S. HRG. 109–69

OPENNESS IN GOVERNMENT AND FREEDOM OF INFORMATION: EXAMINING THE OPEN GOVERNMENT ACT OF 2005

HEARING

BEFORE THE

SUBCOMMITTEE ON TERRORISM, TECHNOLOGY AND HOMELAND SECURITY

OF THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

ONE HUNDRED NINTH CONGRESS

FIRST SESSION

MARCH 15, 2005

Serial No. J–109–7

Printed for the use of the Committee on the Judiciary

U.S. GOVERNMENT PRINTING OFFICE
22–471 PDF WASHINGTON : 2005

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

COMMITTEE ON THE JUDICIARY

ARLEN SPECTER, Pennsylvania, *Chairman*

ORRIN G. HATCH, Utah	PATRICK J. LEAHY, Vermont
CHARLES E. GRASSLEY, Iowa	EDWARD M. KENNEDY, Massachusetts
JON KYL, Arizona	JOSEPH R. BIDEN, JR., Delaware
MIKE DEWINE, Ohio	HERBERT KOHL, Wisconsin
JEFF SESSIONS, Alabama	DIANNE FEINSTEIN, California
LINDSEY O. GRAHAM, South Carolina	RUSSELL D. FEINGOLD, Wisconsin
JOHN CORNYN, Texas	CHARLES E. SCHUMER, New York
SAM BROWNBACK, Kansas	RICHARD J. DURBIN, Illinois
TOM COBURN, Oklahoma	

DAVID BROG, *Staff Director*
MICHAEL O'NEILL, *Chief Counsel*
BRUCE A. COHEN, *Democratic Chief Counsel and Staff Director*

SUBCOMMITTEE ON TERRORISM, TECHNOLOGY AND HOMELAND SECURITY

JON KYL, Arizona, *Chairman*

ORRIN G. HATCH, Utah	DIANNE FEINSTEIN, California
CHARLES E. GRASSLEY, Iowa	EDWARD M. KENNEDY, Massachusetts
JOHN CORNYN, Texas	JOSEPH R. BIDEN, JR., Delaware
MIKE DEWINE, Ohio	HERBERT KOHL, Wisconsin
JEFF SESSIONS, Alabama	RUSSELL D. FEINGOLD, Wisconsin
LINDSEY O. GRAHAM, South Carolina	RICHARD J. DURBIN, Illinois

STEPHEN HIGGINS, *Majority Chief Counsel*
STEVEN CASH, *Democratic Chief Counsel*

CONTENTS

STATEMENTS OF COMMITTEE MEMBERS

WITNESSES

QUESTIONS AND ANSWERS

SUBMISSIONS FOR THE RECORD

OPENNESS IN GOVERNMENT AND FREEDOM OF INFORMATION: EXAMINING THE OPEN GOVERNMENT ACT OF 2005

TUESDAY, MARCH 15, 2005

UNITED STATES SENATE,
SUBCOMMITTEE ON TERRORISM, TECHNOLOGY, AND
HOMELAND SECURITY OF THE COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The Subcommittee met, pursuant to notice, at 10:05 a.m., in Room SD–226, Dirksen Senate Office Building, Hon. John Cornyn, presiding.

Present: Senators Cornyn, Kyl, and Leahy.

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

Senator CORNYN. This hearing of the Senate Subcommittee on Terrorism, Technology, and Homeland Security shall come to order. I want to start out by thanking Chairman Specter for scheduling today's hearing, and particularly Senators Kyl and Feinstein for giving Senator Leahy and I the opportunity to, I guess, hijack their Subcommittee to talk about the subject of open government.

Today's hearing is entitled, "Openness in Government and Freedom of Information: Examining the OPEN Government Act of 2005." It is the third in a series of bipartisan events in recent weeks in which Senator Leahy and I have joined forces. On February 16, shortly before the President's Day recess in February, Senator Leahy and I went to the Senate floor together to introduce the OPEN Government Act, legislation that promotes accountability, accessibility, and openness in the Federal Government, principally by strengthening and enhancing the Federal law commonly known as the Freedom of Information Act, or FOIA. I am pleased to note that the OPEN Government Act is also cosponsored by Senator Isakson of Georgia, and other Senators, I am sure, will be joining in the coming days and weeks, as they become more and more aware of what it is we are doing here.

Last Thursday, Senator Leahy and I joined forces again to introduce the Faster FOIA Act, the Faster Freedom of Information Act of 2005. I have asked Chairman Specter to place the Faster FOIA Act on the Committee's markup calendar for this Thursday in the hope of enacting this legislation as soon as possible. It shouldn't be controversial. It ought to be an easy thing to do, and hopefully will give us more information about the problems with faster implementation of FOIA.

There are, unfortunately, many issues in the Senate Judiciary Committee that are divisive. This is not one of them. So it is especially gratifying to be able to work so closely with Senator Leahy on an issue that is so important and fundamental to our nation as openness in government. I want to express my appreciation not only to the Senator, but also his staff for all their hard work on these issues of mutual interest and national interest, and I would like to thank and commend Senator Leahy—recognize, I am a relative newcomer to the United States Senate, but he has been working on these issues for a long time, and I want to commend his decades-long commitment to freedom of information.

Today is a particularly fitting day to examine these issues. This past Sunday, an extraordinary coalition of print, radio, television, and online media associations and outlets began the nation's first ever Sunshine Week. And tomorrow is National Freedom of Information Day, celebrated every year at a national conference held at the Freedom Forum's World Center in Arlington, Virginia, on James Madison's birthday, quite appropriately.

Now, I know when we talk about freedom of information and the Freedom of Information Act and how that is implemented in the Federal Government that some people have ambiguous reactions and feelings to the invocation of FOIA. It reminds me of a story I saw recently where a person called the FBI and said, "I want to institute a FOIA request to see if you have a file on me. Do you have a file on me at the FBI?" to which the agent on the other end of the line responded, "We do now."

[Laughter.]

Senator CORNYN. Well, freedom of information and openness in government are among the most fundamental founding principles of our government. The Declaration of Independence itself makes clear that our inalienable rights to life, liberty, and the pursuit of happiness may only be secured where governments are instituted among men deriving their just powers from the consent of the governed. And James Madison, the father of our Constitution, famously wrote that consent of the governed means informed consent, that a people who mean to be their own governors must arm themselves with the power that knowledge gives.

In my previous assignment as Attorney General of Texas, I was responsible for enforcing Texas's open government laws, and I have always been proud of the fact that my State has one of the strongest and most robust freedom of information laws in the country. I look forward to bringing some of that sunshine here to Washington.

But the truth is, many States have very robust freedom of information laws, and it reminds me of Louis Brandeis's comment about the States being the laboratories of democracy, and I think we can continue to look toward those State experiences in looking at how we can improve the Freedom of Information Act here in Washington.

After all, it is unfortunate that, as with too many of our ideals and aspirations, that we fall short of reaching our goals. Of course, this is a bipartisan problem and it requires a bipartisan solution. As Senator Leahy and I have both noted on occasion, openness in government is not a Republican or Democrat issue. Any party in power—it is just human nature—any party in power is always re-

luctant to share information out of an understandable, albeit ultimately unpersuasive, fear of arming one's critics and enemies. Whatever our differences may be today on various policy controversies, we should all agree that these policy differences deserve as full and complete a debate before the American people as possible.

I also think it is appropriate to note it was a President from Texas, Lyndon Baines Johnson, who signed the Freedom of Information Act into law on July 4, 1966. Again, addressing the sort of ambiguous connotation of, invocation of the Freedom of Information Act, I read with interest the comments of Bill Moyers, LBJ's press secretary, who said, quote, "what few people knew at the time is that LBJ had to be dragged kicking and screaming to the signing ceremony. He hated the very idea of the Freedom of Information Act, hated the thought of journalists rummaging in government closets, hated them challenging the official view of reality."

Well, it has been nearly a decade since Congress has approved major reforms to that Freedom of Information Act signed in 1966, which LBJ ultimately did sign. Moreover, the Senate Judiciary Committee has not held a hearing to examine this law since 1992, so it is long overdue. I hope that today's hearing will prove to be an important first step toward strengthening those open government laws and toward reinforcing our national commitment to freedom of information.

Today's hearing will provide a forum for discussing the Faster Freedom of Information Act, which Senator Leahy and I have introduced just last week—perfect timing—which will establish an advisory commission of experts and government officials to study what changes in Federal law and Federal policy are needed to ensure more effective and timely compliance with the Freedom of Information Act.

Today's hearing also provides the opportunity to examine the OPEN Government Act, which I alluded to a moment ago. This legislation contains important Congressional findings to reiterate and reinforce our belief that the Freedom of Information Act establishes a presumption of openness and that our government is based not on the need to know, but upon the fundamental right to know.

In addition, the Act contains over a dozen substantive provisions designed to achieve four important objectives: First, to strengthen the Freedom of Information Act and to close loopholes; second, to help FOIA requestors obtain timely responses to their requests; third, to ensure that agencies have strong incentives to comply in a timely fashion; and fourth, to provide FOIA officials with all of the tools that they need to ensure that our government remains open and accessible.

Specifically, the legislation would make clear that the Freedom of Information Act applies even when agency recordkeeping is outsourced. It would require an open government impact statement to ensure that any new FOIA exception adopted by Congress be explicit. It provides annual reporting on the usage of the new disclosure exemption for critical infrastructure information and strengthens and expands access to FOIA fee waivers for all media. It ensures accurate reporting of FOIA agency performance by distinguishing between first-person requests for personal information and other more burdensome types of requests.

The Act would also help FOIA requestors obtain timely responses by establishing a new FOIA hotline service to enable requestors to track the status of their requests. It would create a new FOIA ombudsman, located within the Administrative Conference of the United States, to review agency FOIA compliance and provide alternatives to litigation. And, it would authorize reasonable recovery of attorneys' fees when litigation is inevitable.

This legislation would restore meaningful deadlines to agency action and restore—excuse me, impose real consequences on Federal agencies for missing statutory deadlines. It would enhance provisions in current law which authorize disciplinary action against government officials who arbitrarily and capriciously deny disclosure that have not been used in over 30 years. And, it will help identify agencies plagued by excessive delay.

Finally, the bill will help improve personnel policies for FOIA officials, examine the need for FOIA awareness training for Federal employees, and determine the appropriate funding levels needed to ensure agency FOIA compliance.

The OPEN Government Act is not just pro-openness, pro-accountability, pro-accessibility, it is also pro-Internet. It requires government agencies to establish a hotline to enable citizens to track their FOIA requests, including Internet tracking. And, it grants the same privileged FOIA fee status currently enjoyed by traditional media outlets to bloggers and others who publish reports on the Internet.

As I have said, the OPEN Government Act is a product of months of extensive discussions between Senator Leahy's office and mine, as well as numerous outside advocacy groups and watchdog groups. I am pleased that this bill is supported by a broad coalition of open government advocates and organizations across the ideological spectrum. It is really quite amazing, if you think about it, from the American Civil Liberties Union and the People for the American Way to the Free Congress Foundation's Center for Privacy and Technology Policy, the Heritage Foundation Center for Media and Public Policy, to people like my former colleague on the Supreme Court and the current Attorney General of Texas who is here with us today, Greg Abbott, and Greg, thank you for being here and showing your support and allowing Missy Cary to come testify here today.

Without objection, the letters of support that we have received from these numerous organizations and others will be made part of the record.

I am also pleased about recent positive comments that this legislation has received from the Department of Justice. I certainly understand that no administration is ever excited about the idea of Congress increasing its administrative burdens and I look forward to any technical comments and expressions of concern that the administration may choose to provide. But, I do appreciate the Justice Department's own website that notes that this legislation, and I quote, "holds the possibility of leading to significant improvements in the Freedom of Information Act," close quote. As Attorney General Alberto Gonzales and I discussed during his confirmation hearing in January, we plan to work together on ways to strength-

en the Freedom of Information Act, and I was pleased that he gave me that commitment during his confirmation hearing.

So I look forward to working with General Gonzales, with Senator Leahy, and our other colleagues in the Senate and the House to moving this legislation through the process.

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

And with that, I would like to turn the floor over to Senator Leahy for any opening statement he may have.

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

Senator LEAHY. Thank you, Mr. Chairman. I am delighted to be working with you on this subject. Also, I was just over with Senator Specter at the Judicial Conference at the Supreme Court and there, I was very pleased it was chaired this year, as it always is, by the Chief Justice, who was there. I told him I was in Vermont until late last night and I told him the number of Vermonters who came up to me and to wish him well. He is a part-time resident of our State, the most famous resident we have in our State. I commented that, too, what I thought was a great act of personal courage when he swore in the President for his second inauguration, and I think the signal it sent to the country and the rest of the world of our three branches of government, the continuity of government, was very good.

I was glad to see the weather is very nice since it says "Sunshine Week" on these things. This past week, in addition to the NCAA ski championship held in Vermont and a number of NCAA basketball conference tournaments around the country, most Americans saw in their Parade magazine and their Sunday newspaper that sunshine is a great disinfectant to the abuses of power. The weekly magazine reminded us of a story it ran in January 2004 about a Massachusetts couple, and they relied on State FOIA laws to expose a town's plan to reopen a dormant and potentially polluted landfill. It spotlights the power that individuals have to show what their government is doing.

That is why I am delighted to join with the Senator from Texas. He and I talked about this on the floor at some length. The fact the two of us have joined, I hope it sends a very strong signal, this is not a partisan issue, because no matter who the administration is, Republican or Democratic, we will always get the press releases when everything is going well. You have to fight tooth and nail to find out when things are not going well, and that is why we want to do something on FOIA.

There has not been significant legislation regarding FOIA since 1996, when I was able to author the Electronic Freedom of Information Act Amendments, joined by, again in a bipartisan way, to an update for the Internet age.

I fought against the rolling back of citizens' rights in this regard. I expressed concern in 2002 over an agreement in the Homeland Security legislation that was contrary to those efforts, and this is why I think it is so important Senator Cornyn and I are working together on this to demonstrate that it is not a partisan issue. It is a good government issue. I am going to keep on working on not

only the two that we put in together, but a third bill to restore the FOIA Act, which will be introduced today.

You know, the enactment of FOIA was a watershed moment for democracy. This is one of those areas that can unite liberals and conservatives. We recognize a dangerous trend toward over-classification. On March 3, 2005, J. William Leonard, the Director of Information Security Oversight, testified before a House Committee the number of classification decisions has increased from nine million in 2001 to 16 million in 2004, and the cost alone in 2003 was $7 billion to classify them. It is almost getting, if a story is in one of our major newspapers about something that went wrong in the government, somebody is going to mark the newspaper "top secret" to try and classify it. We have to have open government.

I mentioned that Parade magazine story about Linda and Mike Raymond in Woburn, Massachusetts. In the 1980s, after rates of leukemia spiked upward, the local industries were sued for polluting the area's water. Four years ago, the Raymonds discovered the city's landfill that has been dormant for 15 years was bustling with truck traffic. They contacted the local officials who stonewalled her. They relied on a State FOIA law to get answers, putting the light on what is going on.

That is why a law can be done at the States. I am delighted to see one of your successors is the Attorney General from Texas here, and we are glad to have you here, Attorney General. That is why when Senator Cornyn and I introduced S. 394, the OPEN Government Act, it is just common sense things.

One thing it does is talk about agency delay. The oldest requests we know of date back to the late 1980s. They were filed before the collapse of the Soviet Union. A lot has gone on in the world since then.

The oldest we know of was a FOIA request at the FBI for information on the Bureau's activities at the University of California. It was filed in November 1987. You had a bunch of court cases, five rulings that the FBI had violated FOIA by withholding records, and then after you had this 2002 article in the San Francisco Chronicle and inquiries from Senator Feinstein, the FBI acknowledged that, whoops, we are withholding some records. Well, how much? A few. How much? Seventeen-thousand pages, and apparently 15,000 still out today. Now, that is an extreme case, but we have introduced legislation to speed these things up.

We have, with all good intention, in the Homeland Security law a provision that allows big polluters or other offenders to hide mistakes from public view. They just stamp it "critical infrastructure information." We have got to do better than that. We have got to make sure that people know what is going on.

FOIA is a cornerstone of our democracy. It guarantees a free flow of information. When you get—I mentioned two people, Mr. Chairman, are going to be here. One is Walter Mears. I have known Mr. Mears for many, many years. His hair was dark and I had hair when we first met. He joined the Associated Press when he was a student at Middlebury College in Vermont, became the AP's first correspondent at the State House in Montpelier. He came down here to Washington, won the Pulitzer Prize for his coverage of the 1976 Presidential campaign. He has covered 11 of those for the AP.

And Lisa Graves, who has recently served as my Chief Nominations Counsel, but she has worked in all three branches of government. One of the first cases she worked on after graduating from law school was to help Terry Anderson in his battle to obtain information under FOIA about the decision of the U.S. Government related to his captivity in Lebanon. They had a lengthy fight and he finally got documents, page after page after page, that were totally blacked out except for his name and the page number, a big help there. They finally—President Clinton in 1995 issued Executive Order 12958, which led to an unprecedented effort to declassify millions of those pages.

We are usually stronger when we know what is going on. So, Mr. Chairman, I can't applaud you enough. I joke that when I say all these nice things about the Chairman that there is going to be a recall petition for him back in Texas—

[Laughter.]

Senator LEAHY. —but what he is doing is very reflective of what we think about in Vermont with our open government and our town meetings. Thank you.

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

Senator CORNYN. Thank you very much, Senator Leahy. Again, I can't say enough nice things about you and your longstanding commitment to this issue. It makes so much sense to you and me. Surely, it has got to make sense to all of our colleagues. Hopefully, this legislation will pass out of here at a speed usually unknown in the U.S. Senate, which is not known for its speed, but we will keep pushing.

