole Government because the attorneys' fees statutes are affected by the decision that you discussed, and I would very much like to work with the Senator from Texas on this issue if he agrees this is a problem. I want to continue to make a record here on this attorneys' fees issue.

Mr. Curley, you mentioned in your testimony the problem of not being able to have legal fees reimbursed in the FOIA litigation because an agency will comply with a FOIA request right before the court orders it to do so, as was just mentioned. As I understand it, this problem stems from the fact that under a Supreme Court interpretation of a fee-shifting provision similar to the one contained in the FOIA, you can only get the attorneys' fees if there is a final court order or settlement of your case, so that even if the Government has resisted providing the requested documents, forced you to file suit, dragged out the litigation for quite some time at significant expense in terms of attorneys' fees and other costs, it can avoid paying attorneys' fees by releasing the documents at the last minute before the court actually rules.

Sir, could you provide examples of an agency engaging in these tactics to avoid reimbursing attorneys' fees?

Mr. CURLEY. Well, the case that has gotten the most attention is our efforts to get information about what is taking place at Guantanamo Bay. We have spent well into the six figures. We have won every one of those rulings.

In the case that is coming down, the Department of Defense is willing to give us \$11,000. Obviously, we are going to go back and have to sue them again to get a higher and fairer number.

Now, we have some resources that other do not, but if every situation comes down is a threat of six figures, it just is not right. The McClatchy News Service, then Knight Ridder, spent six figures' worth of money chasing information on the Veterans Administration. So if you get into anything that is at all complicated, Senator, it clearly is a six-figure proposition.

Senator FEINGOLD. Is this practice common enough to actually deter attorneys from taking these cases? And what is the overall effect on those attorneys who are bringing these cases and on the general availability of legal representation to challenge FOIA delays or denials?

Mr. CURLEY. Well, as you know, it is a tough time for media, and you can only have so many battles these days. There are a lot of cutbacks and a lot of revenue going in different directions. So every news organization has to figure out how much it is willing to spend in this area.

Right now everyone, of course, is still willing to stand up on the major issues and make a case and write the checks. There are a lot of great representatives out there trying to help us, legally and otherwise, in these areas. But I do fear, given the funding issues facing the media, where we are going. It is increasingly harder and more expensive to do good investigative reporting. Senator Specter

was right. The growth of Government has been exponential, and media have not kept pace with the ability to provide oversight.

Senator FEINGOLD. Ms. Fuchs, did you want to add anything to this issue?

Ms. FUCHS. Well, you had asked about examples of agencies changing their minds right before having a court do anything. We have a case involving our news media status at the National Security Archive where in 1990 the D.C. Circuit ruled that we are representative of the news media. In a case against the CIA, the district court adopted that same ruling. For 15 years, the CIA and other agencies treated us as representatives of the news media.

Suddenly, in October 2005, the CIA stopped doing that and refused to treat us as representatives of the news media, taking the position that they can determine what is newsworthy—not the requester but the CIA. Imagine that.

So I met with them. I laid out all my legal arguments. Nothing changed. Finally, I filed a lawsuit. Nothing changed. Finally, we filed for summary judgment. That night, the night after we filed for summary judgment, at 6:30 on a Friday, I got a letter from the CIA changing their mind. Suddenly we are representatives of the news media for those 42 requests.

Now, that is an example of a situation where—I mean, their next argument was our whole case is moot, and I am sure after that they are going to say no attorneys' fees. I had to sue to get them to agree to that.

Senator FEINGOLD. Thank you very much.

Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much.

Senator Cardin?

Senator CARDIN. Senator Leahy and Senator Cornyn, thank you very much for your leadership on this issue. We appreciate the fact that we have legislation before us that I think is very important for us to move forward on the FOIA laws.

Let me just mention one area that may not be apparent to why it is important that we modernize our FOIA laws. I have the opportunity to chair the Senate Helsinki Commission, and we use that as an opportunity to raise internationally issues that are important on human rights, security, and economics and the environment.

Many times, the United States delegation is requesting information from other countries to try to understand what they are doing in different areas, documents, et cetera. And on more than one occasion it has come back to me that, well, you know, in the United States you would have a hard time getting that information. And we are not in a strong position internationally for openness and transparency in Government because of the way that we have operated our request for information.

I am interested as to whether there are other countries that could give us a better model as to how FOIA requests should be handled or how they use technology or how they use public information to make it easier, that perhaps we could pattern our reforms based upon the experiences of some of our allied countries. Are there some countries that are better than others in getting information to you?

Ms. FUCHS. If I may respond, I guess I would say that I think the United States is a remarkable example of a country where things are quite open, and that is part of the reason that our country is such a strong democracy. And, in fact, in our experience, because the United States gathers so much information, we have managed at the National Security Archive to use records we have obtained from U.S. agencies to help advance human rights causes abroad as well.

Having said that, our law is 40 years old, and there are some problems with it. In some countries, there actually are penalties for delay. In fact, in India, the civil servant who does not respond within the time period is fined six rupees, or something like that. So there are penalties in other countries.

And another example of something that we could look at as a model from other countries is Mexico where they have an agency which acts sort of as an ombudsman—it is an information commissioner—and which has been really effective because it has a budget to do that work. It posts its decisions online so people can see them. And having a strong agency like that to serve the function of the ombudsman would be something that would be outstanding.

Ms. CARY. Senator, if I could respond, I had the opportunity to go to Mexico several times and assist them with the formation of that law and was very involved in the formation of the committee. I enjoyed talking to the citizens of Mexico about looking at their different laws. They talked to many different governmental entities. Interestingly, they hold the United States and different States in the United States up as a good example. But they formulated this very interesting and intriguing idea, which is, instead of just one ombudsman, they actually have a governmental committee—since they have concerns about the honesty of their core system, is how it was explained by Mexicans to me—that they have great faith in and that they do a lot of education, they try to do a lot of things on the Internet, and they try to put a lot of faith in this sort of free resources, which is this Committee that will mediate disputes and really dive into the issues.

And so I think it is a really neat system, and I think the ombudsman that is proposed in this bill also could create an office that would be very similar, work in a similar manner, to really provide up-front assistance.

It is hard to get your request answered in a vacuum, and so if particular requests that are precise can be mediated with the players, you know, on-site in real time, I think that makes all the difference in the world.

Senator CARDIN. It is clear to me that we could use technology much more effectively, the agencies could use technology much more effectively than they are doing, and your survey points that out pretty clearly.

I do not want to let this opportunity pass without you commenting, if you want, on the branch of Government that we serve in, the Congressional branch, as to whether there is need for change in the way that we make information available. Now, both the House and Senate have passed legislation for more transparency generally, but I do believe that we should set examples,

the legislative branch of Government, and we should be subject to the same types of standards.

This is your opportunity.

Mr. CURLEY. Senator, that is a wonderful, wonderful opportunity. FOIA does not apply to the Congress of the United States, but beyond that, let me say thank God for the Hill. Obviously, we get a lot of stories up here.

Senator CARDIN. I will pass that on to them.

Ms. FUCHS. If I may add, I mean, one thing that I think that Congress certainly could look at is Congressional Research Service reports, which are not publicly available, although, in fact, many are made available to the public. But they contain a wealth of interesting information and analysis that I think members of the public do find interesting.

Senator CARDIN. Thank you, Mr. Chairman.

Chairman LEAHY. Thank you very much.

Senator Cornyn?

Senator CORNYN. Thank you, Mr. Chairman.

I just want to explore some of the comments, and you will forgive me, Ms. Haskell or Ms. Fuchs. I cannot remember which one of you made this characterization, but please jump right in, that we not treat the public as the enemy but, rather, as the customer. I thought that was helpful because I do believe that we must have a culture change in Washington about how we regard the American people. And let me just give you one example, and I think, Mr. Curley, you alluded to this a little bit.

If I am not mistaken, a huge number of the open government or the FOIA requests being made of Federal agencies consist of veterans requesting their own record from the Veterans Administration, which just strikes me as very odd. I mean, I do not understand how an individual cannot call, write, fax, e-mail a Government agency and say, "I would like my own record," rather than have to submit a FOIA request like a third-party requester would.

Do you have any comments or any observations about that, Mr. Curley? And then, Ms. Fuchs and Ms. Haskell, I would be interested in your thoughts.

Ms. FUCHS. I would be happy to start off. Senator, I think that what you are saying about the public being customer is a very, very apt observation. Senator Leahy wrote an article that was published in the Administrative Law Review in 1997 which talked about the remarkable information resource that has been created by the U.S. Government, paid for at taxpayer expense.

With respect to something like the VA, what happens is Privacy Act requests, requests by someone for their own information, have been counted now as FOIA requests. The problem with that is that information does not have to be reviewed. It is released. It is their own information.

For example, when my father passed away, I asked for his military discharge records. I submitted a FOIA request. I got his military discharge records. We should be able to do that without it have anything to do with the FOIA system.

The way it works now, all of the data for Privacy Act and FOIA requests are aggregated together. It makes it difficult to really examine what is happening with the FOIA system. Your legislation,

I believe, includes a provision that would disaggregate those statistics, and if that is the case, I think it would be very helpful for helping the Congress be in a position to focus on FOIA and let the Privacy Act requests function on their own smoothly.

Senator CORNYN. There is a Statement of Administration Policy on H.R. 1309, which is not our bill, but it is a House bill, the Freedom of Information Act Amendments of 2007. I just want to give you an opportunity to respond—maybe, Mr. Curley, you would be the appropriate one for me to ask—but the administration says it would be premature and counterproductive to the goals of increasing timeliness or improving customer service to amend FOIA before agencies have been given a sufficient time to implement the FOIA improvements that the President directed them to develop, put in place, monitor, and report during fiscal year 2006 and 2007.

Do you agree with that, or do you disagree?

Mr. CURLEY. Strenuously disagree, as you might imagine. We are all pleased that the President recognized the importance of freedom of information, that there was at least an acknowledgment of this area as an important cornerstone of the efforts to keep Government credible and open. But there was no teeth, and it was an Executive order. As Senator Leahy says, they can come and go. But the underlying trend is the trend, and the trend is quite ugly.

The E-FOIA is less than 10 percent effective. The regular FOIA are seeing increasing delays. Buck passing is Washington agencies' best game, and we are seeing people become more and more sophisticated at it as time goes on.

There is no provision to enforce FOIA right now. That is the problem. The new provisions in the legislation that you and Senator Leahy proposed give some incentives for the agencies to respond to FOIA in a more timely way. It is night and day better and necessary.

Senator CORNYN. I know Senator Leahy has indicated we have a roll call vote that started. Let me just ask this last question for my part.

Mr. Curley, this SAP, Statement of Administration Policy, says, "The administration strongly opposes commencing the 20-day time limit for processing FOIA requests on the date that the request is 'first received by the agency' and preventing the collection of search fees if the timeline is not met."

The concern, I guess, is if a citizen submits a FOIA request and they do not get it in the right box or to the right agency, the administration wants to wait until it gets to the right place. Do you have a view about that?

Mr. CURLEY. If we give anybody any more excuse or reason for delay, you are going to see that the request will take 2 years, not 1 year.

I think what we have to do is face the facts. They are not responding properly. They need to put in place systems that work. There are places in this town where you can get effective response. You get people with the right attitude working with the public from the get-go. But in too many places, it is part of a larger game to delay.

Senator CORNYN. Thank you very much.

Thank you, Mr. Chairman.

Chairman LEAHY. I see the 5-minute light is going on, and this is a cloture vote. So, Ms. Fuchs, I am going to ask you to elaborate for the record on this. But is it your position that the Federal agencies are not complying with E-FOIA?

Ms. FUCHS. Oh, it is absolutely my position after we looked at 149 websites from agencies and components that they are not complying. Only one in five have required records, and that means the records that show what their policies and positions are.