We are pleased to have a distinguished panel here before us today. Ordinarily, when we choose witnesses for panels, each side of the aisle picks its own witnesses, but that is not the case today. Again, in keeping with the spirit in which we are here, I am particularly pleased that today's witnesses were selected jointly by Senator Leahy and I, consistent with the bipartisan spirit on this issue.

I will introduce the panel and ask each of them to give brief opening statements and then we will ask questions.

The first witness is Katherine Cary—her friends call her Missy—starting here on my left. She is the Assistant Attorney General of Texas and Chief of the Open Records Division for the State of Texas, and I had the pleasure of working with her when I served as Texas's Attorney General. My successor, General Abbott, had the good sense to keep her on in light of the great work that she is doing and I commend him and her for their continued good work.

Because the OPEN Government Act borrows from some core concepts that we already have in place in State law, I thought it would be helpful to have one of our top legal experts on this subject here with us today. But most of all, Missy, I thought it would be nice just to see you again, so welcome here.

We are honored to have Walter R. Mears here, and Senator Leahy has already spoken eloquently about him. But, he is a former Washington Bureau Chief and former Executive Editor for the Associated Press and the author of *Deadlines Past: Forty Years of Presidential Campaigning, a Reporter's Story*. And, of course, as

we heard, he has been honored with receiving the Pulitzer Prize, and we are certainly glad to have you here, Mr. Mears, to talk today about the importance of this issue to the news media, although I am always eager to say that this is not just an issue for the media. This is about the American citizens' ability to get information that they need in order to arm themselves to be good citizens. But we look forward to your testimony here, your statement here soon.

Mark Tapscott is the Director of the Center for Media and Public Policy at the Heritage Foundation. Mr. Tapscott has written extensively on the freedom of information and media issues. Before joining the Heritage Foundation in 1999, he served as a newspaper editor and reporter. He also worked in the Reagan administration and as Communications Director to the immediate former Chairman of the Senate Judiciary Committee, Senator Orrin Hatch.

Sitting next to our Heritage Foundation representative today is Lisa Graves, who you have already heard something about, Senior Counsel for Legislative Strategy for the American Civil Liberties Union. She is quite familiar, as you have heard, with members of this Committee, having served with Senator Leahy as his Chief Nominations Counsel. She has also served previously as Deputy Assistant Attorney General in the Justice Department, so she is intimately familiar with the burdens imposed by the Freedom of Information Act on Federal agencies. Ms. Graves, welcome back to Dirksen Room 226.

Meredith Fuchs is the General Counsel of the National Security Archive at George Washington University. In that capacity, she has become one of the top FOIA experts this city has to offer. She has previously served as a partner in the prestigious Washington law firm of Wiley, Rein and Fielding, and I am pleased to say we have worked together not just on the OPEN Government Act, but on other FOIA-related issues, as well. And I must say, the National Security Archive has one of the best websites and one of the most informative websites on this issue that I have seen, so I am glad you are here with us.

Finally, we are glad to have Thomas M. Susman with us here today. He is a partner at the law firm of Ropes and Gray LLP. He is also the former Chief Counsel of the Senate Subcommittee on Administrative Practice and Procedure and former General Counsel of the Senate Judiciary Committee under Senator Kennedy. He is widely recognized as one of the top FOIA experts in Washington, and I am grateful for all of the advice that he has provided my office in helping to draft this legislation and working with Senator Leahy.

Unfortunately—this is the bad news—we have to ask each of you to keep your opening statement to about five minutes to start with to ensure we have plenty of time to hear from everybody, and then Senator Leahy and other Senators who arrive here will be able to ask you to amplify on those during the Q&A.

At this time, Ms. Cary, I would be glad to hear from you first. And if you will just remember to push that button, and the light indicates that your microphone is on so we can all hear you. Thank you.

STATEMENT OF KATHERINE MINTER CARY, CHIEF, OPEN RECORDS DIVISION, OFFICE OF THE TEXAS ATTORNEY GENERAL, AUSTIN, TEXAS

Ms. CARY. Thank you. Thank you, Senator Cornyn, thank you, Senator Leahy, for letting me appear before you today. For the record, my name is Katherine Minter Cary and I am the Division Chief of the Open Records Division at the Texas Office of Attorney General. Again, it is an honor to appear before you today and convey to you what I do every day in Texas.

First, let me convey for the record Texas Attorney General Greg Abbott's strong support for the bipartisan OPEN Government Act. As you can tell, General Abbott is here today to offer you that support.

As I said, I have the pleasure and the responsibility of working on a daily basis to apply, educate, and enforce one of the strongest, most effective public information acts in the United States of America. I want to state unequivocally to you that unfettered access to government is an achievable reality. Texas has over 2,500 governmental bodies scattered throughout the State, but every single day, I oversee a process that succeeds in getting thousands of pieces of information into the public's hands without controversy. At last check, from the statistics I got before I left the office, two million open records requests are fulfilled every year in Texas.

Under the Texas Public Information Act, as under FOIA, requested information is supposed to be given out promptly. Texas law defines this to mean as soon as possible and without delay. Any governmental body that wants to withhold records from the public must, within ten days, seek a ruling from the Texas Attorney General's Office, specifically from my division, the Open Records Division.

In Texas, a governmental body that fails to take those simple required procedural steps to keep information closed has waived any exceptions to disclosure unless another provision of Texas law explicitly makes the information confidential. This waiver provision, above all else, has provided meaningful consequences to prevent government from benefitting from its own inaction. Under Texas law, if a governmental body—either State, local, county—disregards the law and fails to invoke these provisions that specifically protect certain categories of information from disclosure, it forfeits its right to use those disclosure exceptions.

The OPEN Government Act would institute a very similar waiver provision and it attempts to strike the careful balance as not to negatively affect third parties' rights or violate strict confidentiality. The Texas experience shows that finding this balance is realistic, fair, and workable.

Our pro-openness system of disclosure has boasted great success, and without dire consequences, for 32 years through innumerable high-profile events, including the Space Shuttle Columbia disaster, the suicide of an Enron executive, the death of 19 immigrants in a heated tractor trailer in South Texas, and several very high-profile front page murder trials.

In 1999, governmental bodies in Texas sought roughly 4,000 rulings from you, the Attorney General Cornyn. Last year, my division

handled 11,000 such requests. These requests show an increase in compliance that is directly related to outreach and enforcement.

Often, non-compliance results from a simple lack of understanding rather than malicious intent. For this reason, the Texas Attorney General's Office has worked aggressively to prevent violations of the Texas Public Information Act.

We offer training. We offer videos, handbooks. We have, most importantly, an open government hotline. It is toll-free in the State of Texas and is charged with helping to clarify the law and make open government information readily available to any caller. This service includes, as the OPEN Government Act would, an update on where a request is in the system. The Texas open government hotline answers about 10,000 calls a year. There is no question that the addition of a similar system under the proposed OPEN Government Act provides citizens customer service, attention, and access they deserve from their public servants. Our hotline has been a resounding success, from the both the perspective of requestors and from governmental entities.

My office also has attorneys that handle citizens' complaints as well as respond to their questions about the law. These attorneys attempt, with a 99 percent success rate, to mediate compliance with open records regulations. The OPEN Government Act would create a similar system, and Texas's demonstrated success in resolving such matters underscores the utility of such a dispute resolution function.

Our experience has shown that it requires a few actions by the Attorney General for word to get out that we are serious about enforcing compliance. I believe that the Office of Special Counsel provisions as proposed in your OPEN Government Act will experience the same positive results on the Federal level.

Finally, with regard to outsourcing, Texas has a legal presumption that all information collected or assembled or maintained by or for a governmental body by a third party are open to the public. The OPEN Government Act would also extend the availability of government records held by non-governmental parties. Records kept on behalf of Texas governmental bodies remain accessible by request as long as the governmental body has a right of access to the information. Texas law does not allow the government to contract away access to records held by its agents.

I personally believe this portion of the policy statement that introduces the Texas Public Information Act is instructive. The people, in delegating their authority, do not give the 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 maintain control over the instruments that they have created.

My experience and our State's experience with openness, its commitment to that people have a right to know, not just a need to know, has been a resounding success for 32 years. As Attorney General Abbott noted in his recent letter to you supporting the OPEN Government Act, open government leads inextricably to good government. Openness and accountability, not secrecy and concealment, is what keeps our democracy strong and enduring.

Thank you again, Senator Cornyn, for the privilege of appearing before you today.

Senator CORNYN. Thank you, Ms. Cary. I appreciate your being here.

Ms. CARY. Thank you, sir.

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

Senator CORNYN. Mr. Mears, we would be glad to hear from you.

STATEMENT OF WALTER MEARS, FORMER WASHINGTON BUREAU CHIEF AND EXECUTIVE EDITOR, ASSOCIATED PRESS, CHAPEL HILL, NORTH CAROLINA

Mr. MEARS. Thank you. I appreciate the opportunity to be here today in familiar territory. I spent more than 40 years as an Associated Press reporter, editor, and Washington Bureau Chief, and so I am no stranger to Congressional hearing rooms, but this is my first experience on this side of the table. With that, another disclaimer. I am not an expert on the legal aspects and the fine print of freedom of information law. I hope that you will allow me to interpret my franchise broadly so that I can speak about what I know best, which is the crucial importance of the free flow of information about government to the people.

Too many people in government have an instinct or acquire an instinct to limit that flow because they think that things work better without people they regard as nosy outsiders prying into what they regard as their business. It is not their business. It is all of our business. That is what a free democratic government is all about, and you can't have one unless people know what is going on behind government doors. I believe that as a reporter and I believe it today as a retired American watching government from a distance.

President Bush spoke to Russia's President Putin at the Kremlin about the need for free press in a democracy. What was true at the Kremlin also is true in Washington. The free flow of information is vital to a free press and to a free people.

There is a difficult balance to be kept in this, especially since September 11 brought home to us all the menace of terror in our midst. No reporter I know would demand or publish anything that would serve the purposes of a terrorist. The problem in times like these is to judge what would or would not weaken America against terrorism.

Tom Curley, the President of the Associated Press, observed that the United States was attacked in large part because of the freedoms it cherishes, and Tom said that the strongest statement we can make to an enemy is to uphold those values. They would be upheld by the OPEN Government Act of 2005.

Knowing that you will hear from people far more expert than I on the detailed provisions of the bill, I would like to offer some comments about the findings that preface it, the first of them being that the informed consent of the voters, and thus the governed, is crucial to our system of self-government. That was the mission that guided me through my career as a political reporter, from the State House in Vermont to the Capitol to the Presidential campaigns I covered for the AP.

The bill also would have Congress find, and this is a quote, "the American people firmly believe that our system of government must itself be governed by a presumption of openness." I wish that an act of Congress could make that so. In my experience, many—too many—people do not believe that at all and are willing to let the government determine what we, and therefore they, ought to know.

But the freer the flow of information, the better the job we do of delivering it, the more likely we can meet the standard on which the bill quotes Justice Hugo Black. "The effective functioning of a free government like ours depends largely on the force of informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by elected and appointed officials or employees."

The Freedom of Information Act gets straight to that point. We use it to get data on the quality of government service. In a perfect world, that would be an aim shared by those who cover government and those who run it, and sometimes it is. The information flows because the people who control it realize that it belongs to the people. Too frequently, it is not, sometimes for valid reasons of security and privacy, on which you will hear no argument from us, but more often, it happens because when people get in the government, they tend to get proprietary and protective.

As an AP veteran, I take pride in objectivity. We are concerned what is happening now, what is happening during this administration, and we should be, but I do not limit my observations to the Bush years. This is not new business.

I remember writing a story that angered Lyndon Johnson when he was President. He wasn't satisfied with the way the PR people in his executive branch were getting out his chosen message, so he called in their supervisors and he told them that if they didn't do better, he would replace every one of them with a high school senior from Johnson City, Texas. The White House wouldn't comment on my story, but as soon as it hit the wire, they flatly denied it. It just wasn't so. And immediately after that, they set about trying to find out who leaked it to me.

While restrictions on information have tightened in this administration, I believe that whoever had been in office, regardless of party, when those terrorists destroyed the World Trade towers, the administration would have erred on the side of security. That makes this legislation especially vital in a difficult time. There is a need to reinforce the public's need to know.

It was encouraging to see that Attorney General Gonzales has told you that he will examine Justice Department policies and practices under FOI. It will be more encouraging should he amend the restrictive line set by his predecessor in the memo that essentially flipped the policy from favoring disclosure to one in which the presumption was that the Justice Department would defend any decision to withhold information.

As I said, there is a valid need for secrecy in government operations, but the presumption should be in favor of openness, and much of the information pried loose by pressure of FOI action has nothing to do with security. For example, the AP found that the NIH, National Institutes of Health, researchers were collecting roy-

alties on drugs and devices they were testing on patients who did not know their financial interest in the product. The practice ended under a new policy announced immediately after the story hit the wire.

The New York Daily News found that the Federal courthouse in lower Manhattan had maintenance and cleaning costs double those at State court buildings a block away and that in 1997, it cost $84,812 to polish the brass at the entrances to the building.

Along with those FOI success stories, there are too many episodes of information blocked by delays and by agencies bent on secrecy. One remarkable example, Terry Anderson has been mentioned, the former AP man held hostage for seven years in Lebanon. When he was writing his book, he filed an FOI request for information about his captivity and he says that he was told he couldn't have everything he was seeking because of the privacy rights of his kidnappers.

The OPEN Government Act you are considering will plug some holes and repair some problems in the FOI Act, and for that, it should be approved. But I think beyond the specific steps, the message behind this measure is even more important because its enactment would once again declare that the public has the right to obtain information from Federal agencies and not to have it withheld in favor of secrecy as opposed to disclosure.

I think this hearing and a full discussion of FOI in Congress will serve that mission well. As you have mentioned, as you begin this legislative work, we in the news media are undertaking a project entitled the Sunshine in Government Initiative with a similar mission. What you are trying to do by law, we are trying to do by example and with our reporting.

We newspeople are the highest-profile advocates and users of the Freedom of Information Act, but it is not only a tool for reporters. Increasingly, requests do not come from us but from people like veterans and retirees trying to get information about their government benefits, from citizens looking for information about what is happening in their government. That is worth emphasizing, because it points out that access to information is best for everyone.

We need to find ways to keep that flow of information open, not just for the press, but for all Americans, and to keep it a topic of national concern. So I thank you for what you are doing in that cause and for inviting me to join in that effort.

Thank you, Mr. Mears.

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

Senator CORNYN. Mr. Tapscott?

STATEMENT OF MARK TAPSCOTT, DIRECTOR, CENTER FOR MEDIA AND PUBLIC POLICY, THE HERITAGE FOUNDATION, WASHINGTON, D.C.

Mr. TAPSCOTT. Thank you, Senator. It is a pleasure and an honor to be here to testify today about the OPEN Government Act of 2005. I have submitted my statement for the record, so I am just going to summarize.

Senator CORNYN. That would be fine. All your written statements will be made part of the record, without objection.

Mr. TAPSCOTT. Among Secretary of Defense Donald Rumsfeld's probably lesser-known marks of distinction in his career was an important role that he played back in 1966 as one of the cosponsors of the Freedom of Information Act, and he made a remark during the floor debate on that Act that I think has a great deal of relevance to us today and to what you and Senator Leahy are doing.

He said, and I quote, "This legislation was initially opposed by a number of agencies and departments, but following the hearings and issuance of the carefully prepared report, which clarifies legislative intent, much of the opposition seems to have subsided. There still remains, however, some opposition on the part of a few government administrators who resist any change in the routine of government. They are familiar with the inadequacies of the present law and over the years have learned how to take advantage of its vague phrases," unquote.

I think what Rumsfeld described in 1966 is a problem that we are dealing with still today, and in one sense, we shouldn't be surprised by it because we have a career workforce precisely to insulate them from improper, inappropriate political influences. But one of the problems that comes along with that insulation is precisely the delays and other problems that we are dealing with here today in freedom of information.

And I say that—I should point out that I am the fourth generation in my family to have worked in the government. My father was a civil servant in Oklahoma and my grandfather and great-grandfather were mail carriers in East Texas, Senator, so I have a great deal of respect for government employees. But they are not exempt from human nature, and unfortunately, when it comes to the Freedom of Information Act, the path of least resistance too often results in a misadministration of the Act.

I believe this process accounts for most of the problems that we have, and this was illustrated by a survey in 2003 by the National Security Archive, which I think is one of the best surveys that has been done in this area. They found, among other things, that, quote, "the agency contact information on the web was often inaccurate, response times largely failed to meet the statutory standard, only a few agencies performed thorough searches, including e-mail and meeting notes, and the lack of central accountability at the agencies resulted in lost requests and inability to track progress." They summarized the results of that survey by saying that the system is a system in, quote, "disarray." I think that was a very accurate description.

Having spent nearly two decades in this town as an ink-stained wretch in the journalism world and having filed more FOI requests than I care to remember over the years, I wasn't surprised by these results. When you ask a typical journalist, and I am sure that my colleague, Walter Mears, will agree, why they don't use the FOI more frequently, the reply will invariably be something along the lines of, well, it is going to take too long, they won't give me what I need and what I ask for anyway, and we will just have to court and that will be a lot of expense and my editor will say, what is the point?

I think the OPEN Government Act addresses all of the major problems that have been spotlighted over the years by people on

this panel and elsewhere. I am not going to go into detail on why I think it is so effective. I would point out, however, that I think it is especially encouraging that you have decided to make real consequences for failing to administer the Act in an appropriate way and the establishment of an ombudsman to act as a neutral arbiter, if you will, in disputes between requestors and agencies. Those are the two most important accomplishments that could be obtained by this bill.