Chairman LEAHY. Please, if you want to elaborate on that, because obviously more and more people go online today, and this would be the best thing if it was working.

Ms. FUCHS. Well, and especially—

Chairman LEAHY. And, Mr. Curley, would it be your position that an ombudsman, an effective ombudsman as an alternative to litigation might be helpful?

Mr. CURLEY. Absolutely.

Chairman LEAHY. And, Mr. Curley, about a year ago during Sunshine Week, I wrote an op-ed piece—I do not know if you had a chance to read it or not—on FOIA. Would you agree or disagree with a conclusion I reached that in the last 6 years it has been more and more difficult to get information under FOIA?

Mr. CURLEY. Absolutely, and there are many facts to support that, sir.

Chairman LEAHY. Thank you.

I have been asked to give you a copy of a book written by a former AP reporter—I will not elaborate further on it, but you may want to glance at it—from Vermont. If you want to add a book review for the record, feel free.

Mr. CURLEY. All news is local and understood.

Chairman LEAHY. Well, you know, it is especially important in Vermont where the Associated Press—not only in Vermont, but in many States—has become the overriding wire service. And we have to rely on you.

But I will close with this, and I have said it over and over again. We Americans are not here to serve the Government. It is the other way around. The Government is here to serve us. And Government, no matter what administration, will always tell you everything they are doing that they are proud of.

I want to make sure we know those things where they make mistakes so that we can correct them—not to play “gotcha,” but just so we can correct them. And I think FOIA can be one of the greatest tools Americans have, but it can be awful if we do not use it.

So, with that, we will stand in recess, and, again, I thank the Senator from Texas for all his help.

[Whereupon, at 11:25 a.m., the Committee was adjourned.]

[Questions and answers and submissions for the record follow.]

QUESTIONS AND ANSWERS

RESPONSES FROM
MEREDITH FUCHS, GENERAL COUNSEL, NATIONAL SECURITY ARCHIVE,
TO WRITTEN QUESTIONS OF SENATOR PATRICK LEAHY

*HEARING ON OPEN GOVERNMENT: REINVIGORATING THE FREEDOM OF
INFORMATION ACT, MARCH 14, 2007*

E-FOIA

1. It has been a decade since the Congress enacted the E-FOIA amendments. Given the overall problems with FOIA enforcement, I worry about whether our federal agencies are meeting the requirements under that law. How are federal agencies doing in carrying out Congress' intent under the E-FOIA Act?

Ten years after passage of the Electronic Freedom of Information Act Amendments of 1996 (E-FOIA), most federal agencies have not fully complied with the requirements of the law. Our recent survey of federal agency Web sites (covering 149 agencies and major components) found significant deficiencies across the government in implementing Congress's mandate.

Most agencies have taken initial steps towards implementing E-FOIA by establishing FOIA Web pages and linking to them from agency home pages. Based on our review, however, only 21 percent of agencies clearly post on their FOIA sites all four of the required categories of information (policy statements, opinions and orders, staff manuals, and frequently requested records). In addition, many agencies offer only basic guidance for FOIA requesters as to how to make requests and protect their rights, but fail to provide all of the essential elements that Congress and the Department of Justice have described as necessary.

Most notably, agencies have largely failed to implement Congress's most transformative mandate of proactively disclosing information to the public by making available on FOIA web sites frequently requested records and categories of records related to matters of strong public interest. Most agencies have no clear policy for affirmative and proactive disclosure. Our review found that only 59 percent of agencies post their frequently requested records, despite Congress's clear intention to make such posting the government-wide norm. Moreover, of those agency Web sites that include frequently requested records, many are either missing obvious example of frequently requested records or are so poorly organized that users are unlikely to find the records without significant effort.

As we studied agency compliance with specific E-FOIA requirements, we also discovered some overarching problems that have impeded full implementation of Congress's mandate. Some agency Web sites are so poorly organized, difficult to navigate, or dysfunctional that, while the agency may technically comply, in practice the public does not actually have access to required records. In some cases, the majority of links to required records or guidance information on a FOIA web site were broken or outdated. In addition, many large agencies that have decentralized FOIA programs and have failed to established agency-wide policies or exercise oversight to ensure that components are fulfilling their FOIA obligations.

2. *One of the things that the E-FOIA Act requires is that agencies post their most frequently requested documents online. This practice would certainly make government information more accessible to the public, but doesn't posting records on agency websites also save agencies money and resources?*

In 1996, Congress acted to revolutionize government dissemination of information to the public by requiring agencies to post on their Web sites records frequently requested under FOIA. This provision was innovative because it aimed to make records of heightened public interest available immediately to anyone who accessed the agency Web site. Additionally, it was expected that agencies that proactively disclosed records over the Internet would receive fewer FOIA requests and could direct requesters to the agency Web site, thus saving time and resources. As the Senate Report noted: "FOIA processes should not be encumbered by requests for routinely available records or information that can be more efficiently be made available to the public through affirmative dissemination means." S. Rep. 104-272, at 13 (1996).

A few agencies have recognized the potential benefits of posting frequently requested records. For example, in its FY2000 FOIA report, the U.S. Department of Agriculture (USDA) described its success: "The creation of the electronic Purchase Cardholder Information system on the FOIA Web site has helped improve public availability of this information. Numerous requesters were referred to the FOIA Web site which eliminated the need for written FOIA requests." USDA, *Freedom of Information Act Annual Report FY 2000*, at 12. The Department of State has made available a number of record collections that it deemed to be of significant public interest, with positive results: "By proactively making declassified record collections available to the requesting public in our electronic reading room, we believe we have reduced the amount of direct FOIA cases received per year. This belief is supported by the 16% decrease in number of cases received this reporting period." Department of State, *Freedom of Information Act Annual Report Fiscal Year 2002*. Similarly representatives of the Food and Drug Administration (FDA) have reported anecdotally that the agency's proactive posting program has permitted a reduction in the number of FOIA staff.

Other agencies have made information available in response to significant events of interest to the public, in an attempt to satisfy potential requests before they are made. The National Aeronautics and Space Administration (NASA) received an "influx of requests" following the loss of the Columbia Space Shuttle in 2003. As a result, NASA established a special electronic reading room on its Web site and dedicated extra resources to process and make available as many responsive documents as possible. NASA, *FY 2003 Annual Freedom of Information Act Report*, at 5-6. NASA's efforts should serve as a model to other agencies to use proactive disclosure to reduce FOIA backlogs and satisfy FOIA requesters quickly and with minimal expense of resources.

TRACKING NUMBERS

1. *Based on the National Security Archive's extensive experience with a wide range of federal agencies, do you think it is important to harmonize the way federal agencies track FOIA requests, so that there can be more transparency and accountability regarding how these requests are being handled?*

Improving and standardizing agency tracking of FOIA requests is essential, both for an individual FOIA requester to ensure his or her request is getting the attention it deserves and for Congress, agencies, and advocates to identify specific problems in the FOIA system and work to fix them.

The importance of tracking can be illustrated by the problems faced at one agency that lacks a tracking system. The National Security Archive sued the Department of the Air Force because of its serious FOIA delays. Through that suit it became clear that the Air Force has no system-wide tracking system in place and no tools to manage FOIA requests. In many cases, FOIA requests had been lost or simply thrown out. A federal judge found that the Air Force “has engaged in a pattern or practice of failing to make timely determinations on its FOIA requests and appeals.” *Nat’l Security Archive v. Dep’t of the Air Force*, No. 05-CV-571, 2006 U.S. Dist. LEXIS 21037, at *3 (D.D.C. Apr. 19, 2006).

Several of the failures highlighted in our lawsuit against the Air Force are indicative of the broader problems that reform of FOIA tracking systems can resolve. First, many of the requests stalled at Air Force were referrals—sent both from Air Force to other agencies and from other agencies to Air Force—for review of equity information. Few agencies have an adequate means to track and follow up on requests forwarded to other agencies, and these requests often fall into a black hole in the inter-agency system. Harmonizing tracking could allow requesters and agencies to follow requests through every step of the process in order to ensure efficient and complete processing of each request.

Second, Air Force—itsself a component of the Department of Defense—maintains a highly decentralized FOIA processing system. The main FOIA office at Air Force headquarters does not generally process FOIA requests, but rather forwards them to a component office, base, or other facility for processing. Our lawsuit revealed that agency officials could not keep track of the requests sent out to components and offices. Many requests are essentially lost within Air Force itself. In one instance, the Archive sent a request for FOIA processing data to an Air Force component—Air Materiel Command. The response we received from that office was that they did not have the data because the AMC central office did not track or monitor processing at each of its sub-offices. In order to respond to our request, the central office would have to forward our request to each Air Materiel Command office and wait for a response. If Air Force instead maintained a centralized, agency-wide tracking database, that FOIA officer easily could have pulled up the data and responded to our request.

These types of scenarios play out every day, across the federal government. Ensuring uniform, effective tracking of FOIA requests is a vital component of better reporting and better oversight, allowing Congress and the public to identify problems with FOIA processing and compel agencies to conduct their FOIA programs with greater efficiency and transparency.

2. Section 7 of the OPEN Government Act requires that federal agencies establish a system to assign tracking numbers to all FOIA requests and that federal agencies set up a FOIA hotline so that FOIA requestors can use this number to track their requests. Do you think that these FOIA reforms would improve FOIA processing times and make government records more accessible to the public?

By mandating that all agencies assign tracking numbers to requests they receive, provide members of the public with comprehensive tracking information for requests, and set up FOIA hotlines, Congress can ensure that requesters have the tools they need to follow up on their requests, advocate for their rights and expose deficiencies in the system. Using such tools to work with agencies to accomplish processing of requests helps the public hold agencies accountable.

Several of the specific requirements in Section 7 of the OPEN Government Act may assist requesters in getting a more timely response from agencies. In particular, the bill compels agencies to provide requesters with a tracking number for their request within 10 days after the request is received. This provision is important because it will discourage agencies from stalling or ignoring requests for a period of time after they are received. If agencies provide a tracking number right away, the requester would be assured that his or her request arrived in the right hands rather than wondering for weeks or more about whether it even was received.

In addition, I applaud the effort in the bill to encourage agencies to use electronic means to communicate with requesters about the status of requests. A handful of agencies already provide online status inquiry forms, but the OPEN Government Act would hopefully encourage more agencies to do so. By giving requesters the information they need online or via e-mail, agencies can satisfy status inquiries more quickly and expend fewer resources that could be used to process requests.

Similarly, requiring agencies to provide requesters with an estimated timeline for completing processing is important, both to keep requesters more informed about the process and to reduce the burden on agencies in responding to multiple inquiries from unsatisfied requesters who are waiting for a response. More practically, mandating that agencies set a tentative deadline for themselves to complete processing of a request may compel them to stay on track.

FOIA REPORTING

1. A recent GAO Report on FOIA Processing Trends found significant problems with the current reporting requirements for federal agencies under FOIA. According to this report, GAO found that "more complete information would be useful for public accountability and for effectively managing agency FOIA programs, as well as for meeting the act's goal of providing visibility into government FOIA operations." Do you agree with GAO's conclusion that better agency reporting is needed?

The Government Accountability Office (GAO) has recommended that Congress take action to amend the FOIA's reporting requirements. Gov't Accountability Office, *GAO-07-441 FOIA Implementation and Improvement Plans 32* (2007). GAO is correct that the current reporting requirements are deficient in several respects and impede accurate assessment of trends and shortcomings in FOIA operations throughout the federal government. FOIA annual reports do not permit Congress to conduct quality oversight, agency managers to identify problems and improve processing, and the public to press for responses. The data that agencies currently

report hide the true extent of the delay and backlog problems. GAO's concerns about its inability to aggregate data expressed as median times is well-founded and further illustrates the problem of poor reporting.