It is also my hope that those members of Congress who consider themselves to be of a conservative persuasion will pay particular attention to this Act, to this bill, because it can be an effective resource for restoring our government to its appropriate size and functions. Sunshine is the best disinfectant, not only in the physical world, but also in combatting things like waste and fraud in government, and I hope that my fellow conservatives in Congress will pay very close attention to that fact.

We are, indeed, fighting a global war on terrorism. It is a war that puts unusual demands on the FOI system. But conservatives and liberals alike should always remember that an ever-expansive, ever-intrusive government is ultimately antithetical to the preservation and expansion of individual liberty and democratic accountability in public affairs.

Having said that, Senator, I commend you and Senator Leahy and I hope that this ends in a great success.

Senator CORNYN. Thank you very much for that opening statement.

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

Senator CORNYN. Ms. Graves, we would be glad to hear from you.

STATEMENT OF LISA GRAVES, SENIOR COUNSEL FOR LEGISLATIVE STRATEGY, AMERICAN CIVIL LIBERTIES UNION, WASHINGTON, D.C.

Ms. GRAVES. Good morning, Chairman Cornyn. Thank you for the invitation to testify today before the Subcommittee on Terrorism, Technology, and Homeland Security on behalf of the American Civil Liberties Union. We are very pleased to testify in support of your bill, the OPEN Government Act, S. 394, which was introduced last month by both you and Senator Leahy, who have been leaders in open government policies in Texas and nationally. This bill makes agency compliance with the Freedom of Information Act a priority and not an afterthought, and for that, we commend you. It supports accountable, democratic government by finally giving teeth to the deadlines set by Congress.

Second, it will help bring FOIA into the 21st century by applying FOIA's rules to government contractors in this era of outsourcing and also by leveling the playing field for independent reporters and publishers in the Internet age.

Third, it protects incentives for the enforcement of FOIA when a litigant is a catalyst for change and for the disclosure of information that the public is entitled to.

And finally, fourth, it emphasizes that the core purpose of FOIA is disclosure and not secrecy.

The ACLU has experienced lengthy delays in the handling of some of its FOIA requests. For example, in October 2003, the ACLU filed a FOIA request for information about detainees held overseas by the United States, and then we filed a lawsuit in June of 2004 asking that the government comply with the terms of FOIA. In August of last year, a Federal court ordered the government to disclose documents responsive to that request. As a result of those disclosures, the public has learned about executive branch policy decisions about detainees, individuals kept from inspection by the Red Cross, as well as information about the treatment of those detainees.

The underlying disclosures raise very troubling issues, but that is not the purpose of my testimony today. The fact of disclosure, even as a result of court order, demonstrates the continuing vitality of the democratic principles of an open society and the central importance of FOIA in our country.

The OPEN Government Act takes important steps toward keeping the promises made by FOIA. S. 294 improves FOIA and government openness not by necessarily making more records subject to disclosure or by eliminating FOIA exemptions, but by helping ensure that agencies follow the law and disclose information that the Freedom of Information Act requires them to disclose. It is a very good beginning.

Finally, I would like to note that in the wake of 9/11, there has been an epidemic of over-classification. However, this over-classification is not something new, as Terry Anderson's case in the Clinton administration and so many others have shown. Senator Cornyn, you recently commented on the problem of over-classification in your article in the LBJ Journal of Public Affairs. You noted that the Honorable Thomas Kean, the Chair of the 9/11 Commission, had stated that in reviewing the documents, the important documents that the Commission reviewed for its report, three-fourths of what he saw was classified and shouldn't have been.

Government secrecy can be an enemy of an open society and democracy, but, of course, this does not mean that every piece of information the government has can or should be made open to the public. There are limits, many of which the ACLU supports, to protect other important national and individual interests. But we as a people must continue to resist the culture of secrecy when it unnecessarily permeates our government, no matter which party is in power. When it comes to information about how the government is using its vast powers, ignorance is definitely not bliss.

The ACLU supports S. 394 because this much-needed bill will help buck the growing trend of hiding government action from public scrutiny. We commend you, Senator Cornyn and Senator Leahy, for introducing the OPEN Government Act and we urge members to join you in support of this good government measure which will strengthen our nation's democracy. Thank you.

Senator CORNYN. Thank you very much.

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

Senator CORNYN. Ms. Fuchs, we are glad to hear from you.

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

Ms. FUCHS. Thank you, Senator Cornyn. Mr. Chairman, thank you for the opportunity to speak with you today about the reforms that would be enacted by the OPEN Government Act of 2005. I wish to commend the cosponsors of this bill, Senator Cornyn and Senator Leahy. Each of you has an established record as a defender of open government and we appreciate the effort you are making to make our government more responsive and accountable to the citizens.

I have extensive experience in the Freedom of Information Act. The National Security Archive, of which I am the General Counsel, is one of the most active and successful nonprofit users of the FOIA in this country. Our work has resulted in more than six million pages of documents that otherwise would be secret today being available to the public, and we have conducted two studies of Federal Government administration of the FOIA and most of my remarks today are based on what we learned doing those audits.

I want to start by talking about why FOIA is important. In a world in which terrorism is commonplace and where the people are caught in a balance of terror, our soldiers are fighting the war to promote democratic ideals, an informed citizenry is the most important weapon that the country has, an informed citizenry that will support and be loyal to its government.

Our FOIA law is one of the best mechanisms for empowering the public to participate in governance. The fact of the matter is that there is a reflex of secrecy in the government right now. People are afraid to open up the proceedings of government to the public. But in many cases, there is a need for the public to know what is happening, to know what the risks are that they face.

Certainly national security is a very real and important concern, but it is not the only concern and there is often times when it can be impacted by public activity. Just last summer, Congressman Shays of Connecticut gave a striking example of the paradox that is caused by secrecy and against the public interest in disclosure. He talked about a 1991 Department of Defense Inspector General report that was classified that showed that 40 percent of the gas masks used by our military leaked. He couldn't talk about the report because it was classified. He couldn't tell his constituents who were soldiers who fought in the Gulf War what happened and why they might have Gulf War illnesses.

Six years later, finally, the report was declassified and people could learn what was the cause of their Gulf War illnesses. The rest is history, so to speak. Those are the kinds of things that the public needs to know and that the government needs to acknowledge so that instead of hiding these secrets, we can confront the problems and fix them.

Indeed, this is the lesson of the inquiries concerning the September 11 attacks on the United States. It was most directly addressed by Eleanor Hill, the Staff Director of the joint House-Senate Intelligence Committee investigation, who said, quote, "The record suggests that prior to September 11, the U.S. intelligence and law enforcement communities were fighting a war against ter-

rorism largely without the benefit of what some would call their most potent weapon in that effort, an alert and committed American public."

This conclusion is echoed in the report of the 9/11 Commission, which includes only one finding that the attacks on the United States could have been prevented. As you will see in the graphic that I included and appended to my testimony, the 9/11 Commission specifically talks about the interrogation of one of the hijackers' paymasters, Ramzi Binalshibh. Binalshibh commented that if the organizers, particularly Khalid Sheikh Mohammed, had known that the so-called 20th hijacker, Zacarias Moussaoui, had been arrested at his Minnesota flight school on immigration charges, then bin Laden and Mohammed would have called off the 9/11 attacks. The Commission's wording is important here. Only publicity could have derailed the attacks.

We see many examples of how the public is empowered by information released under FOIA. I have appended to my testimony a list of 21st century FOIA successes, a list of news articles that resulted from information disclosed under FOIA.

It is interesting. I remember when a foreign official visited my office on the eve of his own country adopting a FOIA law and asked, what happens if it discloses something bad that the government did, and my answer to him, and my answer to you, is that is exactly what FOIA is about. The American public deserve a government that can acknowledge its mistakes, can correct those mistakes, and do better in the future.

A key part to empowering the public, however, is giving them information in sufficient time for them to do something about it, and one of the things that we found in the audit of Federal agencies that we conducted is that there is a persistent problem of backlog and delay in FOIA. Your bill goes very far to address that and we are very grateful that you have taken into consideration some of the lessons that we found in our audit.

You all know the old adage that justice delayed is justice denied. Well, we have found in our own FOIA requests to Federal agencies that when there is a long delay in the release of documents, the documents often disappear. They may be destroyed. They may be lost. And yes, we can sue, but really, we would rather not have to sue to get documents.

How much worse is it for reporters who are handling breaking news who really need the documents quickly? What about communities that have health and safety problems in their community and they want to protect their children? What about the advocacy groups that are telling the people about the risks in the water or of mercury in fish? This information needs to get out to people quickly.

The OPEN Government Act of 2005 will go far to motivate agencies to process FOIA requests and to process them in a timely fashion. Despite there being 3.6 million FOIA requests reported in fiscal year 2003, there are not that many lawsuits, and so I commend you in particular for the provision that would impose a penalty when there are lawsuits—when in lawsuits it is found that the government has not met a statutory standard of clear and convincing evidence for good failure to comply with time limits.

That penalty provision may come under attack for fear that it is going to result in troubling disclosures, but in fact, it is not going to result in disclosures of the information that is most important to be kept protected. It is not going to result in national security information, privacy information, or information that Congress has mandated be secret, such as intelligence sources and methods being disclosed.

In fact, I would liken the impact of that proposed penalty to the impact that automatic declassification in Executive Order 12958 had on the declassification of historical materials. Even though no agency has seen its records automatically declassified, agencies were forced to put in a process that would result in declassification, and the number of declassification decisions went up dramatically. We need a penalty to make clear that FOIA matters.

I would also note that the provision to require the Attorney General to notify the Office of Special Counsel of judicial findings of arbitrary and capricious agency withholding makes clear that the Attorney General is going to take some action when agency personnel ignore FOIA. It makes this stop being an "us" versus "them" procedure and makes clear that it is the government's obligation and mission to support FOIA.

I am going to close now since I have run out of time, but I have submitted the rest of my comments for the record.

Senator CORNYN. Thank you very much.

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

Senator CORNYN. I would like to note that we have been joined by Senator Kyl, who graciously has agreed to let us use his Subcommittee as the forum to have this hearing, and without his help, we wouldn't be here today, so I want to say thanks to him for that.

He noted that he has got a pretty hectic schedule today and I would just tell everybody out there and everybody watching that the fact that we don't have all these seats occupied is no reflection on the importance of this, and frankly, no reflection on how, I think, well the message will be received and addressed, but it just is a fact of life in the United States Senate. It seems like we are always flying by the seat of our pants to some extent.

Chairman KYL. Thank you, and Mr. Chairman, let me just reiterate that. That is why we have staff and why we have a record. Unfortunately, this is scheduled during the week that we are debating the budget and that makes it a very difficult thing. I will only be able to be here a few minutes, but I wanted to specifically come by and acknowledge all of you and welcome you and indicate that I think what Senator Cornyn is doing is very, very important, to take a look at the status of our FOIA laws right now, and to let all of you know that we will want to continue to receive your comments and that my staff will try to be in touch with you. So my lack of being here for most of the morning shouldn't be taken as a lack of interest in the subject. Thank you very much.

Senator CORNYN. Thank you very much, Senator Kyl, and I am sure that is true for all of us. This is just the beginning. This is not the end.

Mr. Susman, we would be glad to hear from you.

STATEMENT OF THOMAS M. SUSMAN, ROPES AND GRAY LLP, WASHINGTON, D.C.

Mr. SUSMAN. Mr. Chairman, Mr. Chairman, I am honored to appear today with such an esteemed group of colleagues to support S. 394. This legislation is balanced and modest, but it is extremely valuable and would strengthen the Freedom of Information Act in many important respects.

Senator Cornyn, you mentioned that this was the first hearing on freedom of information in the Senate since 1992. I sit in this chair somewhat nostalgically. I testified in 1992 before Senator Leahy on what became the Electronic Freedom of Information Amendments. I had a chance to testify a decade before that on what became the set of amendments in the mid-1980s. And I began my career with freedom of information sitting where Jim Ho is back there in the Subcommittee in the late 1960s and early 1970s. Frankly, you read a lot about how Congress and the Senate has changed through the decades, but one thing that seems to be improving with age is the quality of staff in the Judiciary Committee.

[Laughter.]

Mr. SUSMAN. In my prepared testimony, I begin with a discussion of how the business community has made use of the Freedom of Information Act. I intend that as a complement to the media, advocacy groups, think tanks, public interest groups, that business requestors as well as individuals and non-governmental organizations serve an important public interest by bringing about disclosure of how policy decisions are made in agencies, how programs work, how products are regulated, how laws are enforced, and how contracts are awarded.

On a broader plain, the marketplace generally functions more efficiently through enhanced access to information, and especially government information. Clearly, businesses benefit both directly and indirectly from open government information.

S. 394 addresses some of the really important issues that frustrate freedom of information administration today, but it does so carefully. It recognizes that FOIA isn't a game of "us" versus "them," and it approaches responsibly and sensitively the issue so that it serves the needs of both "us" and "them," that is, the requestor community and government agencies that have to administer this law.

In my prepared testimony, I go through each of the sections and review all of the provisions of this statute, but for my few minutes of oral testimony, I would like to concentrate on three issues.

The first is the Office of Government Information Services. Section 11 of the bill establishing this new office is to me the most important provision in the legislation. This new office has a number of functions, all of which are important. It will assist the public in resolving disputes with agencies as an alternative to litigation. It has the authority to review and to audit agency compliance with the Act. And it can make recommendations and reports on freedom of information administration. A number of States have this kind of function, including the State of Texas where the Attorney General plays this important role.

Appropriations for the Administrative Conference, where this new office would be located, must be restored for this to work the

way in which the legislation proposes. ACUS is the right place for this office of Government Information Services since it has historically been a nonpartisan agency dedicated to improving administrative procedures and assisting agencies do a better job. If Congress does not make this modest investment to restore ACUS, and I urge it to do so, then this office should nonetheless still be established and a location found elsewhere, perhaps in the National Archives. I am confident, Mr. Chairman, that the Office of Government Information Services will more than pay for itself in diverting cases from the courts, cases that could be settled with an objective arbiter between the requestor and the agency.

The second issue, recovery of attorneys' fees in litigation. It is imperative that Congress reverse the application of the Supreme Court's Buckhannon decision to FOIA cases. While this may seem a little self-serving, since I have been known to litigate an occasional freedom of information case over the past couple of decades, it is important for the plaintiff to be able to recover fees and costs where the court does not finally adjudicate the issue of disclosure for a special reason in these cases.

It is clear to me, and I believe all of us who have worked with the Freedom of Information Act, that government occasionally withholds requested information to keep it out of the public domain for as long as possible, knowing full well that the law will ultimately not support withholding. Or, on occasion, delay may be caused by some other purpose, but the only thing that a requestor can do ultimately to get the information which ought to have been released earlier is to file a lawsuit. These cases don't move quickly through the courts and they can be expensive to pursue. So when the government sees the end of the road, it only has to hand over the information at that time and the case becomes moot with no consequences to the agency. In the freedom of information context, the Buckhannon decision rewards agency recalcitrance and delay.

I should repeat the same point that Meredith did a few minutes ago. Lawyers working with the media, with advocacy groups, even with businesses, view litigation as a last resort. Our clients would rather have a timely response from the agency. They would rather have an Office of Government Information Services to help resolve disputes. They would rather negotiate than litigate their differences with the agencies.

But when a lawsuit is filed, the plaintiff is assuming the same role as law enforcer played by the Texas Attorney General. That is, where the lawsuit is responsible for disclosure, a public service has been performed. In those cases, recovery of fees and costs is appropriate.

Third issue, enhanced Congressional oversight. That is not captured by a single section in the bill, but by a number of sections, and additionally, by the Faster Freedom of Information Act introduced by the two of you last week, Senator Leahy and Senator Cornyn, which I was delighted to hear is on a fast track for consideration by the Committee. That bill and a number of provisions of S. 394 reflect a commitment by Congress to improve its ability to oversee and strengthen administration of the Freedom of Information Act and related laws. I list a number of provisions, starting with the findings and going all the way through the studies at the

end of the bill that will enhance Congress's ability to strengthen and oversee the law. Now these, of course, won't do anything in and of themselves, but they signal that Congress intends the Freedom of Information Act to work efficiently and smoothly and will continue aggressively to oversee agencies to make sure that is the case.

I want to end with a brief personal story that illustrates the power of what I believe to be a truly magnificent law. About 25 years ago, I sent a Freedom of Information request to the Justice Department for records relating to my father, who had been a lawyer in the Justice Department in the 1920s. Since he died when I was very young, our family knew nothing about his early professional career, how he came to Justice, what he did while he was there, or how he wound up living in Houston, where I was brought up. All of this information and more was contained in a package of photocopies of faded personnel and litigation records that I obtained from the Department under the Freedom of Information Act. I immediately made copies and distributed them to all the family, and our family's understanding and pride in our own heritage had been enriched by this experience. My own pride in having worked for the Justice Department was certainly enhanced by knowing of my father's role in that agency many decades before.

The Freedom of Information Act remains a powerful tool that contributes meaningfully to our democracy, and S. 394 does an excellent job of addressing some of its remaining weaknesses.

I appreciate the opportunity to testify and I look forward to continuing to work with the staff of the Subcommittee and the Committee to see this legislation enacted during this Congress. Thank you.

Senator CORNYN. Thank you very much, Mr. Susman. I appreciate your statement.

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

Senator CORNYN. Now, we will go to a round of questions. I will start with Ms. Cary. I believe Ms. Fuchs mentioned that there were about 3.6 million Freedom of Information Act requests in the Federal Government in the year 2003, and did I hear you correctly that your office, General Abbott's office, administered two million in a single year? Did I get that right?