In particular, the median processing times that are reported now give no sense of the outer limits (the oldest pending requests) or even the average time a FOIA requester can expect to wait. After two National Security Archive audits that revealed the ten oldest FOIA requests in the federal government, Department of Justice officials realized the importance of this measure and, in April 2006, recommended that agencies include as part of additional statistics in their annual reports the time range of requests and consultations pending. DOJ, FOIA Post, "Executive Order 13,392 Implementation Guidance" (April 27, 2006).

Consequently, many agencies did include the time ranges of pending requests and consultations in their recently-released FY2006 annual reports, shedding new light on both the backlog problem and the flaws in reporting. For example, it now appears that the Criminal Division, a component of DOJ, has the oldest pending request in the federal government—originally filed on July 10, 1989. A brief glance at the processing data for the Criminal Division paints a very different picture, however; the component reports that its median processing time for complex FOIA requests is 40 days—a far cry from the more than 4500 business days one requester has been waiting for a reply. DOJ, *Freedom of Information Act (FOIA) Report for Fiscal Year 2006*.

Another significant problem with the current reporting is that many agencies aggregate FOIA and Privacy Act processing data together. The Privacy Act covers first-party requests generally for routine agency files. These requests usually can be processed quickly and easily. In some agencies, the Privacy Act data skews the overall numbers to show a much better track record. For example, the Department of Veterans Affairs (VA) reports some of the shortest processing times of any federal agency. In FY2002, the VA reported median processing times between 4 and 24 days, but was not able to respond within ten months to the Archive's simple request for VA's ten oldest pending FOIA requests.

Moreover, median times reported to Congress do not include the delays from wrangling over fee waivers and news media status. Under the current system, there are no strict rules for when agencies must begin counting the time for processing a request. Many do not start the 20-day period until the request has reached the proper office within the agency for processing, until the request has been "perfected," or until disputes with the requester have been settled. In effect, an agency can leave a request sitting on the fax machine for weeks, then shuffle it around the office for a few more weeks, then follow up with the requester and wait for a response about the scope of the request. If after all this initial delay, the agency finally processes the request in a few days, that is the "processing time" that gets reported to Congress, excluding the months of stonewalling.

2. *Section 9 of the OPEN Government Act includes a number of additional reporting requirements for federal agencies, including the average and median number of days it took an agency to respond to FOIA requests and data on the 10 active requests with the earliest filing*

dates. In your view, would these additional reporting requirements be effective in reducing the heavy backlogs of FOIA requests?

The additional reporting requirements that the OPEN Government Act of 2007 would impose on agencies are essential to help the public and Congress oversee FOIA processing and target specific agencies and components with backlogs and other deficiencies. Reporting alone cannot eliminate backlogs; but reporting can help us understand the problems, press agencies on their specific failings, and generalize about trends and successes government-wide to help focus future FOIA reform efforts.

Each of the new reporting requirements, in Sec. 9 of the bill, is essential to getting a full picture of FOIA operations at each agency. As discussed in response #1 above, the median processing time is essentially a meaningless number. It conceals long backlogs and does not accurately reflect the true state of FOIA operations at an agency. In addition, it is difficult to derive other statistics, including trends across agencies, from median data because these numbers cannot be aggregated.

Average processing times and processing time ranges for requests and appeals are necessary to provide accountability about agency FOIA programs and give requesters an idea of how long they actually may have to wait for a response. In addition, the time pending for the ten oldest requests and appeals is an important measure that can reveal how some agencies leave requesters waiting for years. Exposure of these figures can have an impact—agencies whose oldest requests were put in the spotlight by the Archive’s highly-publicized audits have made it a priority to process those old requests. The Department of Defense recently completed processing of its oldest request, 17 years after it was filed.

Agencies should also include complete data about expedited processing and fee waiver requests. The current reporting is limited—agencies need only reveal how many expedited processing requests they have granted and the median time to process them. Without an accurate count of how many such requests were received and how many were denied, however, Congress and the public cannot assess whether agencies are complying with the law. Similarly, detailed reporting on the granting of fee waivers will bring transparency to the process and discourage abuse.

Finally, it is essential that Congress continue to monitor the state of agency FOIA resources. In some cases, the imposition of additional reporting requirements will be a burden on agency FOIA offices, largely because of the deficiencies in tracking discussed above. If an agency does not adequately track its requests in a database or by other reliable means, it will be difficult for that agency to report the range of data that now is required for the FOIA Annual Report. However, both tracking and reporting are vital, as I have emphasized here. Congress therefore should ensure that agencies allocate necessary funds and attention to their FOIA programs so that the new requirements can serve their important purpose.

SUBMISSIONS FOR THE RECORD

Testimony
United States Senate Committee on the Judiciary
Open Government: Reinvigorating the Freedom of Information Act
March 14, 2007

Ms. Katherine M. Cary
General Counsel,
Texas Attorney General's Office

Thank you, Chairman Leahy and Members of the Committee:

My name is Katherine Minter Cary. I am the General Counsel of the Texas Attorney General's Office. Thank you for the high honor of appearing before you today.

First, let me convey for the record Texas Attorney General Greg Abbott's strong support for the bipartisan OPEN Government Act of 2007. Attorney General Abbott has a strong record on open government and believes that, as stewards of the public trust, government officials have a duty of transparency when governing. He often quotes Supreme Court Justice Louis D. Brandeis who said that "sunshine is the best disinfectant."

As the leading open government expert in the Office of the Attorney General, I work daily to apply, educate and enforce one of the most proficient public information laws in the United States. As I have said before, unfettered access to government is a principled – and an achievable – reality.

Texas is a big state. We have more than 2,500 governmental bodies that span 268,801 square miles. From El Paso to the Panhandle and from Texarkana to Brownsville, the Texas Public Information Act ensures that information is placed into the public's hands every day without dispute.

Under the Texas Public Information Act, as under the Freedom of Information Act, requested information is to be "promptly released." Texas law defines this to mean as soon as possible, within a reasonable time, without delay. Any governmental body that wants to withhold records from the public must, within 10 business days, seek a ruling from the Attorney General's Office.

In Texas, a governmental body that fails to take the simple, but required procedural steps to keep information closed has waived any exceptions to disclosure unless another provision of law explicitly makes the information confidential. It is this waiver provision that is critical to providing meaningful consequences that prevent government from benefitting from its own inaction. Under the Public Information Act, if a governmental entity disregards the law and fails to invoke the provisions that specifically protect certain categories of information from disclosure, it has forfeited its right to use those disclosure exceptions. The OPEN Government Act would institute a similar waiver provision. The Texas experience shows that striking this

balance is fair and practical. Simply stated– it works.

In 1999, with Senator Cornyn as Attorney General, governmental bodies in Texas sought roughly 4,000 rulings from the Attorney General. Last year, our office issued approximately 15,000 rulings. This is staggering when you consider that these rulings represent a mere fraction of the requests for information that are promptly fulfilled every day.

What I have found is that education is vital. A noncompliance with open government laws most often results from a misunderstanding of what the law requires rather than malicious intent. For this reason, our office asked the Texas Legislature to require mandatory open government training for public officials in Texas. They agreed, requiring a course of training that must either be done or approved by the Attorney General's Office. We offer the training by free video that is available on the Attorney General's website. To date, our office has issued completed training certificates to almost 40,000 people.

In addition to open government training, our office provides handbooks about the law and an extensive open government website. The Attorney General's Office also has an open government toll-free hotline staffed by attorneys who help clarify the law and make open government information readily available to anyone. This service includes updating callers on where a request for ruling is in the process. The Texas open government hotline answers over 10,000 calls per year. The inclusion of a similar interactive process in the proposed OPEN Government Act would provide citizens with the customer service, attention and access that they deserve from their public servants.

Our office also handles citizen complaints. The Open Records Divisions attorneys attempt, with a 99 percent success rate, to mediate compliance with open records requirements. The OPEN Government Act would create a similar system that Texas has all ready demonstrated successfully. Resolving matters efficiently certainly underscores the usefulness of a dispute resolution function.

We have learned that it only requires a few legal actions by the Attorney General for word to get out that we are serious about enforcing compliance. It appears that the proposed Special Counsel will be in a comparable position to achieve positive results on the federal level.

Finally, Texas has a legal presumption that all information collected, assembled or maintained by or for a governmental body by a third party is open to the public. Records kept by third parties on behalf of Texas governmental bodies remain accessible by request to the governmental body as long as the governmental body enjoys a "right of access" to the information.

Moreover, Texas law does not allow the government to contract away access to public records held by its agents. The OPEN Government Act would appropriately extend the availability of federal governmental records to those records held by non-governmental third parties.

The policy statement that introduces the Texas Public Information Act is on-point:

The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

The United States Supreme Court has held that the Freedom of Information Act's ideals are analogous:

The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.

NLRB v. Robbins Tire and Rubber Co., 437 U.S. 214, 242 (1978)

Thank you again for the privilege of appearing before you today.

I would be happy to answer any questions.

STATEMENT OF SENATOR JOHN CORNYN
Before the Senate Judiciary Committee
“Open Government: Reinvigorating the Freedom of Information Act”
March 14, 2007

Thank you Mr. Chairman. It’s a continuing source of pride for me that Texas has one of the strongest laws in the U.S. expanding freedom of government information. Our state is known for allowing citizens access to government records and requiring that the material be produced quickly.

Since being elected to the U.S. Senate, I’ve made a point of trying to bring some of that “Texas sunshine” and openness to Washington, D.C. We have made some significant progress.

As the country observes national Sunshine Week this month, we are moving to shore up procedures to ensure that citizens and their representatives have quick and effective access to the inner workings of the federal government. The public deserves to know more about how their elected officials are working on their behalf and how their tax dollars are being spent.

Yesterday, Chairman Patrick Leahy and I introduced bipartisan legislation to reform the landmark Freedom of Information Act (FOIA) of 1966. Our goal is expanding accessibility, accountability and openness for government data.

Unsurprisingly, the government often is slow—hopelessly slow, in some cases—to fulfill some information requests. One of our goals is accelerating the timetable for meeting these requests. The right to access information is diminished when requests for information are subject to lengthy delay.

Our bill, the *Openness Promotes Effectiveness in our National Government Act of 2007* (the “OPEN Government Act”), would close loopholes in FOIA that can lead to waits of months – or even years – for requested information. It would protect access to FOIA fee waivers for legitimate journalists and those engaged in the expanding world of information. That would include bloggers and other Internet-based journalists.

The OPEN Government Act would also assist FOIA requestors in obtaining more timely responses by establishing FOIA hotline services in various agencies. These access points, either by telephone or the Internet, would enable requestors to track the status of their FOIA requests. It would also create a FOIA ombudsman position to review agency FOIA compliance and to suggest alternatives to litigation.

Finally, our legislation would set up strong incentives for agencies to act on FOIA requests in a timely fashion. It would restore meaningful deadlines that require agency action on FOIA requests within 20 days of their receipt—and would impose real consequences on federal agencies for missing statutory deadlines.

Our ultimate goal is to change attitudes. Legislation can be helpful, but the administration's top-to-bottom commitment is essential. Open government is an ethic. The citizen on the telephone asking about her three-year-old FOIA request isn't a nuisance to be placed on hold and left waiting. She is—or should be—the boss.

I believe the default position of our government must be one of openness. If records can be open, they should be open. If good reason exists to keep something closed, it is the government that should bear the burden to prove that—not the other way around.

We are optimistic about seeing this bill become law sometime this year. But even if that occurs, we recognize there is much more to be done, including striking the right balance on documents marked as secret or classified by government officials, especially during a time of war. Open government does not mean we should be irresponsible about protecting our national security. But there has been severe over-classification in the past, and I will help lead an effort to find a better balance.

Open government is a prerequisite for a free society. As our Founding Fathers recognized, a truly democratic system depends on an informed citizenry. Accountability is only an empty promise without transparency. I believe our legislation will provide citizens and journalists with more information and make our great American democracy even stronger.