Ms. CARY. Not General Abbott's office. We administer the ones, as you know, that people object to release. Texas Building and Procurement Commission let out some statistics last week that were reported in The Statesman that said that they estimated two million requests fulfilled for the fiscal year, I think it was 2004—the 2003–04 fiscal year, and so we only did—we did about 11,000 ruling off the two million requests. So, you see, the information is going out at a much greater pace than it is being withheld.

Senator CORNYN. Thank you for that clarification. So it sounds like requests for a ruling is clearly the exception and not the rule. The rule is that recognizing their responsibility, governmental entities are providing the information really without objection, without asking for any intervention by your office, is that correct?

Ms. CARY. Yes, sir. That is our belief.

Senator CORNYN. One of the things that I also want to follow up on from my experience, and I know your experience in the AG's Office, is that many government entities, of course, they have their budgetary struggles. We are having to deal with the entire Federal budget. But, each agency has their own budget and perhaps is reluctant to allocate a portion of those limited resources to having a Freedom of Information Officer or somebody who is actually there to administer it, someone to secure the records and the like. Can you just speak briefly to your experience in terms of what kind of commitment it requires government to make in order to be responsive to these requests?

Ms. CARY. In Texas, the law says that the Officer for Public Information by law is the chief executive officer of any agency unless they designate. So, there is a little bit of motivation on the part of most chief executives to make a designation of a Public Information Officer, at least one. At the Attorney General's Office, we have two lawyers and one paralegal that work full time answering the requests that come just to the Office of the Attorney General. It is my experience that most cities get by with at least one Public Information Officer, with help from their legal counsel. So, generally speaking, one person is budgeted in most cities, most counties, and on the State level, there is usually a staff of several people that answer public information requests. So those things are committed to.

It is a top-down commitment, as you know, Senator Cornyn. If your executive head of your agency is supportive of prompt release of public information and they appoint an officer that shares that feeling, as you did with me when I was your Public Information Officer, then things move very quickly because you just need to send the information out promptly. So it is a matter of just the time in gathering it and sending it out, so—

Senator CORNYN. Thank you very much.

Ms. CARY. Yes, sir.

Senator CORNYN. Mr. Mears, you alluded to, as we all are conscious of, the fact that we are living in a post-9/11 world, and that security always remains a paramount concern for government. I believe the first requirement of government is to keep the people safe. And I know that there are always concerns about whether government itself is perhaps protecting more information than it should in the name of security. But, what this bill does, in part, I think, is to require it not take away any security exemptions that exist under the law but require the government entity who requests the information to simply demonstrate in some satisfactory fashion that it is not just take the word for it, but to actually show how, without revealing too much, that indeed it is a security exemption.

And, I would like for you to comment on that, but first, let me say, you know, I am struck how, of course, in Washington that, unfortunately, we get too embroiled in finger pointing, and, of course, people who criticize the current administration forget maybe that Democrat administrations had the same problems, and that was alluded to here. But, one of the things I was struck by when I was thinking about the Iraq war, for example, is the historic embedding of reporters with our troops as they went into Iraq and elsewhere. I think we need to work to try to keep this balance, and I also want to make sure that we don't degenerate into finger pointing, which

I think would be destructive of our efforts to move forward on something we all agree on on a bipartisan basis.

But could you just speak as a reporter how you view the balance between the security interests that obviously are so important and the public's right to know?

Mr. MEARS. Obviously, drawing that line has always been a very difficult decision to make. It seems to me that the starting assumption ought to be that "classified" and "security" don't mean the same thing. It has been pointed out that over-classification may have contributed to the terrorists' feeling that they were operating secretly and could go ahead with 9/11. There has been, I think, a 60 percent increase in classification of documents in recent years.

That does two things. It seems to me to speak to going too far over the line on the side of secrecy as opposed to disclosure and of over-classification, of making classification decisions that aren't warranted. I believe that Tom Ridge made that observation himself, that much of what he saw classified shouldn't have been classified. I remember Senator Moynihan, the late Senator Moynihan fought a long battle about classification and about taking some of these reams of documents, some of them ancient history, that are still classified secret.

My other observation on the classification problem would be that if you classify more and more material, you are much more likely to lessen the use of valid classification to protect real necessary secrets. If everything is classified, then my colleagues are going to go after everything. I have already said a couple of times, we don't want security information. We don't want to equip terrorists with information that could hurt this country. But neither do we want to be deprived of information that the people of the United States ought to know.

One of the stories you will find in my written testimony is about a Civil War episode in which an AP reporter tried to file a story about Robert E. Lee's army marching up the Shenandoah Valley and was told that it couldn't be reported because it would compromise secrets. Our guy, my ancient journalistic ancestor, said, "Well, don't you suppose the Confederates know they are marching up the Shenandoah Valley?"

[Laughter.]

Mr. MEARS. And the censor said, "I guess they do," and let the story go. I think there is a lot of that mindset and that it is something we need to guard against.

Senator CORNYN. Thank you. Senator Leahy?

Senator LEAHY. Thank you very much. Listening to Mr. Mears, it makes me think of a time, I remember once on the Intelligence Committee, the third time in two weeks the then-Director of the CIA was in. They had this emergency meeting to say, here is something I realize I am required to tell you by law, and I hadn't told—he hadn't told anybody in the Congress. But the reason we had these three emergency meetings, it had been on the front page of either the New York Times or the Washington Post. None of us had been told about it, but there it was. And he came up and said, "I was supposed to, under law, I was supposed to tell you and I didn't get around to it, but now it has been in the press." So I finally said, you know, we could save so much money and come up here, just

each day have a copy of the Times delivered to us marked "top secret."

[Laughter.]

Senator LEAHY. I said, we get three benefits from this. One, we are going to hear about the information much, much sooner than we will ever hear about it from you—this was Bill Casey at the time. Secondly, we will get it in far greater detail. And third, the greatest advantage, we get that wonderful crossword puzzle.

[Laughter.]

Senator LEAHY. A couple of his staff laughed. They were given a look by the Director, which makes me think their next assignment was not the best.

[Laughter.]

Senator LEAHY. Ms. Graves, the ACLU has several high-profile FOIA cases pending now, including ones related to the PATRIOT Act and the question of foreign prisoner abuse. On PATRIOT, the ACLU forced the Department of Justice and the FBI to release data on the provisional law, it has gotten more attention than anything else, Section 215. I think that it is fair to say the ACLU has actually forced the public release of far more information than Congress has obtained carrying out its oversight role, to whatever extent it has been on this. Does this mean that—I will toss you a nice softball—does this mean that we need FOIA and can't rely just on the Congressional oversight?

Ms. GRAVES. Well, thank you so much for that question, Senator, and also for your kind welcoming remarks to me earlier.

My answer would be that FOIA is essential, that notwithstanding the separation of powers that is enshrined in the Constitution, that gives the legislature a check over the executive branch's execution of the powers that are contained in the statutes passed by Congress, the fact of the matter is that public citizens, that individuals and public interest organizations have at times had much greater success in getting access to information from the government than Committees of the Senate and the House have.

I think that the most recent disclosures that we have received have reinforced that notion. I think the ACLU has received approximately 35,000 documents to date in response to the FOIA lawsuit and the order of the court in the prison treatment cases. About 20,000 of those documents, I believe, have been public, but 15,000 were not, and there are many more documents that under court order are still being reviewed by the Department of Defense and the CIA is undertaking a similar review.

So ideally, FOIA requests by the public and Congressional oversight can work hand in hand in making sure that our government is accountable to the people.

Senator LEAHY. I think about when you worked at the Justice Department, the FOIA guidelines erred on the side of disclosure. Now, the guidelines tell agencies the Department of Justice will defend the use of FOIA exemptions. I think that is resulting in, from what I see, withholding of a lot of unclassified documents. Both Senator Cornyn and I talked to Attorney General Gonzales about this. I wish they would go back to a policy that presumes disclosure unless you have something that is really classified.

It is the case, I mean, we have actually requested material that has been in the press, verbatim in the press, and we have been told, well, it is classified. We have got to go on the assumption—and again, it is not a liberal or conservative issue—we have got to go on the assumption of put things out unless it really does affect national security.

Mr. Mears, I take it from reading through your statement you feel the war on terrorism has changed the government's attitude toward openness?

Mr. MEARS. I think that it has predictably led to a more restrictive policy toward information. I suspect that it was also the case in such circumstances before my time. I grew up during World War II and I remember seeing the posters around that said, "Loose lips sink ships."

Senator LEAHY. Yes.

Mr. MEARS. That presumed that people walking around Lexington, Massachusetts, knew where the ships were, which I don't think we did.

[Laughter.]

Mr. MEARS. But I think that instinct has been repeated over our history and I think it is in play now.

Senator LEAHY. When I was four years old, I can remember my father going out wearing this tin air raid warden's hat going around urging the people in Montpelier, Vermont, to pull their shades. I did not really think that we were the number one target in the world, although when you read General Walters' book, Vernon Walters' book, you find that he was, as a young lieutenant, rousted out of bed in the middle of the night and asked if he spoke German. He said, "Yes, I speak about ten languages." And he was at Fort Ethan Allen outside of Burlington and they were intercepting some radio messages from Stowe being sent to U-boats. Subsequently, they found out who the Nazi sympathizer was there.

I think sometimes we get—there are still things we do that make you wonder. Don't photograph this site. Well, we have got a photograph of it here that has been published last year. That was last year. Don't photograph it this year. I think we have to be careful.

Are there threats to the United States? Of course. Is there a real terrorist threat? Yes. I just, though, remind everybody what, to paraphrase Benjamin Franklin, who said that the people who would trade their liberty for security deserve neither.

Mr. Chairman, again I thank you for doing this. I want to put in the record a statement by Senator Feingold, if I might—

Senator CORNYN. Certainly, without objection.

Senator LEAHY. —nd I will submit other questions for the record.

Senator CORNYN. Absolutely.

Senator LEAHY. Thank you.

Senator CORNYN. Thank you. I think the discussion up to this point leads me to want to ask a little bit about process issues. One of the differences I found coming from the State government to the Federal Government is a lack of process by which people understood what their responsibilities were. At the State level there were consequences for not acting within a particular time period and there was actually somebody, if you had a dispute, let us say a le-

gitimate dispute about what the law required, what was open and what was not open, somewhere you could go and ask.

I wonder, Mr. Susman, can you share with us some of your thoughts? You talked a little bit about attorneys' fees, the importance of this ombudsman. We heard something about resources people can go to to find out what their responsibilities are, how could we improve those incentives to comply in a way that would reduce the need for people ultimately to go to court?

Mr. SUSMAN. Thank you, Mr. Chairman. Let me start by saying that I do not tend to view the professionals who administer Freedom of Information Act requests from day to day, the access professionals in the bureaucracies, as the problem because, for the most part, they follow the policy directions from above. They work with the resources that they have. They work with the systems that they have. They work with the technology that they have.

So I think that the issues, the process issues, administration issues, are not the fault of those who receive the requests, open them, and have to find the documents and respond, but they arise higher up in the agency. And most agencies, and certainly the executive branch generally, do not have the structure for dealing with disputes in a regular and rapid way.

So, for example, if there is a delay that an agency experiences or if there is a dispute over fees, a lot of the times the reason you have to go directly to court is because you can't otherwise get a person high enough up in the agency to focus on the subject quickly enough. Sometimes, you go to court in order to get the Justice Department involved because the agency doesn't want to disclose something that will be embarrassing, and it is only when the U.S. Attorney's Office or a Justice Department lawyer calls a meeting with his or her client before the status conference in court that the discussion is had that Senator Leahy refers to in terms of the Attorney General's memorandum. It may say we will defend you, but these lawyers on the line don't want to go before the District Court judges and defend cases that are indefensible.

So that supports having, for example, a tracking system that your legislation calls for in the first instance. I was talking to some of my colleagues about the number of times I have used the Freedom of Information Act request and had to follow up with a faxed copy of the request or call and send another one or even two over again because the agencies haven't had the systems in place to track them and to let you know readily where the request is. This is technology most foreign countries, which have been adopting open government statutes over the last decade, already have. It is time for us, too.

Once you begin to deal with the agency, if there is a dispute, a lot of times, these disputes are caused by simply mistrust. The agencies have had their fill of requestors trying to get this kind of information and the requestor has had their fill of getting what is viewed as stonewalling by the agency, and yet there is no place else to go. There is just no place to go.

You can go to the Justice Department for advice, but they defend the agencies, so that is not at all like the Texas Attorney General's Office. That is not exactly where I would put my hotline in the Federal Government. We need an independent office that can act

as a neutral, objective arbiter between the requestor and the agency, and then at the end of each year say, these are the kinds of problems, in some ways perhaps like your Faster FOIA Commission would work, these are the kinds of problems that we see happening over time and let us work on them. Let us not have Congress have to come back every few years and make the adjustments. Let us do it ourselves.

The Justice Department has not played that role. The White House has not played that role, and it is useful to have another agency that can play that role.

Senator CORNYN. Mr. Tapscott, I guess we have talked a little bit about the ideological spectrum reflected here. I think we cover the whole spectrum, which is good. I think, as Senator Leahy and I have said time and time again, this is not a Democrat or Republican issue. And I guess, really, I am trying to figure out in my own inarticulate way how to say that the facts are the facts are the facts, and the interpretation that you draw from the facts or perhaps the way you see the world based on those facts may differ and that may be what makes some people conservative, some liberal, some Republican, some Democrat. But what we are talking about is getting access to the facts.

It has been my experience that, from a conservative standpoint, the facts will often reveal abuses, waste. My experience has also been that the facts will often reveal what a good job government officials are doing. And, my experience has been that most people that work in government are good people trying to do their best to live up to their responsibility.

Would you address, in terms of the waste and abuse and the importance that you see in having a robust Freedom of Information Act, why it is so important in that area?

Mr. TAPSCOTT. Certainly. Let me preface that by saying, Senator, that I occasionally wear a pink shirt to work and I have noted on occasion that when I have done that, that some of my colleagues at Heritage say something along the lines of, "He has been talking to Leahy again."

[Laughter.]

Senator LEAHY. You weren't supposed to tell anyone.

[Laughter.]

Mr. TAPSCOTT. I think your point is absolutely right. Government frequently cheats itself of the benefit of people knowing what a good job most government employees do. The fact is, however, with any government as big as the Federal Government or a government the size of the State of Texas or wherever it may be, there will be problems and there will be waste and fraud occurring.

Two examples that come to my mind, which I allude to in my statement, the Sun Sentinel in Florida found through the FOI that in spite of the fact that Hurricane Frances had landed 100 miles north of Miami-Dade County, that residents there had collected about $28 million in Federal reimbursements for things that had been destroyed by this hurricane, like televisions and sofas and things like that. The highest recorded winds in Miami-Dade County were 47 miles an hour. We wouldn't have known about that without the FOI.

More importantly, there is a case going on right now which I think speaks to one of Tom's points, and that is Cox Newspapers has been requesting from the Department of Justice a database of grants from the Federal Government to State and local law enforcement. The reason they are looking for this is they have discovered in Georgia that there are several thousand illegal aliens who are—excuse me, in Georgia, several hundred illegal aliens who had been convicted of serious felonies and released but then not deported as they are required to be under Federal law, the reason being the immigration officials from the Federal Government just didn't show up. And the suspicion obviously is that the reason the Department of Justice will not release this database is because they are afraid of the headlines that could result.

If they did release that, for the same reason that "Wanted" posters work in the post office, if these reporters had access to this database, private citizens and the media all over the country could help the government find these people who have committed serious crime.

Senator LEAHY. Thank you, Mr. Chairman. I worry about that very same thing, the number picked up, released.

Let me ask this question regarding the National Security Archive. You are one of the most active users of FOIA in the nonprofit community. I am told by my staff you filed 30,000 requests, made six million pages of documents available. You have probably heard my story before about Bill Casey and stamp the newspaper top secret. But you sort of go across the board to a whole lot of different agencies. I mean, it might be Agriculture, it might be Justice, it might be anything else. Do you find a difference in the way agencies monitor and track their FOIA requests? Is there uniformity among agencies?

Ms. FUCHS. No, Senator Leahy, there is not uniformity amongst agencies, and in fact, it is some of those differences that really highlight why the proposals in the bill, such as the hotline and the tracking and monitoring, is so necessary.

What we have found in looking at over 35 Federal agencies is that they have completely different systems. Some are so decentralized that once you submit your FOIA request, you have absolutely no idea where it goes, whether it goes to another component of the agency, whether it gets referred out to another agency altogether, and there is no way of finding that out except by making many, many phone calls. You know, we have a full-time person who monitors our FOIA requests and we have a database in which we keep track of every FOIA request and what happens with it. But for most FOIA requestors, they don't have the ability or the resources to do that.

I think that requiring agencies to acknowledge requests, requiring them to set up a FOIA hotline so you can find out where your requests are are critical for making the agencies be responsive. And frankly, I think it is going to reduce disputes and litigation, as well, because by having an agency let the FOIA requestor know, we have your request, it is in the line, we are taking care of it, this is our estimated completion time, people are going to feel that the government is responding to them.

What happens right now is with many agencies, it is a complete black hole. We have one agency where we have something like 100 requests that are, oh, between two and 14 years old that we don't get any responses to, despite follow-up. Well, that is not going to be possible when agencies have to have a tracking system in place.

Senator LEAHY. I also see some of these new classifications, "sensitive but unclassified," or "for official use only." These don't have any legal protections under FOIA, do they?

Ms. FUCHS. They shouldn't have legal protection under FOIA.

Senator LEAHY. But do agencies tend to hold back? I mean, do they have a chilling effect on FOIA?