Testimony of Tom Curley

President and CEO of
The Associated Press

Representing the Sunshine in
Government Initiative

On

"Open Government: Reinvigorating
the Freedom of Information Act"

Senate Judiciary Committee

March 14, 2007

Chairman Leahy, Ranking Member Specter and Members of the Committee on the Judiciary, thank you on behalf of the Sunshine in Government Initiative. (Members of SGI include: American Society of Newspaper Editors, The Associated Press, Association of Alternative Newsweeklies, Coalition of Journalists for Open Government, National Association of Broadcasters, National Newspaper Association, Newspaper Association of America, Radio-Television News Directors Association, Reporters Committee for Freedom of the Press, and Society of Professional Journalists.) Your efforts to strengthen the Freedom of Information Act show a courageous and timely commitment to the essence of our democratic values.

The enactment of the Freedom of Information Act more than 40 years ago affirmed that even though this government had become the mightiest power on earth, it was still the people's government.

It also was a bold admission that failure to allow public oversight leads quickly to less public service and more self-service.

FOIA was a promise to the people that whatever they might want to know about what their government was doing, the law would back them in all but a few kinds of highly sensitive or confidential matters.

The law does back them. But in too many cases the government doesn't back the law. As a result, increasingly we are seeing in the front-page headlines trends toward self-service government instead of public service.

First, let's look at the facts. The Coalition of Journalists for Open Government reported recently that the backlog of third party requests to executive departments rose in 2005 to 31 percent.

An Associated Press analysis last year of Freedom of Information summaries showed that the backlog problem, and the response delays have steadily worsened since agency performance reporting started in 1998.

What statistics like these can't show us is what the poor performance is costing us. News organizations like the one I manage understand that cost very well. We use FOIA and its state law counterparts every day.

When agencies respond as the law says they should, we know that the information they reveal can provoke public response that improves government operations, curbs waste and fraud, and even saves lives. When agencies don't respond, those opportunities are delayed, or lost altogether.

What kinds of opportunities lie hidden in the more than 200,000 FOIA requests that went unanswered in 2005?

I can tell you about one of them. It's not a dramatic story. It's as ordinary as the lunchbox a child carries to school every day.

In 2005, government scientists tested 60 of those little lunchboxes and found that one in five contained levels of lead that some medical experts consider unsafe. Several of them had more than 10 times the maximum acceptable level.

Yet the consumer Product Safety Commission issued a statement that said the tests uncovered "no instances of hazardous levels." AP national writer Martha Mendoza asked to see the tests and learned that the statement wasn't true.

You might have expected to read Martha's report more than a year ago when she filed her expedited FOIA request for the study results. But her story was just published last month.

That's because it took an entire year to get the 1,500 pages of lab reports and other documents...a year in which many parents continued to buy those popular soft vinyl lunch carriers and hand them to their children without any reason to wonder if they might not be safe.

Apparently the commission still thinks the boxes are safe. They told Martha that children don't use their lunchboxes in a way that exposes them to the lead found in the tests.

Maybe they're right. But maybe they're not.

Martha talked to researchers who study the effects of exposure to lead. Some of them told her the lead levels were cause for serious concern.

And they weren't the only ones who thought the commission had underplayed the threat. Another federal agency thought so, too.

When the Food and Drug Administration heard about the test results last summer – many months after the consumer commission said there was no problem – FDA officials warned lunchbox manufacturers that they might face penalties if they didn't get the lead out. One major store chained pulled the boxes off its shelves nationwide.

Evidently, reasonable people can disagree over whether it's okay to manufacture a tiny bit of toxic metal into your child's lunchbox.

And that's the point...reasonable people can disagree...but only if they know. And parents can make informed choices about what to put in their kids' hands only if they hear those differing views.

Why did it take a year for the commission to respond to a relatively simple request that FOIA says it was supposed to answer in 20 working days?

The commission offered a reason. Its position was that the test report could not be released until each lunchbox manufacturer had been notified that information about its product was being disclosed.

We'll leave for another day the question of whether a government safety agency should be more sensitive to product manufacturers than to the concerns of parents for their children's health.

What I believe should concern this committee is the choice that agencies like the consumer product commission face when they confront a FOIA request like Martha's:

On one hand, ignoring a duty to inform the manufacturers – whether the duty is real or not – could bring political or legal repercussions from powerful business interests and their allies.

On the other hand, ignoring a duty to meet the disclosure deadlines in the Freedom of Information Act could bring ... no consequences at all.

Any agency compliance officer with a healthy survival instinct could figure this one out. Disclosure brings risk. Delay or denial brings no risk.

No risk, that is, unless you count whatever the risk may be to your child of lead in the lunchbox.

I urge you to make changes that give the benefits of full and timely disclosure of government information a fighting chance of overcoming the often self-serving forces arrayed against them.

S. 394, the Open Government Act introduced last Congress by Senators Cornyn (R. Texas) and Leahy (D. Vermont) included real FOIA enforcement provisions. The Sunshine in Government Initiative supported that bill and will help in any way it can toward enactment of similar legislation this year.

By no means is the news from the FOIA front all bad. I could tell you FOIA success stories, too.

Thanks to FOIA, AP last year was able to report for the first time the extent of deaths and injuries among private contract workers in Iraq.

Thanks to FOIA, AP learned that the FDA suspected but failed to follow up in time to stop a transplant organ provider who was using faked health records to ship body parts that were implanted in human recipients.

And FOIA requests were a crucial part of AP's reporting which showed that highly publicized federal fines against companies that break the law are increasingly being quietly written down afterwards – sometimes by more than 90 percent.

It's a tribute to the professionalism and respect for the rule of law of so many agency FOIA officers that they respond correctly to thousands of requests for information each year.

They know – as we do -- that our government was designed to be open and works best when its principles are upheld.

But I am not here to reassure you that FOIA is working fine because we all know it's not. FOIA is a law that protects us against real harm and real loss. Such laws cannot be asked to enforce themselves.

If you leave FOIA defenseless, agencies will continue too often to take the risk-free path -- the easy path -- and just say no. And they're all the more likely to do it when something has gone wrong that the public really, really needs to know about.

One of our reporters had an experience a few years ago that shows just how little risk it can take to make "no" seem like the right answer to a FOIA request.

We asked the Defense Department for a copy of a training video they had developed.

They said “no.” Their reason was that a Freedom of Information Act exemption prevented them from releasing a copy of “Freedom of Information Act: The Public’s Right to Know.”

We had a good laugh over this. But it was the kind of laughing you do to keep from crying...because this is what life has been like so often in recent years for reporters and other regular FOIA requesters. The very same reflex that prompted the Department of Defense’s goofy denial of our request for their video is evident everywhere . . . sometimes with results nearly as absurd.

When we asked the Interior Department for documents showing which employees had asked for waivers from agency ethics rules in 2004, Interior said our request was too broad. They said we had to provide the names of the employees who sought the waivers . . . exactly the information we were requesting from them.

Federal officials who used to provide information for the asking now say you have to file a time-consuming FOIA request. Ground-level FOIA officers may be willing enough to comply with the law, but their bosses look for ways to delay or deny.

Administrative appeals from those denials are often no more than occasion for further broken deadlines and ritual denials. The requester ends up with a choice between giving up or commencing litigation that can easily cost well into six figures.

Even AP has to choose such fights carefully. Another problem is that we can litigate a FOIA denial for years and still not get our legal fees reimbursed if an agency turns over the goods before a court actually orders it to do so.

How many of your small business or private constituents can't afford to sue and just have to give up?

There could easily be a third way. A strong FOIA ombudsman within the federal government could help requesters around some of the most unreasonable obstacles without forcing them to go to court.

Unreasonable obstacles abound in part because many agency executives think obstructing information flow is our national policy. The Ashcroft memorandum advising agencies that the Justice Department stands ready to back any plausible argument for denying a FOIA requests continues to set the tone for the denial of access.

In similar fashion, the mania for classification of government documents and the creation of such categories as sensitive but unclassified continues to be a costly scourge. When in doubt, stamp it secret...even if it's been public for decades.

This reflex undermines our values, erodes public confidence in its government and in the end leaves the public in far greater danger than it would be if it knew more about the threats to its safety.

And the problem is no longer just with federal agencies. An AP survey last year found that state agencies and legislatures have caught the secrecy virus. We identified more than 600 new state laws that restrict access to what had once been public information.

The presumption that any plausible reason for locking the files is a good enough reason is doing immeasurable harm.

When government has trained itself to believe that the risks from openness are substantial, while the risks from keeping secrets are negligible, you begin to get the kind of government nobody wants – a government that believes its job is to do all the thinking for us.

You get, for example, a Consumer Product Safety Commission that decides on its own – for all of us – that a little bit of toxic lead in a lunchbox is okay...and that the matter needs no further discussion.

“Further discussion” is the essence of a free society. We need a strong and effective Freedom of Information Act to make sure that discussion flourishes.

Mr. Chairman, Senator Specter, members of the committee, on behalf of the Sunshine in Government Initiative, we are grateful for this opportunity to appear before you today. We urge you to pass Open Government Act legislation this year.

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Statement of U.S. Senator Russell D. Feingold
Senate Committee on the Judiciary
“Open Government: Reinvigorating the Freedom of Information Act”
Wednesday, March 14, 2007

Chairman Leahy, thank you for holding this hearing on an issue of vital importance. The Freedom of Information Act is an essential piece of legislation for our democracy. It enables researchers, journalists, and interested citizens to obtain Executive Branch documents at a reasonable cost. At the same time, the Act protects certain documents from disclosure to shield national security, privacy, trade secrets, and other privileges. A government that permits citizens access to records that document its day-to-day decisions is one that fulfills the promise of democracy in a particularly significant way. Congress should regularly review and update how the law that makes such access possible is working.

When the Executive Branch knows its actions are subject to public scrutiny it has an added incentive to act in the public interest. I fear that this important value of government openness has taken a back seat in the years since the terrible events of September 11. Protecting our citizens from terrorist attacks must be the top priority of government, but we can do that while still showing the proper respect for the public's right to know.

Unfortunately, that has not been this Administration's attitude. From the excessive secrecy surrounding the post-9/11 detainees, to the lack of information about implementation of the controversial provisions of the USA PATRIOT Act, to instructions to federal agencies issued by former Attorney General Ashcroft that tightened the standards for granting an FOIA request, this Administration has too often tried to operate behind a veil of secrecy.

That is why I intend to cosponsor the bill that Senators Leahy and Cornyn introduced yesterday to strengthen the Freedom of Information Act. Thank you again, Mr. Chairman, for being such a strong leader on this issue. I am proud to join you in working to empower individual citizens to obtain the information they need to hold their government accountable. In so doing, we can help ensure that our democracy remains strong and vibrant.

**Hearing on
Open Government: Reinvigorating the Freedom of Information Act**

**United States Senate
Committee on the Judiciary**

Statement of Meredith Fuchs, General Counsel, National Security Archive

March 14, 2007

Chairman Leahy, Ranking Member Specter and Members of the Senate Committee on the Judiciary, I am pleased to appear before you to support efforts to improve the Freedom Information Act (FOIA).

I am General Counsel to the National Security Archive (the "Archive"), a non-profit research institute and leading user of the FOIA. We publish a wide range of document sets, books, articles, and electronic briefing books, all of which are based on records obtained under the FOIA. In 1999, we won the prestigious George Polk journalism award for "piercing self-serving veils of government secrecy" and, in 2005, an Emmy award for outstanding news research.

In my five years at the Archive, I have overseen five audits of federal agency FOIA processing, including one released this week that examined agency noncompliance with the E-FOIA Amendments of 1996 (which I am attaching to my testimony), two that identified the ten-oldest pending FOIA requests in the federal government, and one that examined the proliferation of sensitive but unclassified information labeling policies. Through those audits, my colleagues' FOIA requests, litigation, and training federal agency FOIA officers, I am very familiar with how the Act functions.

There are many ways to measure the role the Freedom of Information Act plays in our nation. One way is to look at the work of the news organization headed by Mr. Curley, who sits on this witness panel. All the remarkable news stories based on records released under FOIA and reported by the AP to the public would not have been possible if the AP were not willing to litigate in court to enforce its right to information. This illustrates a significant problem -- while the FOIA has been a powerful tool to advance honesty, integrity and accountability in government, there is still a culture of resistance to the law in many federal agencies. Instead of viewing the public as the customer or as part of the team, the handling of FOIA programs at some agencies suggests that the public is considered the enemy and any effort to obstruct or interfere with the meddlesome public will be tolerated. For requesters with the resources, litigation is sometimes a solution. The rest of the public is simply shut out of the process.

I recently spoke at the Western Regional Training Conference for the American Society of Access Professionals (ASAP), a private professional association comprised mainly of federal government FOIA personnel. A FOIA specialist came up to me after one of my talks and told me that at her agency, whenever a FOIA request touches on anything controversial, the staff begins listing ways to slow it down or derail it. She said

they start with fee disputes, then they add on questions about how clearly the request is described, and then they let it languish, apparently hoping all of those tactics will lead to the requester abandoning the request.

My response to her was one of dismay. This is a country where we are strong enough to acknowledge our mistakes, air our dirty laundry, and then fix the problems. If anything is a testament to the strength of our democracy, it is the fact that American citizens are not afraid to ask the government hard questions, but this is something we take for granted in the United States.

I would like to address why reforms are necessary now to revitalize the FOIA. The FOIA is a unique law. There is no federal, state or local agency that enforces it. Rather, it depends on the public to make it work with the tools provided by Congress and an independent judiciary that is willing to remind agencies of their obligations. Based on their own reporting, we know agencies will not make FOIA a tool for timely education about government activities. Each agency is required to submit an annual report that provides FOIA processing statistics as well as information on agencies' progress in achieving goals they set in FOIA improvement plans mandated by Executive Order 13392. Reports for FY 2006 were due by February 1, 2007. As of this past Monday (five weeks after the due date), the reports from only 8 out of 15 federal departments and only 51 out of 75 federal agencies were available.¹

The Department of Justice has taken the lead on guiding agencies through the Executive Order process. The Department of Justice's annual report, however, acknowledges that DOJ components have failed to meet 30 different goals set out in its FOIA improvement plan.² Most striking to me is the report from the Federal Bureau of Investigation (FBI), which indicates that 8 of the FBI's FOIA improvement goals were not met. For some goals the FBI simply pushed back its deadlines by one year. For example, in the FBI FOIA improvement plan, the FBI reported 60 vacancies in its FOIA staff and set a goal to fill those vacancies by September 30, 2006. They did not do the hiring and instead the goal has now been moved to September 30, 2007. They set a goal to review and update their Web site by December 31, 2006. They failed to do it and instead moved the deadline to December 31, 2007.

As you know, the FOIA requires agencies to respond to FOIA requests within 20 business days. Attached to my testimony is a compilation of the date ranges of pending FOIA requests at federal agencies. The list was compiled from the agency annual reports referenced above. As you can see from the chart, at least **7 departments have FOIA requests still pending that are more than 10 years old**. Another **7 have requests more than 5 years old**. Twenty-eight (28) more have requests that are between 1 and 5 years old. The second chart shows what happens when requests are sent to another agency for consultation – additional delays result. And, those are just the agencies whose reports are available. The Criminal Division of the Department of Justice reports the oldest FOIA request so far – it is eighteen years old and dates from 1989.

¹ Available at <http://www.usdoj.gov/oip/fy06.html>.

² Available at http://www.usdoj.gov/oip/annual_report/2006/06foiapp12.htm.

At a hearing held in the House of Representatives on February 14, 2007, Melanie Pustay from the Department of Justice testified that agencies have made great progress handling their backlogs.³ While it is true that some agencies are gradually reducing their backlogs, I would like to give you an example of how they are doing so.

The story begins in 2001 when the Treasury apparently was trying to close out old requests. It sent the Archive letters concerning 31 requests that had been submitted in the mid-1990s and asked whether we remained interested in the requests. We said we were still interested in the records. Then, in December 2005, President Bush issued Executive Order 13392, which directed agencies to set goals designed to reduce or eliminate the agencies' FOIA request backlog. Here is what happened next:

- June 14, 2006: The Department of the Treasury set a goal in its FOIA improvement plan of reducing its FOIA backlog by 10% by January 1, 2007.⁴
- August 24, 2006-Present: The Archive receives letters from the Department of Treasury asking whether we are still interested in pursuing access to records under our pending individual FOIA requests, many of which were submitted 10 or more years ago. The letters – which usually took more than seven days to reach our office – warned “if we do not receive a reply from you within 14 business days from the date of this letter, we will conclude that you no longer are interested in the requests and will close our files regarding this matter.” **We received these letters for the same 31 requests that the Department of the Treasury checked on in 2001.**
- January 9, 2007: I sent a letter to Treasury in which I wrote: “In many instances, we have received two or three letters [threatening to close] a particular FOIA request despite the fact that we already advised the Department of our continued interest in that request. In some cases, we have received these letters for requests that are pending on administrative appeal (including appeals filed as recently as August 2006) where the very fact that we appealed should signal our continued interest.” I concluded, “I request that you do not close any Archive FOIA request or appeal without processing it.”
- February 23, 2007: Treasury sent a letter asking whether we continue to be interested in several other old FOIA requests, filed in 1997, in which it states: “We received a letter from Meredith Fuchs of the National Security Archive ... [but] we are in the process of reducing [Treasury’s] significant backlog by communicating with requesters as to which of those requests have gone stale.”

The punch line is that several of the letters received in the past year also indicate that the original requests (which had been submitted from 1994–1997) have been

³ <http://www.usdoj.gov/oip/foiapist/2007foiapist.htm>.

⁴ Available at <http://www.ustreas.gov/foia/reading-room/foia-improvement-plan.pdf>.

destroyed and ask if we can send new copies of the original FOIA requests. What has the Department of the Treasury FOIA program done for the last six years after it asked whether we would abandon our requests? I wonder if I come back here in another six years whether I will be able to tell you that they asked us yet again whether we are willing to give up.

There are many things wrong with Treasury's practices. They have requests as old as 10-13 years that they clearly have made no effort to process in all those years. In some cases they destroyed the requests without making any substantive response to the FOIA requester. In addition, despite taking years to respond, and failing to meet their 20 business day response time, they only give the FOIA requester 14 business days before closing the request. What if the requester has moved in the intervening 13 years? What if they do not get the letter until more than a week has passed and simply are not able to respond in time? While this may be one way to eliminate backlogs, it is certainly not what Congress intended from FOIA programs.

There are several provisions of the OPEN Government Act of 2007, introduced just yesterday by Senators Leahy and Cornyn, that I think are critical for improving the functioning of FOIA. The attorneys' fees provision will improve the situation because it will make it possible for the public to enforce a law that now has no one ensuring compliance. It will end agency litigation gamesmanship, such as the common practice of agencies taking no action until after a lawsuit has been filed and summary judgment has been briefed. I, and colleagues at other organizations, all can offer examples of these wasteful litigation tactics. Restoration of the catalyst theory for attorneys' fees awards will push agencies to take a responsible legal position from the outset and will end practices that waste the resources of FOIA requesters, the Department of Justice lawyers who have to defend agencies, and the judicial system. The attorneys' fees reform, along with the imposition of real consequences for delay and enhanced authority of the Office of Special Counsel, will provide incentives for agencies to process requests correctly and expeditiously.

Better reporting is an essential part of the package. FOIA annual reports do not permit Congress to conduct quality oversight, agency managers to identify problems and improve processing, and the public to press for responses. I urge you to mandate better, more reliable reporting, including requiring data on: average processing times, range of processing times, oldest pending requests and appeals, the number of requests abandoned by requesters due to delay, the number of requests rejected because the records are operational files, the number of expedited requests received, the number denied, and the processing times for expedited requests. In addition, the Committee should require more standardized reporting, including measuring response time from receipt of the FOIA request and disaggregating data for first person Privacy Act requests and FOIA requests. I assure, judging by the results of our audits and the success of FOIA, such transparency will have an impact on agency processing of FOIA requests.

The tracking requirements also will help. Although it seems obvious that agencies should have some reliable record of public information requests, many do not.

As a result, many requests get lost in the system. It is very hard for a FOIA requester to advocate for processing when neither the requester nor the agency knows who is handling the request.

Finally, the OPEN Government Act of 2007 includes many additional provisions that will help improve FOIA programs. The personnel review could lead to improvements in the professionalism of FOIA programs. The requirement that withholding statutes include specific reference to FOIA would curb the slow erosion of the presumption of open government by making sure careful consideration is given to any new withholding statute. The annual reporting requirement on the use of the Department of Homeland Security disclosure exemption for critical infrastructure information would provide greater accountability concerning the use of the exemption. The provision clarifying that all legitimate journalists are entitled to preferred status would eliminate a common delay tactic employed by agencies against FOIA requesters.

I am hopeful that my testimony today has offered a glimpse into the public's experience with FOIA. I am grateful for your interest in these issues and am happy to respond to any questions.

Meredith Fuchs serves as the General Counsel to the non-governmental National Security Archive at George Washington University. At the Archive, she oversees Freedom of Information Act and anti-secrecy litigation, advocates for open government, and frequently lectures on access to government information. She has supervised five government-wide audits of federal agency FOIA performance including one released this week entitled: "File Not Found: Ten Years After E-FOIA, Most Agencies are Delinquent." She is the Secretary of the Board of Directors of the American Society of Access Professionals (ASAP), a private professional association of FOIA personnel who serve throughout the federal government. She is the author of "Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy," 58 Admin. L. Rev. 131 (2006); and "Greasing the Wheels of Justice: Independent Experts in National Security Cases," 28 Nat'l Sec. L. Rep. 1 (2006).

Previously she was a Partner at the Washington, D.C. law firm Wiley Rein & Fielding LLP, where she was a member of the Litigation, Insurance, Privacy and E-Commerce practice groups. Ms. Fuchs served as a law clerk to the Honorable Patricia M. Wald, U.S. Court of Appeals for the District of Columbia Circuit, and to the Honorable Paul L. Friedman, U. S. District Court for the District of Columbia. She received her J.D. from the New York University School of Law.