Ms. FUCHS. Well, we at the National Security Archive, particularly because many of our requests go to military and intelligence agencies, we worry about that. We have seen an increase in the labeling of information as "sensitive but unclassified," "for official use only," and agency officials tell us it doesn't have an impact on FOIA, but, in fact, it is hard to believe that when documents are coming across for review and they say, "sensitive but unclassified," "sensitive security," "sensitive homeland security information," or any of the other combinations of letters, that they are not being held back from disclosure.

Senator LEAHY. I remember one of the first trips as a young Senator I took to the then-Soviet Union and we were in what was then called Leningrad, now St. Petersburg, a beautiful city, and I was walking around to do photography, and they still had signs on all the bridges. I had seen the maps that had the city about eight miles off from where it really was, as though your satellites couldn't make any difference, and the bridges had signs in Russian, English, I think French, saying no photography allowed there. One is a beautiful bridge with great sculptures. I had my wife who stands while I was taking a photograph of her with a telephoto lens but shooting over her shoulder.

But then I came to a church, and again, it was being repaired. Here is this sign. I couldn't understand the reason. The person who was with us was actually in the KGB, although that is not what they told us—we knew it, he wasn't going to say it—but he said, "Go ahead and take the picture." As soon as I put up the camera, a police officer comes running down the street. I thought, God, I am going to end up in jail. He got almost up to this guy, who flashed his ID at him and the man starts going backwards saluting. And he turns to me and says, "Like I said, take the picture."

[Laughter.]

Senator LEAHY. I worry in some ways we are doing this. Again, I don't want somebody to send out a list of here are our 12 undercover agents in this particular country. Of course not. Nobody is asking for that. But it is so easy to say, well, if we classify everything, we can never be accused of letting the wrong thing come out.

I appreciate what you are doing and Senator Cornyn and I will continue our work. I mean, he has had his own experience in Texas and can sell how well it can work. We will just keep on it, but thank you. I will submit the rest of my questions.

Senator CORNYN. Ladies and gentlemen, all good things must come to an end and we are going to close this hearing for now. But, as I said earlier, this is, from my standpoint and I trust from Sen-

ator Leahy's standpoint, the beginning and not the end. We consciously chose in our discussions about what to file in terms of early legislation things that we thought would not be particularly controversial, things that were common sense and would assist agency representatives both through education and training and other things to do the job that the law already requires them to do.

I not only want to thank you for your testimony, your oral and written testimony today, but also thank you for your willingness to work with us on this important issue and trust that we can continue to call on you from time to time to help us as we move forward, because as I said, this is just the beginning and not the end.

So, on behalf of Chairman Specter and certainly Senator Kyl and Senator Feinstein, as I said, Senator Leahy, they allowed us to hijack their Subcommittee for purposes of this hearing, I want to express my appreciation to them, but also finally again to Senator Leahy and his staff for their great work.

We will leave the record open until 5:00 p.m. next Tuesday, March 22. There will be, no doubt, written questions that others would like to submit to you which we would like to get your answers for the record and would ask you to respond to those as soon as you can.

With that, the hearing is adjourned.

[Whereupon, at 11:48 a.m., the Subcommittee was adjourned.]

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

[Additional material is being retained in the Committee files.]

QUESTIONS AND ANSWERS

U.S. Senate Subcommittee on Terrorism, Technology and Homeland Security
U.S. Senate Committee on the Judiciary
U.S. Senator John Cornyn (R-TX)

**"Openness in Government and Freedom of Information:
Examining the OPEN Government Act of 2005"**

Tuesday, March 15, 2005, 10 a.m., Dirksen Senate Office Building Room 226

WRITTEN QUESTIONS FROM SENATOR JOHN CORNYN

Questions for Meredith Fuchs

1. Section 6 of the OPEN Government Act may turn out to be the most controversial provision in the bill. That provision would create an enforcement mechanism to ensure that federal agencies comply with the 20-day time limit that exists *under current law*. Specifically, section 6 provides that, if an agency fails to respond within the current 20-day time limit, the agency effectively waives its right to assert certain FOIA exemptions, unless that agency can demonstrate, by clear and convincing evidence, good cause for its failure to comply with the time limit (or unless the exemption involves endangerment to national security, disclosure of personal private information protected by the Privacy Act of 1974, or proprietary information).

1.a. Based on your experience with FOIA, is this provision necessary?

Yes. Aside from litigation, there are no tools currently available to a FOIA requester to get agencies to process requests in a timely manner. There is no incentive in FOIA to get the agency to accomplish timely processing on its own initiative. There are no rewards or performance incentives associated with FOIA. Instead the FOIA personnel are often isolated from the rest of the agency and not provided sufficient high-level attention or resources. Nor are there any penalties for an agency's failure to meet its obligations.

And litigation itself is not a very appealing option. Most private attorneys will require a retainer upwards of $15,000 to cover the cost of drafting a complaint and responding to a government motion for summary judgment. Most people do not have the resources to spend such a large sum on litigation. And, when lawsuits are brought, the government can simply relinquish records mid-stream in order to moot out the case and prevent the plaintiff from being able to obtain attorneys' fees to cover the cost of the suit. The record shows several high profile recent instances of exactly this kind of conduct.

Without a carrot or a stick to encourage compliance with FOIA, some agencies feel no pressure to anything to meet their obligations. In March 2005, the Archive filed a lawsuit against the United States Air Force, which has a particularly bad pattern of not processing FOIA requests. In that lawsuit the Archive specifically describes 82 individual FOIA requests that were filed between 1987 and 2004 that have not been processed. The correspondence for these requests

shows that the Archive made repeated attempts to facilitate the processing of the requests, such as by narrowing or clarifying the requests. In most cases no progress was ever made. Instead, the Archive received occasional letters from the Air Force asking us whether we had lost interest in the request given the passage of time. In some cases it has become apparent that the requested records have now been destroyed or have been lost in the intervening years since the request was made. The Archive tried repeatedly to discuss the underlying problems with the Air Force. I personally wrote to the Secretary of the Air Force and the Air Force General Counsel. I left telephone messages for the Air Force's principle FOIA contact. Nothing happened as a result of those efforts.

After all, why should an agency respond? If it can stonewall the FOIA requester long enough, the six year statute of limitations on FOIA requests (measured from the date the request is submitted) will run and the requester will not even be able to take the agency to court.[1]

Something has to be done to spur agencies to comply with the law. The encouragement offered by the Department of Justice's Office of Information and Privacy is useful to improve how agencies handle FOIA requests, but it does not create an incentive to comply in the first place. The OPEN Government Act's Section 6 penalty would provide such an incentive for the first time.

1.b. Have you experienced agency delays, or are you aware of others who have experienced agency delays, that occurred primarily because the agency had no incentive to comply with the statutory deadlines already established by Congress? In those incidents, were the agencies capable of reasonably responding within the statutory deadline period?

The Archive has experienced numerous unexplained delays. We have open FOIA requests from almost every year of the Archive's 20 years in existence. For example, the Archive still has 57 FOIA requests pending that were filed with agencies 15 years ago in 1990, and 47 pending that were filed in 1991. Even moving to the more modern era of FOIA processing, the Archive still has at least 250 FOIA requests pending that were filed 8 years ago in 1997.

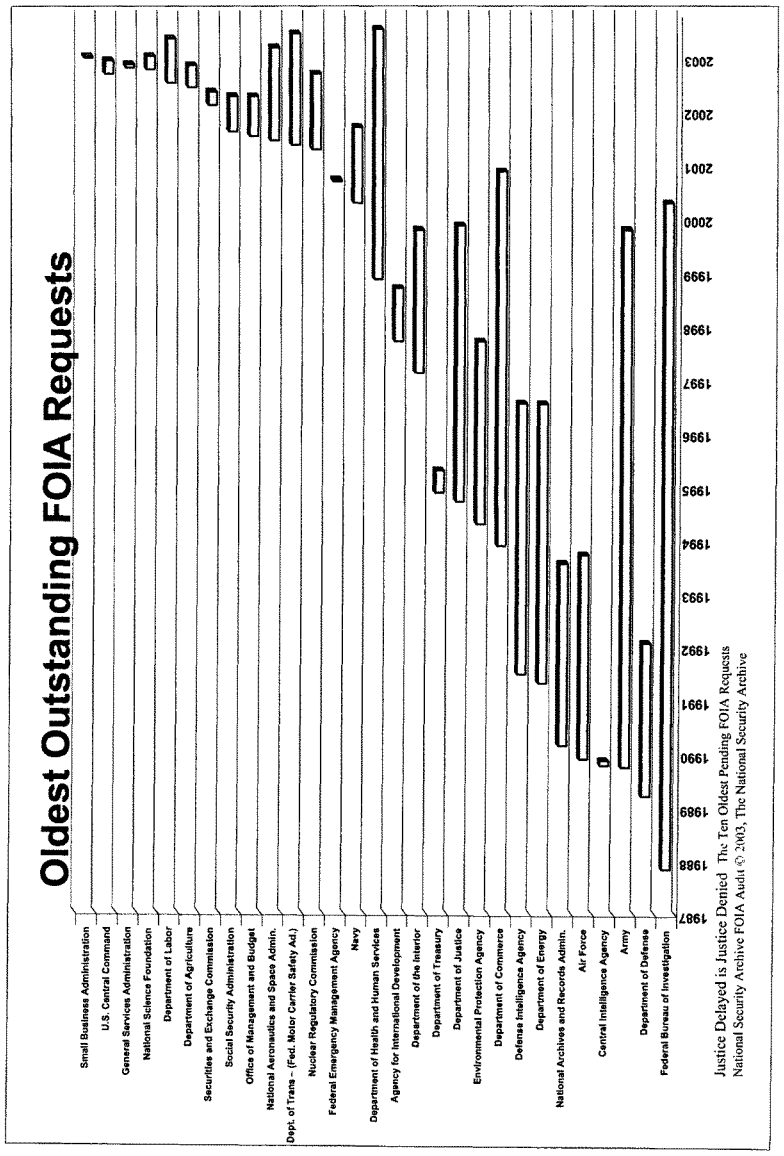
The Archive's experience is not unique. In November 2003, the Archive published a study on FOIA delay that looked at the ten oldest pending FOIA requests in 35 federal agencies. That study found that there were at least 17 agencies with FOIA requests that were more than 2 years old, and some that were as old as 15 years. (A chart illustrating the age range of each agency's ten oldest pending FOIA requests is attached). These included agencies such as the Federal Bureau of Investigation, Department of Defense, Army, Central Intelligence Agency, National Archives and Records Administration, Department of Energy, Defense Intelligence Agency, Department of Commerce, Environmental Protection Agency, Department of Justice, Department of Treasury, Department of Interior, Agency for International Development, Department of Health and Human Services and Navy. In fact, the oldest FOIA request identified by the Archive – one filed by an investigative reporter named Seth Rosenfeld that has been the subject of several lawsuits – still remains incomplete despite a court order that the FBI process it.

[1] In the case of the Archive's suit against the Air Force, the Archive was forced to refile almost 40 FOIA requests in a procedure that has been approved the courts.

We are in the process of updating our ten oldest study, which asks for information that should be immediately at hand in the agency FOIA offices and should not require the FOIA officer to seek records from program offices. Yet, the early returns show that the backlog problem has not been solved. For example, two Air Force components that have responded to our inquiry still have pending the same oldest FOIA request as they had pending in 2003. In one case it is a request filed in 1994 for three Air Force Histories covering the years 1968-1970. We do not understand why these records have not been reviewed in the eleven years that the request has been pending. In the case of the Federal Aviation Authority, the ten oldest FOIA requests currently pending with the agency are the same ten that were pending with the agency when the Archive conducted this study in 2003. These include, among others: (1) a 1997 request for comments submitted by tour operators in response to the Grand Canyon National Park NPRM; (2) a 1997 request for FAA interpretations or advisory opinions regarding a federal regulation from 1996; and (3) a 1997 request for releasable portions of a specific submission for approval of a proposed master interchange agreement. Our review reveals no reason why these FOIA requests have not been responded to. We are still awaiting responses from the vast majority of the agencies that are part of the survey and we will provide you with additional information as it becomes available.

You might think that locating the ten oldest pending FOIA requests at an agency would not be a hard task. After all, one would assume that the agency FOIA office would be able to quickly identify its pending FOIA requests. In fact, 25 out of the 35 agencies surveyed failed to respond to the Archive's FOIA request for copies of the ten oldest pending requests within the 20 business day statutory response time provided by FOIA. (A chart summarizing the response times is attached). Of those, 19 agencies responded between 21 and 184 business days after the FOIA requests were filed. At that point, the Archive published the results of its audit. An additional 6 agencies had not responded to the request at the time the audit was published, which was nine months after the FOIA requests were first made. Not only does this demonstrate how varied agencies' responsiveness can be to a FOIA request – in this case the exact same request to each agency, a request susceptible of little ambiguity, and one that would be expected to be at the fingertips of the FOIA processor – but it also demonstrates the complete absence of tracking systems at many agencies. The OPEN Government Act's provision for tracking and a FOIA hotline would be a real improvement over the currently haphazard filing systems of some agencies.

Finally, the costs of delay are not hard to think of, or even to prove. I have attached to this statement letters from agencies telling researchers that records have been lost, destroyed or transferred to another agency while requests were pending. If the goal is to avoid releasing information to the public, then delay and stonewalling have proven to be powerful tools.


Oldest Outstanding FOIA Requests
Small Business Administration
U.S. Central Command
General Services Administration
National Science Foundation
Department of Labor
Department of Agriculture
Securities and Exchange Commission
Social Security Administration
Office of Management and Budget
National Aeronautics and Space Admin.
Dept. of Trans – (Fed. Motor Carrier Safety Ad.)
Nuclear Regulatory Commission
Federal Emergency Management Agency
Navy
Department of Health and Human Services
Agency for International Development
Department of the Interior
Department of Treasury
Department of Justice
Environmental Protection Agency
Department of Commerce
Defense Intelligence Agency
Department of Energy
National Archives and Records Admin.
Air Force
Central Intelligence Agency
Army
Department of Defense
Federal Bureau of Investigation
1987
1988
1989
1990
1991
1992
1993
1994
1995
1996
1997
1998
1999
2000
2001
2002
2003
Justice Delayed is Justice Denied The Ten Oldest Pending FOIA Requests
National Security Archive FOIA Audit © 2003, The National Security Archive

AGENCY RESPONSE TIMES

NO. BUS. DAYS	AGENCY	DATES OF 10 OLDEST REQUESTS
1	Air Force – Education and Training Command	May 22, 1994 - July 29, 2003
3	Office of Personnel Management	No pending requests
3	National Science Foundation	September 11, 2002 – February 19, 2003
4	Department of Agriculture	July 19, 2002 - December 2, 2002
5	Defense Intelligence Agency	July 8, 1991 – August 1, 1996
6	Army – Criminal Investigation Command	March 22, 2000 - June 26, 2003
6	Navy - Naval Education and Training	July 25, 2003 (1 pending request)
7	Department of Education	No pending requests
10	Air Force – Combat Command	June 6, 1995 - May 6, 2000
10	Securities and Exchange Commission	March 5, 2002 - June 12, 2002
13	Small Business Administration	January 19, 2003 - January 30, 2003
14	Social Security Administration	September 7, 2001 - May 24, 2002
15	Army – Corps of Engineers	June 6, 2002 - June 27, 2003
15	Nuclear Regulatory Commission	May 7, 2001 - October 4, 2002
15	Navy – Naval Facilities Engineering Command	No pending requests
17	DOL – Mine Safety and Health Administration	August 1, 2002 - June 3, 2003
17	Navy - U.S. Pacific Fleet	No pending requests
18	Army – Admin. Assistant to Sec. of the Army	November 27, 2001 - April 29, 2002
18	Army - Total Army Personnel	March 5, 2001 - February 14, 2002
18	Navy - Naval Sea Systems	May 25, 2000 – October 10, 2001
19	Department of Commerce	December 28, 1993 – December 12, 2000
20	Army - Intelligence and Security Command	October 5, 1989 - October 3, 1999
20	National Archives and Records Administration	March 9, 1990 - August 18, 1993
21	Agency for International Development	October 14, 1997 - October 19, 1998
21	Federal Emergency Management Agency	September 24, 2000 - October 10, 2000
21	General Services Administration	September 13, 2002 - December 6, 2002
22	Department of Justice	October 17, 1994 - December 28, 1999
22	Environmental Protection Agency	May 23, 1994 - October 10, 1997
23	Department of the Interior	March 25, 1997 - November 5, 1999
26	Department of Defense	January 31, 1987 - February 3, 1992*
26	Navy- Naval Air Systems	February 13, 2002 - June 12, 2003
27	Air Force – Materiel Command	May 12, 1999 - August 12, 2003
33	DOT - Federal Motor Carrier Safety Admin.	June 4, 2001 - July 28, 2003
35	Department of Treasury	December 9, 1994 - May 24, 1995
38	Central Intelligence Agency	May 29, 1987 - November 22, 1989*
54	Office of Management and Budget	August 15, 2001 - May 31, 2002
89	Air Force - 11th Wing	December 5, 1989 - December 2, 1993
130	Federal Bureau of Investigation	November 9, 1987 - May 28, 2000
147	Department of Energy	May 14, 1991 - August 7, 1996
150	Department of Health and Human Services	December 30, 1998 – August 29, 2001
178	National Aeronautics and Space Administration	July 12, 2001 - April 3, 2003
184	U.S. Central Command	October 10, 2002 - January 16, 2003
160+	**Drug Enforcement Agency**	**- Request Pending**
190+	**Department of Housing and Urban Develop.**	**- Request Pending**
190+	**Department of Labor**	**- Request Pending**
190+	**Department of State**	**- Request Pending**
190+	**Department of Transportation**	**- Request Pending**
190+	**Department of Veterans Affairs**	**- Request Pending**

* See endnote (i) and individual agency summary for information relevant to dating of ten oldest requests produced by this agency.