Range of Pending FOIA Requests

Data from FY 2006 FOIA Annual Reports

| Agency | Oldest Pending Request | Most Recent Pending Request |
|---------------|------------------------|-----------------------------|
| CNS | N/A | N/A |
| FTC | N/A | N/A |
| NIGC | N/A | N/A |
| USTR | N/A ⁵ | N/A |
| DOJ-Criminal | 7/10/89 | 1/8/07 |
| DOD | 3/10/91 | 9/30/06 |
| CIA | 2/1/92 | 1/23/07 |
| NARA | 9/21/92 | 1/31/07 |
| DOJ-FBI | 12/18/92 | 1/9/07 |
| DOE | 3/10/93 | 1/30/07 |
| EPA | 5/23/95 | 1/30/07 |
| DOS | 11/28/97 | 1/24/07 |
| NTSB | 1/7/99 | 1/23/07 |
| DOJ-Antitrust | 6/3/99 | 1/8/07 |
| DOJ-EOUSA | 12/30/99 | 1/9/07 |
| DOT | 8/29/00 | 1/29/07 |
| DOJ-CRT | 1/10/02 | 1/9/06 |
| DOJ-OIP | 2/5/02 | 1/8/07 |
| DOC-NOAA | 8/2/02 | 1/31/07 |
| SEC | 10/4/02 | 1/31/07 |
| EDU | 12/11/03 | 1/31/07 |
| NEH | 2/27/04 | 1/31/07 |
| DOJ-EOIR | 6/20/04 | 1/17/07 |
| CPSC | 7/26/04 | 1/22/07 |
| Peace Corps | 8/2/04 | 1/22/07 |
| NASA | 11/5/04 | 1/29/07 |
| RRB | 2/2/05 | 9/27/05 |
| DOJ-JMD | 3/7/05 | 12/16/06 |
| DOL | 4/5/05 | 1/24/07 |
| DOJ-USMS | 4/20/05 | 1/9/07 |
| DOC-NIST | 4/28/05 | 1/31/07 |
| DOJ-BOP | 4/29/05 | 1/9/07 |
| DOJ-OLC | 5/20/05 | 12/21/05 |
| SSA | 8/10/05 | 12/31/07 |
| DOJ-ENRD | 8/11/05 | 12/19/06 |
| Committee | 9/30/05 | 1/22/07 |
| EEOC | 10/13/05 | 1/23/07 |
| DOJ-DEA | 11/5/05 | 12/31/06 |
| DOJ-OIG | 12/28/05 | 12/21/06 |
| NSF | 1/13/06 | 11/9/06 |

⁵ N/A—Agency did not provide information in FY 2006 Annual Report

| Agency | Oldest Pending Request | Most Recent Pending Request |
|-----------------------|-------------------------------|------------------------------------|
| ODNI | 1/23/06 | 1/3/07 |
| DOJ-OJP | 1/26/06 | 1/11/07 |
| DOJ-USPC | 2/7/06 | 2/7/06 |
| DOJ-OIPR | 2/21/06 | 1/3/07 |
| Amtrak | 3/1/06 | 1/26/07 |
| DOC-OIG | 3/10/06 | 1/31/07 |
| EXIM | 4/10/06 | 1/30/07 |
| USPS | 4/25/06 | 1/25/07 |
| USTDA | 4/28/06 | 1/25/07 |
| FCC | 5/2/06 | 1/30/07 |
| DOJ-EOUST | 5/8/06 | 12/14/06 |
| CFTC | 5/24/06 | 1/31/07 |
| DOJ-ATF | 6/12/06 | 1/8/07 |
| DOC-PTO | 6/16/06 | 1/31/07 |
| TVA | 6/29/06 | 10/24/06 |
| DOC-BTS | 7/13/06 | 12/19/06 |
| DOC-ITA | 7/21/06 | 1/31/06 |
| FEC | 8/8/06 | 1/29/07 |
| PBGC | 8/21/06 | 1/31/07 |
| FERC | 8/30/06 | 1/9/07 |
| FCA | 9/8/06 | 9/22/06 |
| DOC-Census | 9/11/06 | 10/26/06 |
| DOC-OS | 9/12/06 | 1/31/07 |
| DOC-EDA | 9/14/06 | 11/15/06 |
| DOC-NTIA | 9/20/06 | 1/29/07 |
| FRB | 9/28/06 | 1/29/07 |
| DOJ-OSG | 10/6/06 | 1/9/07 |
| FMC | 10/11/06 | 1/31/07 |
| GSA | 10/11/06 | 1/31/07 |
| NLRB | 10/11/06 | 1/24/07 |
| DOJ-Civil Division | 10/24/06 | 12/15/06 |
| MSPB | 11/9/06 | 1/30/07 |
| FDIC | 11/14/06 | 12/7/06 |
| OMB | 11/15/06 | 2/1/07 |
| DOJ-OWW | 11/16/06 | 12/18/06 |
| DOJ-OPR | 12/7/06 | 12/20/06 |
| DOJ-NDIC | 12/15/06 | 1/11/07 |
| NCUA | 12/26/06 | 1/30/07 |
| OFHEO | 12/27/06 | 1/19/07 |
| OGE | 1/17/07 | 1/17/07 |

Range of Consultations Pending with Other Agencies
By date of initial interagency communication

Data from FY 2006 FOIA Annual Reports

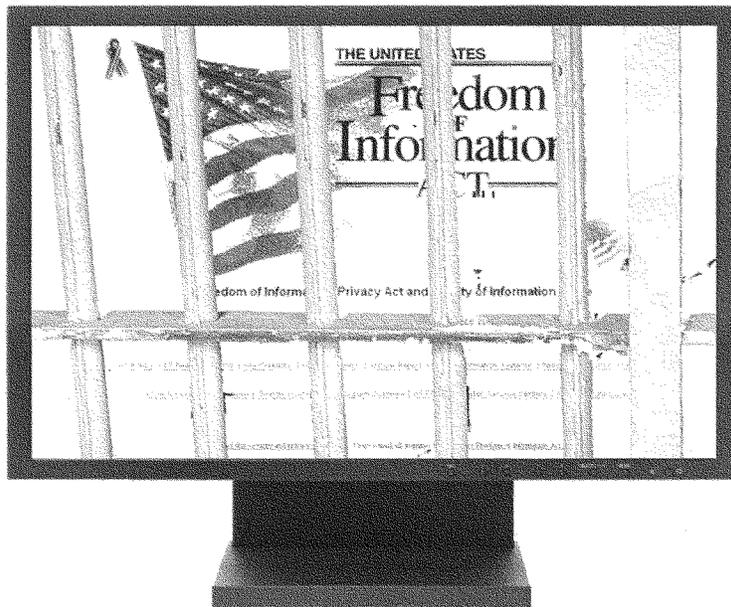
| Agency | Oldest Pending Request | Most Recent Pending Request |
|--------------------|-------------------------------|------------------------------------|
| CNS | N/A | N/A |
| FTC | N/A | N/A |
| NIGC | N/A | N/A |
| USTR | N/A ⁶ | N/A |
| DOS | 4/13/89 | 1/24/07 |
| DOD | 5/3/93 | 9/30/06 |
| NARA | 9/4/93 | 1/31/07 |
| DOE | 5/17/95 | 11/21/06 |
| CIA | 6/2001 | 1/29/07 |
| DOJ-Criminal | 8/2/01 | 1/9/07 |
| DOJ-FBI | 1/8/02 | 1/9/07 |
| DOJ-DEA | 1/3/03 | 12/29/06 |
| DOJ-OIP | 1/3/03 | 12/29/06 |
| DOJ-USMS | 8/4/03 | 9/11/06 |
| DOC-NIST | 8/4/05 | 1/31/07 |
| DOJ-OIPR | 3/24/06 | 1/5/07 |
| DOJ-OIG | 6/15/06 | 9/11/06 |
| DOJ-Civil Division | 8/7/06 | 8/7/06 |
| DOJ-OSG | 11/27/06 | 12/18/06 |
| DOC-OS | 12/5/06 | 1/31/07 |
| EPA | 12/13/06 | 1/23/07 |
| DOJ-OJP | 12/15/06 | 12/15/06 |
| DOC-NTIA | 12/19/06 | 1/29/07 |
| DOC-OIG | 1/2/07 | 1/31/07 |

⁶ N/A—Agency did not provide information in FY 2006 Annual Report

THE KNIGHT OPEN GOVERNMENT SURVEY 2007

i **File Not Found:**

**10 Years After E-FOIA,
Most Federal Agencies Are Delinquent**



CONDUCTED BY
THE NATIONAL SECURITY ARCHIVE
THE GEORGE WASHINGTON UNIVERSITY
www.nsarchive.org

March 12, 2007 ♦ Sunshine Week

SUMMARY

In 1996, Congress sought to revolutionize disclosure of government information to the public by directing federal agencies to use the Internet to make more information publicly available. Congress saw on the horizon huge returns: more public access to important government information and less time and money spent at agencies to process Freedom of Information Act (FOIA) requests.

Ten years after the provisions of the Electronic Freedom of Information Act Amendments (E-FOIA) came into force, the Executive Branch still has not obeyed Congress's mandate for change. The National Security Archive's Knight Open Government Survey of 149 federal agency and component Web sites found massive non-compliance with E-FOIA. The poor state of agencies' FOIA Web sites forces the conclusion that not only did the agencies ignore Congress, but lack of interest in FOIA programs is so high that many agencies have failed even to keep their FOIA Web sites on par with their general agency Web sites. Congress's best intentions have not had the desired impact.

Key findings of the Knight Open Government Survey are:

- Only about one in five (21%) of the agencies reviewed had on its FOIA site all four categories of records that Congress explicitly required agencies to post. (See Figure 1.) This audit found 41% of the agencies had not even posted frequently requested records. (See Figure 2.) Agencies have generally failed to use the Internet as a means to reduce the FOIA burden by posting as a matter of course records related to matters of strong public interest or categories of records generally requested by the public.
- Only one in sixteen agencies (6%) had on its Web site all ten elements of essential FOIA guidance that the Archive's audit identified based on the E-FOIA statute, legislative history, and DOJ guidance. (See Figures 3 and 4.) These include basic information on: (1) where to send a FOIA request (by mail and by fax or electronically), (2) fee status, (3) fee waivers, (4) expedited processing, (5) reply time, (6) exemptions, (7) administrative appeal rights, (8) where to send an administrative appeal, (9) judicial review rights, and (10) an index of records or major information systems.
- Only about one in three agencies (36%) provided required indexes and guides to agency records, and many of those are incomprehensible or unhelpful. The guidelines for major information system indexes and the related Government Information Locator Service (GILS) program need a major overhaul.

WHAT CONGRESS INTENDED: TRANSFORMING FOIA

Revolution in Web access. Most government documents available on the Web as a matter of course. When agencies anticipate significant public interest in a topic or event, they post key records before FOIA requests are received.

Fewer FOIA requests. Public has immediate access to vital records online without adding another FOIA request into the backlogged system.

Valuable FOIA tools. Agencies provide FOIA requesters with information they need to make a request and comprehensive guides to agency records, reducing the administrative burden.

THE REALITY: 10 YEARS LATER

Agencies have not obeyed the law.

- Only 1 in 5 posts all required records.
- Only 1 in 16 provides complete guidance for requesters.
- FOIA Web sites are poorly organized, difficult to use.

- Agencies have not incorporated many useful online tools that could ease their processing burden. Only about one in four agencies (26%) has developed a Web-based FOIA submission form.
- Many agency FOIA Web sites are poorly organized and difficult to navigate. Even on sites that provide some or all of the required materials, users may be unable to find the information they are seeking because agencies have not made an effort to design user-friendly FOIA sites. The organization of decentralized agency Web sites in particular is more likely to confuse FOIA requesters than help them. These agencies must establish agency-wide policies and exercise direction and oversight over their components' FOIA programs, particularly in the area of E-FOIA compliance.

Agencies clearly have failed to keep pace with the revolution in access to information. Today, nearly three-quarters of the adult public has Internet access, and the Web has become a principal means of conducting a broad range of personal and business communications. Yet the Knight Open Government Survey showed extremely disparate levels of effort by agencies to use FOIA Web sites as a means to communicate with the public.

There are several outstanding agencies whose efforts in complying with E-FOIA demonstrate that the burden of the law is not too high. For example, the National Aeronautics & Space Administration has proactively posted records of great interest to the public, such as those related to the Space Shuttle Columbia disaster. Also, the Department of Education provides excellent guidance and tools such as online forms for FOIA requesters. However, this audit identified a much larger number of agencies that are delinquent in complying with E-FOIA. For example, Immigration and Customs Enforcement (a Department of Homeland Security component) has no dedicated FOIA page at all; and the Air Force has not posted any of the required records. The Archive has sent letters to the Chief FOIA Officer or other FOIA administrator at each of the worst agencies, laying out the deficiencies found in their FOIA Web sites and recommending improvements.

No authority has compelled federal agencies to comply with the E-FOIA Amendments. This dearth of Executive Branch leadership and Congressional oversight on E-FOIA matters has allowed many agencies to remain far out of compliance for far too long. It is time for FOIA finally to catch up with the information revolution.

FIGURES

Figure 1

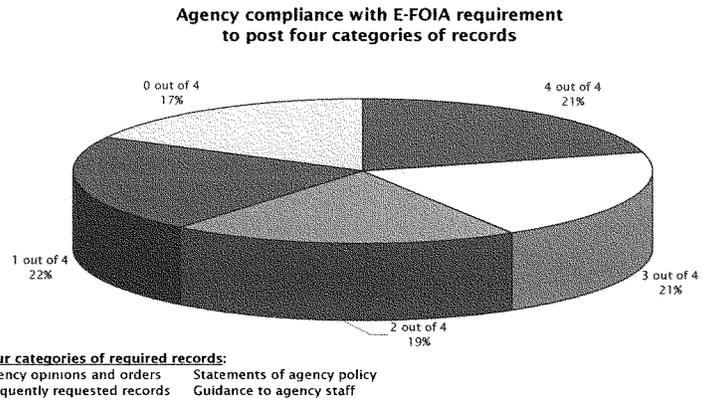


Figure 2

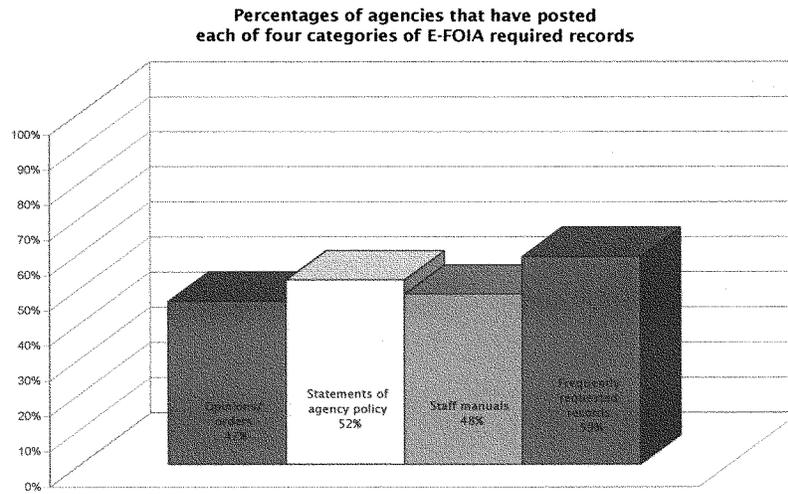


Figure 3

Agency posting of ten categories of essential FOIA guidance

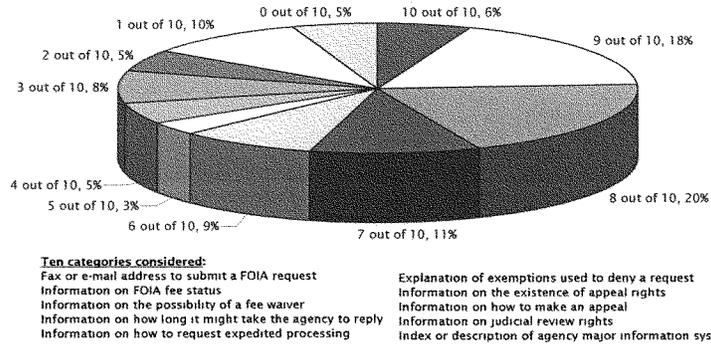
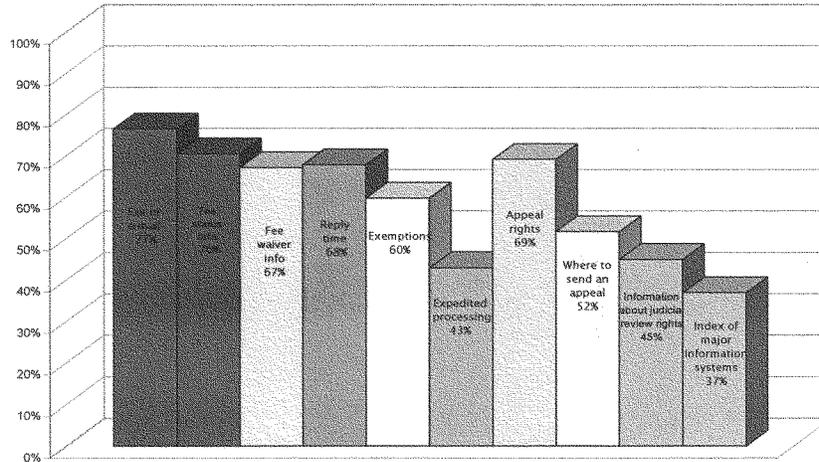


Figure 4

Percentages of agencies that have posted each of ten categories of essential FOIA guidance



★ THE E-STARS: BEST OVERALL AGENCIES ★
In alphabetical order

Department of Education

★ Goes above and beyond what is required with guidance and tools for requesters ★ Good guide, FAQs, FOIA request and appeal checklist ★ Excellent online FOIA appeal and request forms ★ Most of the required documents are available ★ <http://www.ed.gov/policy/gen/leg/foia/foiatoc.html>

Department of Justice

★ Portal scheme links component FOIA sites and reading rooms ★ Excellent FOIA Reference Guide ★ Comprehensive index of major information systems ★ Well-organized electronic reading room ★ <http://www.usdoj.gov/oip/>

Federal Trade Commission

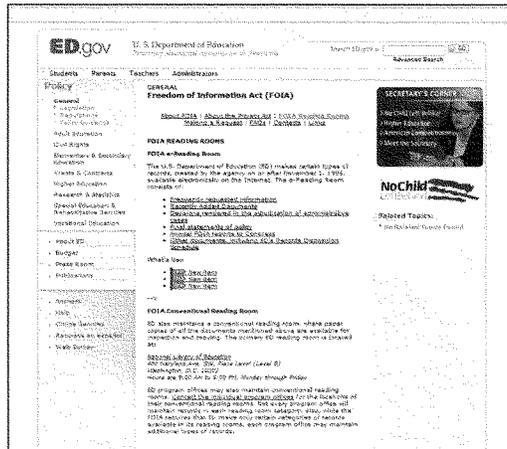
★ Well-organized electronic reading room with extensive records ★ Good guidance ★ FOIA request checklist ★ <http://www.ftc.gov/foia/>

National Aeronautics & Space Administration

★ Uses portal scheme to link all component FOIA Web sites ★ Good proactive disclosure (posted materials related to Space Shuttle Columbia) ★ Comprehensive guidance ★ <http://www.hq.nasa.gov/office/pao/FOIA/agency/>

National Labor Relations Board

★ Excellent navigation scheme ★ Site is well organized and very easy to follow ★ Good guidance ★ Electronic reading room with a lot of available information ★ <http://www.nlrb.gov/FOIA/>



An example of an E-Star electronic reading room.

THE E-DELINQUENTS: WORST OVERALL AGENCIES

In alphabetical order

Air Force (Department of Defense)

* Two distinct FOIA sites, one hidden from main agency home page * Minimal guidance * No required records * Several broken links * Inaccurate information for some sub-components *
<http://www.af.mil/foia.asp> and <http://www.foia.af.mil/>

Department of Defense

* Poor site structure and design * Disorganized, unsearchable electronic reading room * Many required documents could not be located * <http://www.dod.mil/pubs/foi/>

Department of Interior

* No guidance currently available * Poor organization and badly-identified links * Difficult to navigate * One large component, Bureau of Indian Affairs, has no FOIA site * <http://www.doi.gov/foia/>

Department of Labor

* No central reading room and no required documents available * Several components (ETA and EBSA) lack FOIA sites * <http://www.dol.gov/dol/foia/main.htm>

Federal Labor Relations Authority

* Two distinct FOIA pages, each very difficult to find from main site * Poor guidance * No required records available * <http://www.flra.gov/hdbook4.html>

Immigration & Customs Enforcement (Department of Homeland Security)

* No dedicated FOIA page * Very limited guidance * No required documents *
<http://www.ice.gov/about/legal.htm#foia>

Office of the Director of National Intelligence

* No guidance for requesters, only contact information provided * Limited electronic reading room *
<http://www.dni.gov/foia.htm>

Office of National Drug Control Policy

* No substantive guidance * No required documents except annual reports * Poor navigation *
<http://www.whitehousedrugpolicy.gov/about/foia.html>

Small Business Administration

* Very poorly organized site, particularly guidance materials * Few required documents available * Documents and information very difficult to locate *
<http://www.sba.gov/aboutsba/sbaprograms/foia/index.html>

Transportation Security Administration (Department of Homeland Security)

* Limited guidance for requesters * Few, poorly-identified records in electronic reading room * Difficult to navigate * <http://www.tsa.gov/research/foia/index.shtm>

U.S. Trade Representative

* No FOIA link on agency home page * No required documents identified on FOIA site * Guidance scattered and incomprehensible * http://www.ustr.gov/Legal/Reading_Room/FOIA/Section_Index.html

Department of Veterans Affairs

* Very limited guidance * Site is poorly organized * Information is difficult to locate * Several broken links to required documents * <http://www.va.gov/oit/egov/rms/foia.asp>

METHODOLOGY

The National Security Archive has conducted four previous audits of federal government FOIA administration. For each audit, the Archive submitted FOIA requests to federal agencies requesting policies or data for analysis and cross-agency comparison. The Archive set out to conduct this audit in the same manner. After submitting 46 FOIA requests to the largest agencies and components regarding their policies for posting information in their electronic reading rooms, and another 46 requests for policies on the length of time the agencies maintain the records in their reading room, the Archive received an overwhelming number of “no records” responses and concluded that most agencies do not have policies in place for populating and maintaining their electronic reading rooms. The Archive then designed a comprehensive methodology to review each agency’s Web site and assess compliance with E-FOIA based on that review.

The National Security Archive’s government-wide audit of E-FOIA compliance covered 149 agencies and agency components, including:

- All 91 independent agencies that are subject to FOIA and that designated a Chief FOIA Officer under Executive Order 13,392;
- Of those agencies with decentralized FOIA processing, 58 components (bureaus, offices, divisions, or other sub-agencies) that received more than 500 FOIA requests during fiscal year 2005.

The Archive utilized three Web site reviewers who followed a standard methodology designed to examine compliance with legal requirements and DOJ and OMB guidance. The reviews, which were conducted during January and February 2007, focused on three key areas:

- Online availability of four specific categories of records required by the statute;
- Guidance for FOIA requesters, as required by E-FOIA and outlined in the legislative history; and
- Basic elements of a good FOIA Web site, suggested by DOJ guidance and common Web design practice.

Reviewers additionally made a subjective assessment of each site based on the data gathered and their overall impression and experience as to the organization and usability of the site.

In reviewing the Web sites for basic elements, agencies were found out of compliance if specific features were not properly designated. Poor labeling of Web site features can hinder public access. With respect to guidance information, reviewers looked for the elements throughout the FOIA sites. In assessing whether required categories of documents were posted—including agency final opinions and orders, statements of policy and interpretations, administrative staff manuals, frequently requested records previously released, annual FOIA reports, and the agency’s current FOIA regulations—the reviewers looked to see whether they could identify some records which clearly fell into one of these required categories. If records in a required category were not posted or linked from the FOIA site, but available in another location on the larger agency Web site, we only found the agency in compliance when the link to the records was unambiguous and could be located directly from the FOIA site.

ACKNOWLEDGEMENTS

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This report was written by Kristin Adair, with additional writing by Catherine Nielsen and Meredith Fuchs, and was edited by Meredith Fuchs, Malcolm Byrne and Thomas Blanton. Production of the final report relied on the teamwork of many people. This report could not have been completed without the valuable contributions of the following law clerks: Tracie Robinson and Sarah Schwartz from The George Washington University Law School, Hannah Bergman from American University's Washington College of Law, and Renee Dopplick from Georgetown University Law Center. Our law clerks assisted with legal research, Web site reviews, drafting, editing, and a multitude of other necessary tasks. Thank you to Barbara Elias for an early version of the methodology used in this report. Michael Evans deserves our appreciation for his efforts in making our text and data accessible to the public on our Web site at www.nsarchive.org.