U.S. Department of Homeland Security

United States Coast Guard

Commandant
United States Coast Guard

2100 Second Street, S.W.
Washington, DC 20593-0001
Staff Symbol: G-OPL
Phone: (202) 267-1777
Fax: (202) 267-4082

5720
CG FOIA #95-0220
NSA Archive File No. 930614DIA052

FEB - 5 2004

Ms. Kate Doyle
The National Security Archive
Gelman Library, Suite 701
2130 H Street, N.W.
Washington, DC 20037

RECEIVED FEB 1 0 2004

Dear Ms. Doyle:

This is in response to your Freedom of Information Act (FOIA) request of July 21, 1993, in which you wrote to the Defense Intelligence Agency (DIA) asking for records detailing "the heroin trade in Colombia during the 1990s." In responding to your request, the DIA located one document that had originated from the Coast Guard. They forwarded this document to us on February 6, 1995, for review and direct response to you.

Upon receipt of the DIA referral, the Office of Information Management at Coast Guard Headquarters forwarded the letter to the Office of Law Enforcement for filing until it was ready to be processed. The Coast Guard's standard policy is to process FOIA requests in the sequence in which they are received. In Open America v. Watergate Special Prosecution Force, 547 F.2d 605, 614-16 (D.C. Cir. 1976), the court approved the general practice of handling FOIA requests on a "first in, first-out" basis. This processing scheme also applies to referrals of FOIA requests from other Federal agencies.

Due to a myriad of law enforcement responsibilities and limited personnel resources the Office of Law Enforcement (G-OPL) has accumulated a large backlog of FOIA inquiries. This backlog impedes our ability to respond to FOIA requests more expeditiously. Unfortunately, now that we have reduced our backlog to the point at which your case is ready for processing, we are unable to locate the document that DIA referred to us for review.

We have conducted an exhaustive search for this document. We searched the applicable file system in the Office of Information Management, which was the first office in the Coast Guard to receive the document. This search proved unsuccessful. A similar search was performed on the applicable file system in the Office of Law Enforcement, which also was unsuccessful. Ultimately, we contacted the DIA in hopes that they would have a copy of this document. This effort also proved futile. Consequently, we have determined that a reasonable search for this document has been made and no other place within the Coast Guard exist where it is likely to be found. See, e.g., In re Wade, 969 F.2d 241 (7th Cir. 1992); Oglesby v. Department of the Army, 920 F.2d 57 (D.C. Cir. 1990)

We apologize for this administrative mishap and regret the substantial delay that our backlog has caused in processing your request.

5720
CG FOIA #95-0220
NSA Archive File No. 930614DIA052
FEB - 5 2004

This is not a denial of information. We have searched our records and have not found the responsive document referred to us from DIA. I am the person responsible for the "no records" determination in response to your request. Concurring with this decision is Lieutenant Brad Kieserman, Legal Advisor, Office of Law Enforcement. We are required by law to inform you that you may appeal the adequacy of our search. Your appeal must be made in writing and you must submit it within 30 days from the date of receipt of this letter. Your letter should indicate that you are making an appeal based on a "no records" determination of a request made under the FOIA, and the envelope should be prominently marked "FOIA Appeal." Include in your appeal the reason(s) you believe the search was inadequate and a copy of our response. Send your appeal to:

Commandant (CG-611)
U.S. Coast Guard Headquarters
2100 Second Street, S.W.
Washington, DC 20593-0001

Sincerely,

K. A. WARD
Captain, U. S. Coast Guard
Chief, Office of Law Enforcement
By direction of the Commandant

From "Ouellette, Robin" <ROuellette@COMDT.USCG.MIL>
Sent Friday, February 6, 2004 10:03 am
To "'belias@gwu.edu'" <belias@gwu.edu>
Cc
Bcc
Subject US COAST GUARD FOIA APPEAL A93-044

Ref: (a) Nat'l Security Archive FOIA Seq. #920944USG007

August 25, 1992: The Nat'l Security Archive (NSA) submitted a FOIA request, seeking a copy of a 35-page U.S. Coast Guard, Intelligence Coordination Center (ICC) document: The Baja Penninsula and Its Involvement in International Narcotics Trafficking (U).
May 21, 1993: ICC responded, partially denied your FOIA request by providing NSA 16 of the 35 pages, 6 of which appear to have been redacted in part. Only 11 released pages had page numbers. No remanence of the witheld remaining 19 pages were provided. ICC cited exemption (1) of the FOIA, classified documentation, as its basis for all withholding.
October 19, 1993: NSA appealed ICC's response, protesting the extent of deletions made and requested a second review. NSA also complained of the method the Coast Guard used for redacting portions of the record provided them.

Ms. Elias,

This is a follow-up to our PM conversation, February 5, 2004, regarding the status of your FOIA Appeal for reference (a). Please express your comments/concurrence on what I conveyed to you (as follows):

"I apologize for the inordinate delay in processing your FOIA appeal.

Prior to our conversation, I made inquiries for the FOIA request files from my Division as well as ICC. My efforts to date were unsuccessful in locating an unredacted version of the requested document.

Recently, I did obtain a copy of what ICC already provided NSA. ICC informed me that until five/six years ago, it did not maintain unredacted copies of documents with their FOIA request case files. ICC's entire work area is a secured location. If ICC still has an unredacted version of the document, an exhaustive search would be required of ICC's entire work area to locate it. I'm displeased not having located the document's reredacted version.

I concur with NSA's displeasure of the redaction method ICC exercised when processing it's FOIA request. In reviewing what was disclosed to NSA, I noted ICC use of white "patching-over" for withholding information, vice using black. This masks the extent of what information was withheld. There is no page accountability for those pages not provided NSA. Also, if ICC did attempt "line-by-line" segregation for releasing information, it failed to inform NSA that option was visited in its response letter.

Since the appeal process cannot proceed without access to an unredacted version of the document, I suggest the case file, itself, be "closed." Though a reasonable search for the unredacted version of the document was

conducted with negative result, vigilance for it will continue. Should it resurface, NSA will be contacted."

Robin D. Ouellette
ROBIN D. OUELLETTE
FOIA Appeals Case Officer
CG-611
e: rouellette@comdt.uscg.mil
v: 202/267-2300

DEPARTMENT OF DEFENSE
OFFICE OF FREEDOM OF INFORMATION AND SECURITY REVIEW
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155

DEC 20 2004
Ref: 95-F-0876
950207DOD030

Mr. William Burr
National Security Archive
Gelman Library, Suite 701
2130 H Street, NW
Washington, DC 20037

Dear Mr. Burr:

This responds to your February 22, 1995, Freedom of Information Act (FOIA) request. It has been determined that the records you requested have been accessioned by the National Archives and Records Administration (NARA). Accordingly, we are referring your request to NARA at the following address for processing and direct response to you:

The National Archives at College Park
Director, Records Declassification Division
Rm 6350
8601 Adelphi Road
College Park, MD 20740-6001

There are no charges for processing this request, in this instance.

Sincerely,

C. Y. Talbott
Chief

DEPARTMENT OF DEFENSE
OFFICE OF FREEDOM OF INFORMATION AND SECURITY RI
1155 DEFENSE PENTAGON
WASHINGTON, DC 20301-1155

19 AUG

8+ years
no docs.

Ref: 96-F-0653
960116DC

Mr. William Burr
National Security Archive
George Washington University
2130 H Street, NW, Suite 701
Washington, DC 20037

Dear Mr. Burr:

This responds to your March 25, 1996, Freedom of Information Act (FOIA) request which was received in this Office on March 28, 1996.

The Office of the Under Secretary of Defense for Policy has determined that documents responsive to your request have been accessioned by the National Archives and Records Administration (NARA). In the event you have not already done so, I recommend that you redirect your request to NARA, at the following address, for processing and direct response to you:

Director
Records Declassification Div (NND)
Room 6350
The National Archives at College Park
8601 Adelphi Road
College Park, MD 20740-6001

There are no charges for processing this request.

Sincerely,

C. Y. Talbott
Chief

Follow-Up Questions from Senator Patrick Leahy
for Meredith Fuchs, National Security Archive
Hearing on "Expanding Openness in Government and Freedom of Information"
Subcommittee on Terrorism, Technology and Homeland Security
Tuesday, March 15, 2005

1. Most FOIA requestors do not ultimately litigate their claims, but litigation is a fundamental right, and sometimes a critical option, in the FOIA context. The Open Government Act (S.394) preserves what is often referred to as the "catalyst theory" of attorney fee recovery. Why is the recovery of attorneys' fees so important to requestors?

Without an attorneys' fees provision, it would be virtually impossible for individual FOIA requesters to ever litigate FOIA cases. Thus, they would be denied the only type of independent review available under FOIA for denials of records requests, failure to process requests or obdurate conduct by a federal agency. The reason for this is that litigation is costly. FOIA practitioners that I have spoken to have told me that they require a retainer in excess of $15,000 for a FOIA lawsuit in order to cover the basic cost of drafting a complaint and responding to a government motion for summary judgment. This is a significant financial burden for a citizen to bear in order to get the government to comply with its legal, statutory obligation, and is a burden most individuals cannot bear.

As currently interpreted by the courts, attorneys' fees are generally only available to a FOIA litigant if the lawsuit results in a judicially sanctioned change in the legal relationship between the parties, i.e. a court order requiring some relief requested by the FOIA requester. This is problematic because a government agency that seeks to unreasonably avoid, delay, or interfere with the release of records can wait to see if the FOIA can pull together the resources to bring a lawsuit and then, on the eve of judicial consideration, moot out the entire case by releasing responsive records. This wastes the FOIA requester's resources and also the government's resources, as some time likely was put in by Department of Justice Attorneys defending the actions (or inactions) of the client agency. This is bad policy and bad government. Sadly, there is no other avenue for a FOIA requester to seek independent review as the administrative appeals are decided by the same agency that denied the records (or failed to act) in the first place. Some agencies do not even permit administrative appeals for their failure to process FOIA requests.

I recently submitted a letter to Senators Leahy and Cornyn describing a particular incidence of this practice. The letter is attached to this written testimony. In that case, the requester submitted a request and got no response; submitted an administrative appeal and got no response; filed suit and got some records previously released to another requester; then threatened to file for summary judgment and only then (one year after the FOIA request) got additional responsive records.

There are numerous examples of the government playing games in litigation like this. For example, recently I was involved in a case in which the FOIA requester lost a claim for expedited processing in the district court. The requester appealed, and a coalition of organizations including the National Security Archive filed an amicus brief in the D.C. Circuit. One week after the plaintiff's and amici's briefs were filed in the court of appeals, (ten months after the litigation had commenced, after trial court proceedings had been completed, and after appellate briefs had been filed) the government finished its processing of the FOIA request and released the documents. It then argued that the appeal—indeed the entire case – was moot. Most lawyers are not willing to take a case when the government can so easily moot out the claim after substantial time has been invested on litigating and extinguish a right to attorney's fees.

There are unique aspects to FOIA litigation that make the availability of attorney's fees under a catalyst theory essential. FOIA cases are different than other cases in which Congress has seen fit to permit fee shifting. In civil rights cases seeking damages, the defendants cannot easily moot damages claims by capitulating. Plaintiffs may reject settlement offers, increase their demands, or require attorneys' fees as part of a settlement. In the case of equitable relief in civil rights cases, when defendants voluntarily remedy civil rights plaintiffs' injunctive claims, courts generally will not dismiss a plaintiff's action as moot if the defendant might repeat the challenged conduct. Further, because monetary relief may be available, a plaintiff with a strong or meritorious civil rights case often can find an attorney who will pursue the case on the promise that the plaintiff will pay the legal fees if the case is at least partially successful.

FOIA cases are quite different. Plaintiffs never claim monetary damages under FOIA because the law does not provide for them. Nor do plaintiffs typically seek ongoing injunctive relief or declaratory judgments. Nearly all FOIA actions simply demand a one-time release of documents. As a result, except in cases where there is a critical legal dispute at issue, government defendants frequently moot FOIA claims on the eve of judgment and deny compensation to successful plaintiffs' attorneys. Under such an arrangement, only parties capable of risking litigating without compensation are able to enforce FOIA against intransigent government agencies. Furthermore, even in those cases, agencies are able to prolong the litigation without fear of paying costs for their opponents.

2. I have heard FOIA litigators say that even though they may lose their case in court, they win in the process of litigation. Can you explain this and explain how the Open Government Act's fee provision would impact the FOIA requester?

FOIA requesters often find that agency personnel will make categorical denial determinations that result in the wholesale withholding of large swathes of information. A particularly striking example of this involved a Washington Post request under the FOIA for documents from the Department of Defense ("DOD") regarding American efforts to rescue hostages in Iran. When DOD claimed partial or entire exemption for 2000 documents (14,000 pages), a lawsuit was filed. The District Court appointed a

special master skilled in the classification of national security documents to compile a meaningful sample of these documents for the court to review. The Special Master examined the documents and helped the government to disclose new documents and re-examine the originals, resulting in the release of more than two-thirds of the pages of records that had been denied.

Even in a more standard case, however, through litigation, the FOIA request often is given a closer look by a Department of Justice attorney who must respond in court to the FOIA requester's legal arguments. In addition, judges usually set timetables for agencies to review the records and require detailed affidavits or Vaughn indexes that require each record to actually be reviewed. Courts are very permissive in these situations and often allow, indeed encourage, the government to revise and supplement its affidavits throughout the litigation and perfect its case. As a result of each of these processes, agencies often produce records during the course of the litigation that they denied to the FOIA requester. If an agency produces enough records during the litigation and finally justifies its withholdings, it usually will then file a motion for summary judgment and obtain a ruling in its favor. Under current judicial interpretations of FOIA, if the agency has made a sufficient showing and wins the motion for summary judgment, it is likely that the FOIA requester will not be able to obtain attorneys' fees.

The OPEN Government Act's fee provision would change the situation so that when a FOIA requester brings a lawsuit to challenge a government agency's refusal to adequately find and review records, and that lawsuit is a catalyst for the agency releasing records, the FOIA requester will be entitled to attorneys' fees to pay the cost of having to act as a "private attorney general." Thus, it would be an incentive for the government to do its work up front and avoid litigation altogether. As a result it would save resources at the Department of Justice, which might have fewer unreasonable withholding cases to defend. It also would save judicial resources because it might no longer be necessary for courts to monitor cases that can be resolved by the agency putting a little effort into the review up front. It also would save the limited resources of members of the public who are forced to sue to get the agency to review records for release.

3. Do you think that the improved reporting requirements in the OPEN Government Act are enough to solve the backlog problem?

The improved reporting requirements in the OPEN Government Act are vitally important for understanding the trends in FOIA processing and identifying problem centers in the administration of FOIA. As currently specified in FOIA, the reporting requirements provide misleading statistics as to processing time and hide agencies' backlogs. The OPEN Government Act would require more detail as to processing time, including the range of processing times, specific details on backlogged FOIA requests, and other useful information. This would enable agency leadership to know about problems and seek solutions. It would enable the Department of Justice's Office of Information and Privacy to see where the problem agencies are and offer solutions to improve processing. It would make it possible for Congress to understand whether citizens are getting responses to FOIA requests or are being ignored by the very agencies that they pay for. The improved

reporting requirements may put some pressure on agencies to resolve their backlogs, but it probably is not enough of an incentive to completely solve the problem.

4. I have been troubled by the increase in classification of documents in recent years and by the creation of what are often called "pseudo-classification" categories, like "sensitive but unclassified" or "for official use only." The categories do not have legal protection under FOIA, but many believe they create a chilling effect on disclosure. Are you concerned about these categories?

The National Security Archive's experience with pseudo-classification is not encouraging. Among our many projects, we are pursuing the public release of the actual primary sources cited and quoted by the 9/11 Commission, and we have been on the receiving end of an object lesson in reflexive pseudo-secrecy at the Transportation Security Administration. For example, last year we asked for the five Federal Aviation Administration warnings to airlines on terrorism in the months just prior to 9/11 - warnings that were quoted in the 9/11 Commission report and discussed at length in public testimony by high government officials. The TSA responded by denying the entire substance of the documents under five separate exemptions to the Freedom of Information Act, and even withheld the unclassified document titles and Information Circular numbers as "Sensitive Security Information." When we pointed out that the titles, dates, and numbers were listed in the footnotes to the number one best-selling book in the United States, the 9/11 Commission report, the TSA painstakingly restored those precise digits and letters in its second response to us, but kept the blackout over everything else.

These new secrecy stamps – and we know of at least 8 ("sensitive but unclassified," "controlled unclassified information," "sensitive unclassified information," "sensitive security information," "sensitive homeland security information," "sensitive information," "for official use only," and "law enforcement sensitive) – tell government bureaucrats "don't risk it"; in every case, the new labels signal "find a reason to withhold." In another TSA response to an Archive FOIA request, the agency released a document labeled "Sensitive But Unclassified" across the top, and completely blacked out the full text, including the section labeled "background" - which by definition should have segregable factual information in it. The document briefed Homeland Security Secretary Tom Ridge on an upcoming meeting with the Pakistani Foreign Minister, but evidently officials could not identify any national security harm from release of the briefing, and fell back on the new tools of SBU, together with the much-abused "deliberative process" exemption to the Freedom of Information Act.

5. The Open Government Act creates the position of a FOIA ombudsman to resolve FOIA disputes, and if possible, to help everyone avoid litigation. What role do you think can be best served by an ombudsman? How best can this person mediate disputes?

Currently, a FOIA requester has no option short of litigation for independent review of a government agency's denial (or non-response) to a FOIA request. A mediator could try

to get accurate information as to the status of requests, help focus and clarify requests and responses when there has been a breakdown in communication, provide a reality check to the government agency, and resolve those disputes that are not solely a genuine difference of legal opinion.

Because the proposed ombudsman would not have binding authority, the ombudsman office can only be effective if it has credibility as a result of a balanced perspective and non-political nature, a requirement that agencies engage in the process in good faith – both as expressed by Congress and through policy direction from agency heads and the Attorney General to that effect, authority for the ombudsman to hold hearings or take testimony, and publication of the ombudsman's opinions.

6. In addition to dispute resolution, how else can the ombudsman serve agencies and requestors? What policy issues do you recommend the ombudsman address?

In the experience of the National Security Archive there are three general types of dispute with agencies: (1) a genuine difference of legal opinion as to whether particular records should be released; (2) a difference as to what or how much should be redacted in released records; and (3) a belief that the agency is mishandling the FOIA request. For this third category of disputes, the ombudsman could prepare an annual report on frequently reoccurring problems, along with recommendations for solutions. The ombudsman also could identify best practices for handling based on experiences with the agencies. In the second category, the ombudsman can serve to articulate both requester and agency views, which often are based on different assumptions or bases of knowledge. Here too, the ombudsman can make recommendations that help preserve government's interests while advancing public information.

The National Security Archive

The George Washington University
Gelman Library, Suite 701
2130 H Street, N.W.
Washington, D.C. 20037

Phone: 202/994-7000
Fax: 202/994-7005
nsarchive@gwu.edu
www.nsarchive.org
Direct: 202-994-7059
E-mail: mfuchs@gwu.edu

May 10, 2005

The Honorable John Cornyn
United States Senate
Washington, DC 20510

The Honorable Patrick Leahy
United States Senate
Washington, DC 20510

Dear Senators Cornyn and Leahy:

On April 23, 2004, Professor Ralph Begleiter, a University of Delaware professor and a former CNN correspondent, filed a Freedom of Information Act (FOIA) request seeking two categories of information: (1) copies of 361 photographic images of the honor ceremony at Dover Air Force Base for fallen U.S. military returning home to the United States that already had been released to another FOIA requester; and (2) similar images taken after October 7, 2001 at any U.S. military facility.

The unnecessarily prolonged history of this FOIA request demonstrates how plaintiffs often are forced to take the extreme measure of filing a lawsuit to get the government to release information (which in this case probably was not too hard to find or review). And then how, when faced with the obligation to respond in court to the unreasonable denial of the FOIA request or unnecessary delay in processing, the government sometimes simply releases the records. This litigation strategy imposes significant burdens on the FOIA requester, who must locate counsel and participate in litigation, but denies the requester any recompense for fulfilling the "private attorney general" role envisioned by the FOIA, since the absence of a final court ruling requiring the disclosure often denies the plaintiff statutory attorneys' fees.

On June 30, 2004 – 48 business days after Professor Begleiter's request was filed and more than twice the response time permitted under the FOIA – Mr. Begleiter filed an administrative appeal of his April 23, 2004 FOIA request. The appeal was never acknowledged or responded to by the Air Force.

As of September 2004 – five months after the request was filed – Professor Begleiter had received no substantive response to the FOIA request or administrative appeal. Professor Begleiter then contacted each of the two FOIA personnel at the Department of Air Force who had acknowledged receipt of the FOIA request and was told by one person that there were no records and by another that the request was being processed. It was at that point that Professor Begleiter determined to file suit.

On October 4, 2004, Professor Begleiter filed suit for the records requested on April 23, 2004, and in subsequent FOIA requests for similar images. On November 22, 2004, the Air Force provided Professor Begleiter a CD-ROM with the 361 images that had been released six months earlier to another FOIA requester and denied the remainder of his request claiming that it had no more responsive records. When

Professor Begleiter demonstrated to the Air Force in an administrative appeal that its response was incorrect – since he had evidence that numerous other photographic images fitting the description in his FOIA request existed – the Air Force asked for additional time to search a range of components and agencies that had not been searched in the first place. Professor Begleiter, through counsel, agreed to provide the Air Force with additional time and the litigation was stayed at the end of December 2004 pending completion of the search. At the end of February 2005, Professor Begleiter agreed to wait another 30 days for the search to be completed. On March 25, 2005, however, Professor Begleiter informed the court and the Air Force that his counsel was preparing a motion for summary judgment based on the Air Force's failure to process the FOIA request. In response to that notice, on April 8, 2005, the government advised Professor Begleiter's counsel that hundreds of additional images would soon be provided. Ninety-two images were provided on April 15, and an additional 268 images were provided on April 25, 2005. Professor Begleiter is in the process of deciding future steps in the lawsuit.

It was not until he filed his lawsuit that Professor Begleiter obtained release of records that previously had been provided to another FOIA requester. It took an entire year, the filing of a lawsuit, and finally the notice that a summary judgment motion was being prepared to obtain any additional substantive response to the FOIA request. In my view, this sort of manipulation of the timing of records releases is a purposeful litigation strategy designed to put off release of information that someone does not want to release until the government knows that it can no longer resist because a court will not agree with the withholding. It is an attempt to evade FOIA's attorney's fees provision by denying the FOIA requester a judicial decision ordering the release. It diverts FOIA requesters' resources unnecessarily into litigation that could be avoided by proper initial handling of FOIA requests.

Please feel free to contact me with any questions you may have or for more information about Professor Begleiter's lawsuit.

Thank you for your efforts to strengthen the accountability of our government agencies.

Sincerely,

Meredith Fuchs
General Counsel

Questions for Katherine M. "Missy" Cary

1. Section 6 of the OPEN Government Act may turn out to be the most controversial provision in the bill. That provision would create an enforcement mechanism to ensure that federal agencies comply with the 20-day time limit that exists under current law. Specifically, section 6 provides that, if an agency fails to respond within the current 20-day time limit, the agency effectively waives its right to assert certain FOIA exemptions, unless that agency can demonstrate, by clear and convincing evidence, good cause for its failure to comply with the time limit (or unless the exemption involves endangerment to national security, disclosure of personal private information protected by the Privacy Act of 1974, or proprietary information).

As you know, this provision is inspired by a similar provision that already exists in Texas state law.

1. Is Texas law, if anything, harsher than section 6 of the OPEN Government Act, inasmuch as Texas law forces agencies to waive certain exemptions, without any opportunity to show cause for the delay?

Texas law and section 6 of the OPEN Government Act are similar in that they provide for the continuation of the presumption of openness in the law by not allowing government to benefit by using its own exceptions to disclosure if the government does not timely respond to requests for information. Governmental bodies sometimes fail to comply with deadlines for public information requests due to ignorance of what is required or an intent to withhold the information. Waiver has proven to be an effective tool. The lack of a timely response preserves the conceptual equivalent of "compelling exceptions" by allowing late assertions by federal agencies of exemptions involving endangerment to national security, disclosure of personal private information protected by the Privacy Act of 1974, or proprietary information.

2. What is the primary effect of this Texas provision? Is it to nullify the effectiveness of exemptions that Texas agencies are otherwise entitled to? Or is it simply to ensure that Texas agencies respond in timely fashion, so that the waiver provisions are never triggered in the first place?

The primary effect of the waiver provision to ensure a timely response. The key is the starting point of the law which is a legal presumption of openness.

Under Texas law, the presumption of openness can only be "stopped" by taking procedural steps to prevent waiver. (Texas Government Code sections 552.301 and 552.302) The Texas Court of Appeals in Austin has held that when information is presumed public because the governmental body failed to comply with section 552.301, public policy dictates that the agency's burden must be increased to show why the information should not be released. ***Hancock v. State Bd. of Ins., 797 S.W.2d 379, 381 (Tex.App.–Austin 1990, no writ).*** A mere showing that a statutory exception applies to the information is insufficient to overcome the presumption. Once

information is presumed public, a Texas agency can overcome the presumption only by demonstrating a "compelling reason" for withholding the information. Compelling reasons for withholding information generally rest on the principle that a third party (not the government) should not be harmed by an agency's inaction. The OPEN Government Act is not as harsh as the Texas law in that the "show cause" is not limited only to these types of interests.

3. It could be argued that what's appropriate for Texas may not be appropriate for the federal government. After all, so this argument goes, the federal government carries a far more substantial burden than does any individual state. Is this a convincing argument? As I understand it, Texas agencies answered approximately 2 million requests for information in the 2002-03 fiscal year, according to the Texas Building and Procurement Commission. That is not quite as many as the approximately 3.2 million FOIA and Privacy Act requests received by all federal departments and agencies during fiscal year 2003, according to the Justice Department's "Summary of Annual FOIA Reports for Fiscal Year 2003." Nevertheless, do these statistics demonstrate that Texas law is or is not an appropriate model for the federal government?

Texas has about 2 million open records requests per year. The federal government has about 3.5 million requests per year. The higher volume of requests at the federal level does not mean that waiver would be an ineffective tool or even a less effective tool than it is in Texas. Though there are more federal than Texas requests, complying with FOIA and avoiding waiver should be a less onerous burden on the federal level than in Texas. Texas requires governmental bodies to request an external ruling and identify the applicable exceptions to disclosure within 10 business days of receiving the request. They must also submit a brief to that external body within 15 business days of receiving the request. The federal government requires governmental bodies to rule on a request within 20 days of receiving it. No external ruling or briefing is required and the body need not issue a written decision containing its rationale. So, FOIA requires governmental bodies to complete fewer steps than Texas and gives them more time to complete them. Therefore, avoiding the deterrent measure of waiver could arguably be easier on the federal level than in Texas, despite the fact that there are more open records requests of the federal government than the Texas government.

Written Question from Senator John Cornyn for Walter Mears

In your testimony, you spoke eloquently of the fact that historically, in times of war, government always goes too far in limiting information in the name of security. During the recent conflict with Iraq, the Pentagon established an embedded reporter program to allow journalists unprecedented access to battlefield developments. Do you believe that this program was a positive achievement from the standpoint of openness in government?

Answer Prepared by Walter Mears
March 24, 2005

Essentially, what the Department of Defense did, to its great credit, was to reinstate in Iraq a system of coverage that dates from World War II and before - attaching war correspondents to units in the field. Even in Vietnam, where there was no formal system of the type used in Iraq, reporters essentially embedded themselves, by finding a unit with space available in its convoy or helicopters, and traveling to the front with them. In Iraq, embedding enables reporters to go where the troops go, see what they see, and report the real face of war. Without it, Americans would not have seen and read the real stories of the war in Iraq. Those stories did not always meet the approval of the military, which was inevitable. My knowledge of this is second hand, not having been there, but from what I have been told by reporters who were in the field, the process soon gained wide acceptance among the troops, and most of their officers. I think they appreciated knowing that readers and viewers at home were going to see and learn some of what they were seeing in action.

In the Persian Gulf War of 1991 there was no such system. Information from the field was covered by restricted and limited pools of reporters, or funneled through briefings by the military. So first-hand reporting was limited, at the expense of Americans who need to know what is happening to their men and women in danger's way. One anecdote about that system: there was only one major clash of main force units in Kuwait during that brief war, and the only two American reporters there to record it were AP men, able to do so because they had credentials entitling them to travel with Saudi Arabian units. An ironic commentary, given our view of our free press principles.

I believe that this administration served us all and advanced the cause of freedom of information by establishing the embedding process in this conflict.

Answers to Written Questions from Senator John Cornyn

Prepared by Thomas M. Susman
April 12, 2005

The supplemental questions provided by Senator Cornyn inquire generally about the extent and causes of delay in agency responses to FOIA requests and, specifically, whether section 6 of S. 394 is an appropriate remedy for agency delays. They also invite comment on adopting the Texas approach to addressing agency delay. In an effort to provide a context for addressing agency delay, I am responding with a general narrative that incorporates my answers to these questions.

Background on Agency Delay and Congressional Responses

Since the Freedom of Information Act became effective in 1967, agencies and requesters have been grappling with the problem of delay. The original FOIA did not establish time limits for agency responses to requests; rather, it specified only that the agency must make requested records "promptly available." In its 1972 report on the Administration of the Freedom of Information Act (H. Rept. No. 92-1419, at 8), the House Committee on Government Operations listed first among "Major Problem Areas" "the bureaucratic delay in responding to an individual's request for information." By 1974, Congress addressed this problem by establishing deadlines for agency initial response (10 working days) and determinations on appeal (20 working days).

The Senate Judiciary Committee's report on legislation that was to become the 1974 FOIA Amendments (S. Rept. No. 93-854, on S. 2543, 93d Cong., 2d Sess.) highlighted the problems with delay:

> Witnesses from the public sector . . . uniformly decried delays in agency responses to request as being of epidemic proportion, often tending to be tantamount to refusal to provide the information. Media representatives, in particular, identified delay as the major obstacle to use of the FOIA by the press. . . . Almost every public witness at the hearings brought out specific examples of inordinate delays following initial requests for information.

Nonetheless, even with the time limits introduced into FOIA administration by the 1974 Amendments, the problems of delay persisted. In 1996 Congress attempted in its E-FOIA Amendments to address the issue of agency delays once more by amending the FOIA to expand the time for response (from 10 to 20 days) and to codify that large backlogs and inadequate resources do not constitute "exceptional circumstances" justifying delay. From the perspective of the requester community, however, this change has had little or no practical effect on agency practices, although the creation of different queues for handling requests has brought some added efficiency to the system.

In its 2002 report, "Update on Implementation of the 1996 Electronic Freedom of Information Act Amendment" (GAO-02-493), the GAO concluded (page 12) that it was "unable to identify any clear trends in processing time needed to fulfill requests . . . . Governmentwide, however, agency backlogs of pending requests are substantial and growing, indicating that agencies are falling behind in processing requests." Two years later, GAO's "Update on Freedom of Information Act Implementation Status" (GAO-04-257) did indicate that agencies "reported a decrease in the backlog of pending requests remaining at the end of each year" (page 3); however, while seven agencies had a decrease in medial processing time for "simple requests" from 2001 and 2002, in 2002 "eight agencies reported median processing times for pending requests that were greater than 1 year (defined as 251 business days) in length" (page 44). A comprehensive volume on FOIA – "Litigation Under the Federal Open Government Laws 2004" (page 28) – observes that while many agencies meet time limits, "some, particularly the FBI, CIA, IRS, State Department, National Security Agency, and the former Immigration & Naturalization Service, can take several years to respond."

Reasons for Delay

Today, in 2005, there continue to be significant delays in the processing of FOIA requests across most agencies of the federal government. Simple requests can take months; one request to the NIH for a single contract document received no acknowledgement for months and no final determination for over a year. In fact, most requesters who often use the FOIA do not even expect an agency determination within the time limits provided by statute and would be surprised if one were received.

The causes of delay are many – some legitimate and some not – and the issue of agency "incentives" is a complex one. The basic reasons for delay can be categorized as follows:

1. First, and probably foremost, is the absence of adequate resources dedicated to processing FOIA requests. Agencies simply do not view FOIA as a core mission; protecting the environment, making research grants, enforcing criminal laws, or procuring military materiel are core missions; disclosing information is not. This view is usually shared by both the authorizing and appropriating committees of Congress. So it is probably safe to suggest that inadequate resources will always be a problem for FOIA administrators.

2. Some, and perhaps many, instances of agency delays in processing FOIA requests relate to the nature of the requests. Processing time will be directly affected by the size and complexity of the request, as well as the potential need for the agency to consult with third-parties. Agency response time to a simple request for a clearly identified document cannot reasonably be compared with the time to compile and review thousands of pages of agency records from multiple locations. At the same time, agencies should not withhold documents simply because they are taken from a law enforcement file without consulting with relevant personnel about whether there is an ongoing investigation and whether release might jeopardize that investigation. Nor

should agencies disclose documents containing information marked as commercially confidential without consulting with the submitter and then making an independent determination on the potential that disclosure might cause substantial competitive harm. These kinds of agency actions can seldom be completed within the FOIA's time limits.

3. Another major reason for delay relates to the issue of incentives: There is little incentive for the agency to respond in a timely fashion to most FOIA requests. On the other hand, government officials should not need incentives to adhere to requirements of a statute. Any use of financial incentives is likely to be perverse; agencies experiencing chronic delays should hardly be rewarded by added resources unless it is certain that the delays are caused mainly by inadequate resources. Also, because of the lack of clarity of agency reporting on delay, there are not even useful data that can be used to generate accolades for agencies who process requests quickly and opprobrium for agencies who chronically miss deadlines and whose delay is measured in years rather than days or even months.

4. Unfortunately, delay is sometimes used by agency officials to serve political purposes or policy goals, or to mask embarrassment (perhaps until the agency or administration leadership changes, or until a hot news story turns cold). Here, no incentive that implicates judicial review is likely to work, since the agency knows from the start that the information will ultimately have to be disclosed.

5. Another reason for delay sometimes arises: As stated in the leading treatise on FOIA, "Delays in responding to disclosure requests have become an institutional tool to dissuade requests." (O'Reilly, Federal Information Disclosure § 7:31, at 186 (3d ed. 2000).) This, of course, routinely works with media requesters, as Mr. Mears and every press representative who has ever testified or written on FOIA has emphasized.

6. Finally, given the size and complexity of the federal government and the outmoded records-maintenance systems of some agencies, it is not surprising that sometimes agencies simply cannot find the requested records within the time limits. A Court of Appeals panel in a recent Seventh Circuit case involving Department of Veterans Affairs records put it succinctly: "The delays he [the requester] encountered seem to have been caused by simple confusion about the physical location of the records." (*Walsh v. Dept. Veterans Affairs*, No. 04-1915, March 10, 2005.)