The release of "File Not Found: 10 Years After E-FOIA, Most Federal Agencies Are Delinquent" is part of Sunshine Week, sponsored by the American Society of Newspaper Editors. The Archive also acknowledges the contributions of other colleagues at OpentheGovernment.org, the Coalition of Journalists for Open Government, and the Sunshine in Government Initiative. Support for the Archive's Freedom of Information policy and litigation efforts is also provided by the HKH Foundation, the Deer Creek Foundation, and the Rockefeller Family Fund.

Previous National Security Archive audits include:

- Pseudo-Secrets: A Freedom of Information Audit of the U.S. Government's Policies on Sensitive Unclassified Information (March 14, 2006). <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB183/press.htm>
- A FOIA Request Celebrates Its 17th Birthday: A Report on Federal Agency FOIA Backlog (March 12, 2006). <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB182/press.htm>
- Justice Delayed is Justice Denied: The Ten Oldest Pending FOIA Requests (November 17, 2003). <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB102/press.htm>
- The Ashcroft Memo: "Drastic" Change or "More Thunder Than Lightning"? (March 14, 2003). <http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB84/press.htm>

Testimony
United States Senate Committee on the Judiciary
Open Government: Reinventing the Freedom of Information Act
March 14, 2007

Sabina Hasekll
Editor , Brattleboro Reformer

Good morning and thank you for inviting me to talk to you about the Freedom of Information Act and the needed reforms to protect our First Amendment rights. I am Sabina Haskell and I am the editor of the Brattleboro Reformer, a newspaper 10,000 circulation located in southeastern Vermont.

Even at that small size, we're the third largest newspaper in Vermont. And we're in good company: about 85 percent of the daily newspapers in the United States have circulations of 50,000 or less. Smaller newspapers generally pursue public records from state and local officials, rather than from federal sources, but our daily efforts to do so are a quagmire and it's getting worse.

In Vermont, where I am also president of the Vermont Press Association, we're frustrated by the de facto sentiment of secrecy that seems to be seeping down to every level of government – and it begins at the top, where it appears the Bush administration is unilaterally stripping Americans of their Constitutional rights.

The most recent example of the need for the Freedom of Information Act came only last week, when the inspector general released a report revealing that the FBI had improperly used the USA Patriot Act to obtain information about people and businesses. It was through the efforts of Sen. Leahy and others that the Freedom of Information Act was amended last year, making it possible to obtain the records needed to expose the wrongdoing at the bureau.

The fear-mongering espoused at the federal level – where questions and requests for information are viewed as suspect – is replayed time and time again at state and local levels. I truly believe the effort to seal off the federal government is the primary reason that there is increased efforts to close the doors on transparent government at the local and state levels.

The anecdotes I will share come from the dozen dailies and more than four dozen non-dailies that are members of the Vermont Press Association. Multiply us in Vermont by all 50 states and almost 1,500 newspapers and you can understand the magnitude of the problem.

The Freedom of Information Act is supposed to allow any person — individual, corporate, and regardless of citizenship — to request without explanation or justification, access to existing, identifiable executive branch agency records of any topic. Requesters are supposed to get timely answers at little or no cost.

But when we wanted a copy of the Brattleboro police chief's contract and a record of the days he's away from his job, we were rebuffed. We were asked: Why did we want that information? What were we going to do with it? We were told the information would be provided when we answered their questions. We still don't have the documents.

In northeastern Vermont, a weekly newspaper wanted to do a story on the town hall's new handicapped-accessible ramp, paid for, in part, by federal grant money. It was supposed to be a nice, feel-good story about disabled people having better access to their local town hall.

But when the paper requested an architect's drawing of the exterior wooden ramp to illustrate the story, the newspaper was denied because of Homeland Security concerns. It's hard to understand how a wooden ramp and railings, built of pressure-treated lumber, could be viewed as a security risk. You could wait six months, drive by and then snap the picture.

In Winooski, the school board went behind closed doors to make a sweetheart deal to buy out the embattled superintendent's contract. The Burlington Free Press sued to get the details of the settlement and when the newspaper finally won 18 months later and was given the documents, the school district's attorney's response was, "You don't think we lost, do you?" By stalling, the school district and its lawyer kept running up the legal bill on the taxpayers, knowing full well it was all public information, but hoping some of the storm would subside by the time they agreed to follow the law and release the information.

In Jamaica, Vermont, a town official, requested the public documents about the sheriff's department:

- copies of timesheets for the sheriff, a deputy and a detective.
- records showing reimbursed or partially reimbursed expenses incurred by the three
- timesheets and other records that would identify the "whereabouts and activities" of the three for three days in January 2004.

Two of the three requests were denied under subsections of Vermont public records law. The third request was denied because the sheriff was "unable to recall any instance" in which the three incurred a business expense that was reimbursed by the department.

The attorney for the sheriff's department then intimidated this local official, reminding him that there would a 45 cent charge for every minute in excess of a half-hour the bookkeeper spends searching for responsive documents.

The sheriff was later found to be misappropriating money; she resigned in disgrace and was subsequently convicted.

The town official's assessment: "So -- I'm kept from a public record. I take the matter to court on my own dime, and I get falsified information back. Who picks up the tab? Me."

Keeping bad news -- mistakes out of the public eye may work in the short-term -- but the long-term outcome is the ever-increasing mistrust of government and politicians.

A survey conducted by the American Society of Newspaper Editors confirms this: More than two-thirds of Americans polled said the federal government is "somewhat secretive" or "very secretive." People overwhelmingly believe their federal leaders have become sneaky, listening to telephone conversations or opening private mail without getting court permission, the study found.

In fact, the Coalition of Journalists for Open Government has found that the backlog of requests continues to grow. Its latest research found that an all-time record of 31 percent of requests went unprocessed in 2005 -- up 138 percent in seven years. More important was the finding that half of the 26 federal agencies in the study said they failed to comply with even simple requests within the federally mandated 20 days.

The Freedom of Information Act is clear in its charge: We are a country where we do the people's business. And the people have a right to know what local, state and federal officials doing.

FOIA allows but nine exemptions in considering whether a record is open or not. Federal agencies are mandated to reply within 20 days to a request for documents.

But stall tactics and legal costs to challenge officials' decisions effectively closes the doors to government. Requesters are treated as guilty until proven innocent.

In Vermont, a legislative study last summer found that our open government laws have been rewritten and amended to allow 207 exemptions and counting. Like the federal law, Vermont has provisions to reimburse requesters for their costs to obtain the public documents. Like the federal law, those penalties are rarely enforced.

State law, like the federal act, speaks to mandates but enforcement is lax. The Vermont attorney general believes his job is to defend the state officials breaking the law, not protect the citizens who own the public records.

The amendments proposed by Sens. Leahy and Cornyn in S. 394 and in those proposed in the House, under H.R. 1309, are needed and should be passed.

Starting with the premise that records should be considered public, the amendments would strengthen the Freedom of Information Act requiring these safeguards:

- Enforcing the 20-day statutory clock on FOIA requests
- Imposing consequences on agencies that do not respond in a timely manner
- Tracking requests with individualized case numbers and providing telephone and internet access to the status of such requests
- Strengthening reporting requirements, which would identify excessive delays
- Creating a FOIA ombudsman to mediate problems with requests without resorting to litigation
- Making it easier for requesters to recoup costs for successful FOIA challenges
- Holding agencies accountable for their decisions by giving the Office of Special Counsel the ability to take disciplinary action against officials who deny disclosure

These amendments will go a long way to enhancing the Freedom of Information Act and will set higher standard of conduct for state and local officials to follow.

**Statement of Senator Patrick Leahy
Chairman, Committee of the Judiciary
Hearing on "Open Government: Reinvigorating the Freedom of Information Act"
March 14, 2007**

Today, the Committee holds an important hearing on reinvigorating the Freedom of Information Act. The enactment of the FOIA forty years ago was a watershed moment for our democracy. FOIA guarantees the right of all Americans to obtain information from their government and to know what their government is doing.

Now in its fourth decade, FOIA has become an indispensable tool in protecting the people's right to know and in shedding light on bad government policies and government waste, fraud and abuse. Just this week -- amid the growing scandal regarding the firing of several of the Nation's U.S. Attorneys -- we witnessed the importance of openness in our government. We have also witnessed the importance in Sunshine laws with the Justice Department's Inspector General's report on the FBI's abuse of National Security Letters -- a report required by the Sunshine provisions that I and others in Congress worked hard to include in the PATRIOT Act reauthorization bill.

Openness is a cornerstone of our democracy and open government laws like FOIA help guarantee that the people's right to know what their government is doing. From human rights abuses in Iraq, Afghanistan and Guantanamo Bay, to environmental violations at home, to public corruption at the highest levels of our government, information about many of the important issues of our time have been obtained through FOIA. But sadly, today, FOIA also faces challenges like never before.

During the past six years, the Bush Administration has allowed lax FOIA enforcement and a near obsession with government secrecy to dangerously weaken FOIA and to undercut the public's right to know. Currently, federal agencies operate under a 2001 directive from former Attorney General John Ashcroft that reverses the presumption of compliance with FOIA requests previously issued by former Attorney General Janet Reno. The Administration has also sought to erode FOIA by including a broad FOIA waiver for critical infrastructure information in the charter for the Department of Homeland Security -- the biggest single rollback of FOIA in its history.

The troubling setbacks to FOIA are coupled with the expanding use of government secrecy stamps to over-classify government information and the unprecedented use of presidential signing statements and the states secrets privilege to further erode the public's right to know. The consequence of these policies is a FOIA process that is plagued by excessive delays and focused on secrecy rather than transparency.

Today, the oldest FOIA requests pending in federal agencies date back to 1989 -- before the collapse of the Soviet Empire. And, more than a year after the President's directive to government agencies to improve their FOIA services, Americans who seek information under FOIA remain less likely to obtain it.

Just recently, the Government Accountability Office found that federal agencies had 43 percent more FOIA requests pending and outstanding in 2006, than they had in 2002. In addition, as the number of FOIA requests that Americans submit to federal agencies each year continues to rise, our federal agencies remain unable – or unwilling -- to keep pace. According to a new report by OpenTheGovernment.org, the number of FOIA requests submitted annually has increased by more than 65 thousand requests (65,543) since 2004. But, because federal agencies have not kept up with this demand, more and more pending FOIA requests are being carried over from year to year.

FOIA implementation has also been hampered by the increasing use of exemptions under section (b)(3) of FOIA, allowing FOIA exemptions to be snuck into legislation passed by the Congress without debate or public scrutiny. I am also troubled by the findings in a new report by the National Security Archive that, ten years after Congress passed the Electronic Freedom of Information Act (“E-FOIA”) Amendments, which I coauthored in 1996, federal agencies are still not complying with the requirements of that law.

Earlier this week, Senator Cornyn and I reintroduced the OPEN Government Act to address some of the major problems that I have outlined regarding FOIA implementation. We drafted this bill after a long and thoughtful process of consultation with individuals and organizations that rely on FOIA to obtain information and I hope that the Senate will promptly pass this bill.

I appreciate the strong partnership that I have with Senator Cornyn on open government issues and thank him for his dedication to reinvigorating FOIA. I also thank the distinguished witnesses that are appearing before the Committee today. They each bring valuable perspectives on the importance of FOIA in guaranteeing the public’s right to know.

There is much work to be done to correct the many problems with lax FOIA enforcement, to ensure that our federal FOIA law is properly enforced. Congress must do its part to make sure that this open government law not only survives, but thrives for the next forty years. This Committee will do its part to reinvigorate the Freedom of Information Act, so that this important open government tool will be available to future generations. I look forward to a meaningful exchange.

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