Until and unless we know into which category a delayed agency response falls, we should not attempt to propose a one-size-fits-all solution. And it is almost impossible for any single requester to know in any given case whether the agency is, as Senator Cornyn's question poses, "capable of responsibly responding within the statutory deadline period." This question implicates institutional, government-wide issues that require broad inquiry.

Crafting Solutions for Delay

I strongly support S. 589, creating an advisory commission to examine and evaluate the causes of agency delay in processing FOIA requests and to make recommendations regarding possible administrative and legislative solutions. This will best allow Congress to craft responses to this problem that recognize that one size will not fit all. Three other actions by Congress can contribute to diminishing the problem of delay.

First, make sure that the data on agency handling of requests are reliable and sufficiently detailed to assist in both evaluating the problem generally and holding specific agencies accountable for failures. Section 9 of S. 394 will assist with this objective.

Second, provide additional resources to agencies experiencing chronic delays, with requirements for accountability in the allocation and expenditures of those resources so that both Congress and the agencies can learn how better to attack this problem.

Third, continue congressional oversight and GAO scrutiny of agency administration of the FOIA, with greater intensity and with more attention to the role of agency heads in setting priorities and allocating resources.

As to Section 6(b) of S. 394, which would handicap agencies in court where a response to a specific request has been subject to delay, it is probably premature to adopt this provision in the absence of more reliable data and without distinguishing among reasons for delay and the kinds of information requested. Although the provision is drafted to protect the rights of third parties, the potential for imposing unintended consequences affecting important law enforcement or other governmental interests seems sufficiently serious to suggest that action on this section await more thorough exploration of the implications of this proposal.

Conclusion

Reducing delay in the processing of FOIA requests is challenging, but need not be seen as impossible. The most important steps that Congress can take to address this problem include mandating useful and accurate data on the processing of requests, ensuring adequate resources to agencies whose delays are caused by resource constraints, continuing to oversee and investigate agency administration of the FOIA, and enacting S. 589, to establish a Commission on Freedom of Information Processing Delays.

SUBMISSIONS FOR THE RECORD

Thank you, Chairman Cornyn and Members of the Subcommittee:

My name is Katherine Minter Cary. I am the Division Chief of the Open Records Division 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 2005. Attorney General Abbott agrees with the Father of our Constitution, James Madison, who once observed that "[k]nowledge will forever govern ignorance; and a people who mean to be their own governors must arm themselves with the power which knowledge gives."

I have both the pleasure and the responsibility of working on a daily basis to apply, educate and enforce one of the strongest, most effective public information acts in the United States. I want to state unequivocally that unfettered access to government is a principled – and an achievable – reality. Texas has over 2,500 governmental bodies

scattered throughout the state. But every single working day, the process I oversee succeeds in getting thousands of pieces of information into the public's hands without controversy.

Under the Texas Public Information Act, as under FOIA, requested information is to be "promptly released." Texas law defines this to mean as soon as possible without delay. Any governmental body that wants to withhold records from the public must, within 10 days, seek a ruling from the Texas Attorney General's Office, specifically from my division, the Open Records Division.

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. This waiver provision – above all else – has provided meaningful consequences to prevent government from benefitting from its own inaction. Under Texas law, if a governmental body – state, county, or local – 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 very similar waiver provision, and it attempts to strike a careful balance so as not to negatively effect third parties' rights or violate strict confidentiality. The Texas experience shows that finding this balance is realistic, fair and workable.

Our pro-openness system of disclosure has boasted great success and without dire consequences for 32 years and through innumerable high-profile events, including the space shuttle Columbia disaster, the suicide of an Enron executive, the death of 19 immigrants in a heated tractor-trailer in South Texas, and several front-page murder trials.

In 1999, governmental bodies in Texas sought roughly 4,000 rulings from the Attorney General. Last year my division issued approximately 11,000. These requests show an increase in compliance that is directly related to outreach and enforcement.

Often, non-compliance results from a simple lack of understanding of the law rather than malicious intent. For this reason, the Texas

Attorney General has worked aggressively to prevent violations of the Public Information Act.

We offer training, videos, handbooks, and an extensive open government website. Most importantly, we have an open government toll-free hotline that is charged with helping to clarify the law and making open government information readily available to any caller. This service includes updating people on where a request is in the process. The Texas open government hotline answers over 10,000 calls per year. There is no question that the addition of a similar system under the proposed OPEN Government Act would provide citizens with the customer service, attention and access that citizens deserve from their public servants. Our hotline has been a resounding success from the perspective of both requestors and governmental bodies.

My office also has attorneys that handle citizen complaints, as well as respond to questions about the law. These attorneys attempt, with a 99 percent success rate, to mediate compliance with open records regulations. The OPEN Government Act would create a similar system,

and Texas' demonstrated success in resolving such matters certainly underscores the utility of such a dispute resolution function.

Our experience has also shown that it requires only a few actions by the Attorney General for word to get out that we are serious about enforcing compliance. I believe that the Office of Special Counsel provisions proposed in the OPEN Government Act will experience the same positive results on the federal level.

Finally, with regard to outsourcing – Texas has a legal presumption that all information collected, assembled or maintained by government or for the government by a third party is open to the public. The OPEN Government Act would also extend the availability of government records held by non-governmental third parties. Records kept 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.

I believe that this portion of the policy statement that introduces

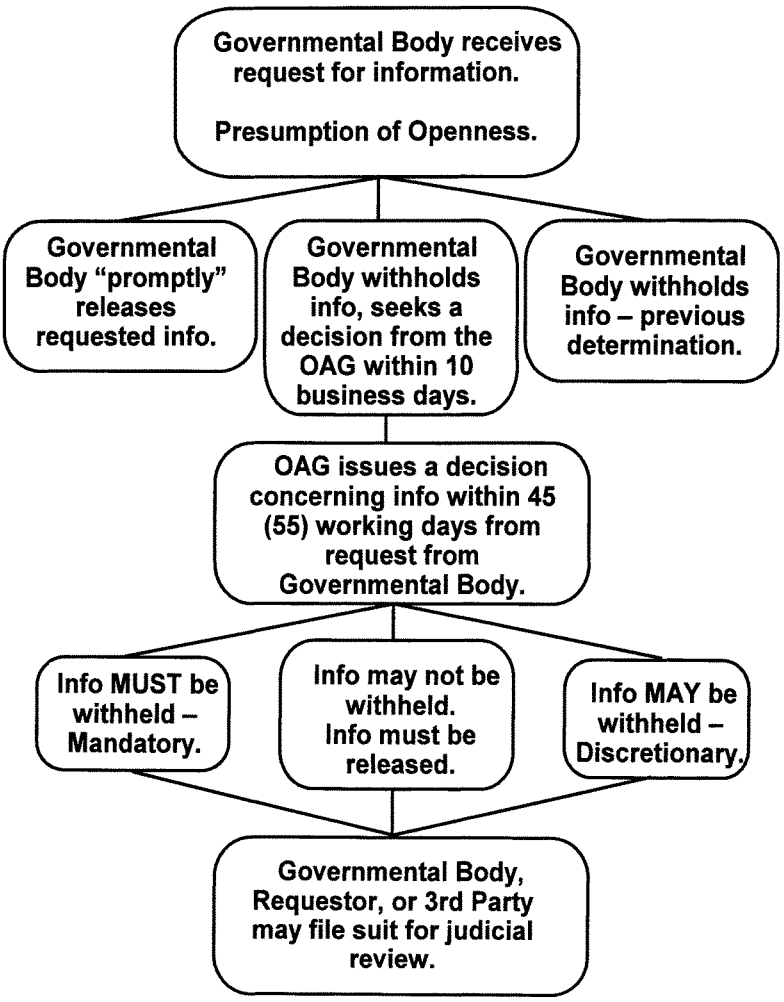
the Texas Public Information Act is instructive:

> 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.

Our State's experience with openness – its commitment that the people have a right to know, not a mere need to know – has been a Texas-sized success for 32 years. As Attorney General Abbott noted in a recent letter to Senator Cornyn supporting the OPEN Government Act, "open government leads inexorably to good government," and "Openness and accountability – not secrecy and concealment – is what keeps democracies strong and enduring."

Thank you again for the privilege of appearing before you today. I would be happy to answer any questions.

Texas Public Information Act: Basic Process for Governmental Bodies



Statement
United States Senate Committee on the Judiciary
Openness in Government and Freedom of Information: Examining the OPEN Government Act of 2005
March 15, 2005

The Honorable John Cornyn
United States Senator , Texas

U.S. Senate Subcommittee on Terrorism, Technology and Homeland Security
U.S. Senate Committee on the Judiciary
U.S. Senator John Cornyn (R-TX)

"Openness in Government and Freedom of Information:
Examining the OPEN Government Act of 2005"

Tuesday, March 15, 2005, 10 a.m., Dirksen Senate Office Building Room 226

OPENING STATEMENT OF SENATOR JOHN CORNYN

Today's hearing is entitled: "Openness in Government and Freedom of Information: Examining the OPEN Government Act of 2005." It is the third in a series of bipartisan events in recent weeks in which Senator Leahy and I have joined forces. On February 16, shortly before the President's Day recess in February, Senator Leahy and I went to the Senate floor together to introduce the OPEN Government Act – legislation that promotes accountability, accessibility, and openness in the federal government, principally by strengthening and enhancing the federal law commonly known as the Freedom of Information Act, or FOIA. I am pleased to note that the OPEN Government Act is also co-sponsored by Senator Isakson, and that other Senators will be joining in the coming days and weeks as well. Last Thursday, Senator Leahy and I joined forces again, to introduce the Faster FOIA Act of 2005, and I have asked Chairman Specter to place the Faster FOIA Act on the committee's markup calendar for this Thursday, in the hope of enacting this legislation as soon as possible.

There are, unfortunately, many issues in the Senate Judiciary Committee that have become partisan and divisive. So it is especially gratifying to be able to work so closely with Senator Leahy on an issue as important and as fundamental to our nation as openness in government. I am grateful to Senator Leahy and to his staff for all their hard work on these issues of mutual interest and national interest. And I would like to thank and to commend Senator Leahy for his decades-long commitment to freedom of information.

Today is a particular fitting day to examine these issues. This past Sunday, an extraordinary coalition of print, radio, television, and online media associations and outlets began the nation's first-ever Sunshine Week. And tomorrow is national Freedom of Information Day – celebrated every year at a national conference held at the Freedom Forum's World Center in Arlington, Virginia, on James Madison's birthday.

I heard a joke recently – one that is relevant to today's hearing. It is about a person who filed a FOIA request with the FBI. He asked them if they had a file on him. The FBI wrote back, curtly: "There is now."

Freedom of information and openness in government are among the most fundamental founding principles of our government. The Declaration of Independence makes clear that our inalienable rights to life, liberty and the pursuit of happiness may be secured only where "Governments are instituted

among Men, deriving their just powers from the consent of the governed." And James Madison, the father of our Constitution, famously wrote that consent of the governed means informed consent – that "a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."

As Attorney General of Texas, I was responsible for enforcing Texas's open government laws. I have always been proud that Texas is known for having one of the strongest and most robust freedom of information laws in the country, and I have long been looking forward to bringing a little of our Texas sunshine to Washington.

After all, it is unfortunate that, as with so many of other founding ideals, all too often we fall short of reaching our goals. This is a bipartisan problem – and we need a bipartisan solution to solve it. As Senator Leahy and I have both noted on occasion, openness in government is not a Republican or a Democratic issue. Any party in power is always reluctant to share information, out of an understandable – albeit ultimately unpersuasive – fear of arming its enemies and critics. Whatever our differences may be on the various policy controversies of the day, we should all agree that those policy differences deserve as full and complete a debate before the American people as possible.

I am glad that it was a President from Texas, Lyndon B. Johnson, who signed the Freedom of Information Act into law on July 4, 1966. As Bill Moyers, LBJ's press secretary, once noted, however – and I quote – "what few people knew at the time is that LBJ had to be dragged kicking and screaming to the signing ceremony. He hated the very idea of the Freedom of Information Act; hated the thought of journalists rummaging in government closets; hated them challenging the official view of reality."

It has been nearly a decade since Congress has approved major reforms to the Freedom of Information Act. Moreover, the Senate Judiciary Committee has not held a hearing to examine FOIA compliance since 1992. I hope that today's hearing will prove to be an important first step towards strengthening our open government laws and to reinforcing our national commitment to freedom of information.

Today's hearing will provide a forum for discussing the Faster FOIA Act, which Senator Leahy and I introduced just last week, to establish an advisory commission of experts and government officials to study what changes in federal law and federal policy are needed to ensure more effective and timely compliance with the FOIA law.

Today's hearing also provides the opportunity to examine the OPEN Government Act. This legislation contains important Congressional findings to reiterate and reinforce our belief that FOIA establishes a presumption of openness, and that our government is based not on the need to know, but upon the fundamental right to know. In addition, the Act contains over a dozen substantive provisions, designed to achieve four important objectives: (1) to strengthen FOIA and close loopholes, (2) to help FOIA requestors obtain timely responses to their requests, (3) to ensure that agencies have strong incentives to act on FOIA requests in a timely fashion, and (4) to provide FOIA officials with all of the tools they need to ensure that our government remains open and accessible.

Specifically, the legislation would make clear that FOIA applies even when agency recordkeeping functions are outsourced. It would require an open government impact statement to ensure that any new FOIA exemption adopted by Congress be explicit. It provides annual reporting on the usage of the new disclosure exemption for critical infrastructure information, and strengthens and expands access to FOIA fee waivers for all media. It ensures accurate reporting of FOIA agency performance by distinguishing between first person requests for personal information and other, more burdensome

kinds of requests.

The Act would also help FOIA requestors obtain timely responses by establishing a new FOIA hotline service to enable requestors to track the status of their requests. It would create a new FOIA ombudsman, located within the Administrative Conference of the United States, to review agency FOIA compliance and provide alternatives to litigation. And it would authorize reasonable recovery of attorney fees when litigation is inevitable.

The legislation would restore meaningful deadlines for agency action and impose real consequences on federal agencies for missing statutory deadlines. It would enhance provisions in current law which authorize disciplinary action against government officials who arbitrarily and capriciously deny disclosure and yet which have never been used in over thirty years. And it will help identify agencies plagued by excessive delay.

Finally, the bill will help improve personnel policies for FOIA officials, examine the need for FOIA awareness training for federal employees, and determine the appropriate funding levels needed to ensure agency FOIA compliance.

The OPEN Government Act is not just pro-openness, pro-accountability, and pro-accessibility – it is also pro-Internet. It requires government agencies to establish a hotline to enable citizens to track their FOIA requests, including Internet tracking, and it grants the same privileged FOIA fee status currently enjoyed by traditional media outlets to bloggers and others who publish reports on the Internet.

The OPEN Government Act is the product of months of extensive discussions between my office, Senator Leahy's office, and numerous advocacy and watchdog groups. I am pleased that the bill is supported by a broad coalition of open government advocates and organizations across the ideological spectrum – from the American Civil Liberties Union and People for the American Way to the Free Congress Foundation's Center for Privacy & Technology Policy, the Heritage Foundation's Center for Media and Public Policy, and Texas Attorney General Greg Abbott. Without objection, letters of support from these numerous organizations shall be entered into the record.

I am also pleased by recent positive comments about the legislation from the Department of Justice. I certainly understand that no Administration is ever excited about the idea of Congress increasing its administrative burdens. And I look forward to any technical comments and expressions of concern that the Administration may choose to provide. But I do appreciate that the Justice Department's own website notes that this legislation, and I quote, "holds the possibility of leading to significant improvements in the Freedom of Information Act." As Attorney General Alberto Gonzales and I discussed during his confirmation hearings in January, we plan to work together on ways to strengthen the Freedom of Information Act.

I look forward to working with General Gonzales, and with Senator Leahy and our other colleagues in the Senate and in the House, to moving this legislation through the process.

STATEMENT OF SENATOR RUSSELL D. FEINGOLD

Hearing on
"Openness in Government and Freedom of Information:
Examining the OPEN Government Act of 2005"
Subcommittee on Terrorism, Technology and Homeland Security
March 15, 2005

I want to thank Senator Cornyn for holding this hearing on an extremely important issue – one of vital importance to our democratic nation. It is a hallmark of democracy when a government operates openly, and citizens are permitted access to the records that document the day-to-day decisions of their government. Accordingly, the Freedom of Information Act is in many respects an essential piece of legislation, enabling researchers, journalists and interested citizens to obtain Executive Branch documents, taking account of the need to protect certain documents from disclosure to protect national security, privacy, trade secrets, and certain other applicable privileges.

Our constitutional scheme depends on Congress and the Judicial Branch serving as a check on the Executive Branch. The public's right to know provides another layer of oversight, and helps ensure that our Executive Branch agencies act in the public interest because they know their actions are subject to public scrutiny. Over the years, FOIA requests and litigation have led to important revelations about government actions, and in some cases, abuses. Most recently, in late 2004, important details about interrogation procedures at Guantanamo Bay were made public as a result of a FOIA lawsuit.

Unfortunately, I fear that the 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 I believe we can do that while also respecting civil liberties and the public's right to know. That has not been the Administration's prevailing attitude in the past four years. From the excessive secrecy surrounding the post-9/11 detainees, to the lack of information provided about implementation of the controversial provisions of the USA PATRIOT Act, to new agency instructions from Attorney General Ashcroft tightening the standards for granting a FOIA request, this Administration has too often tried to operate behind a veil of secrecy.

That is why I am proud to be an original cosponsor of a bill that Senator Leahy introduced this morning that would address at least one aspect of this problem. The Restore FOIA Act would tighten some of the substantial FOIA loopholes created by the Homeland Security Act in a misguided attempt to protect critical

infrastructure information. The Homeland Security Act not only exempts from FOIA an astonishingly broad category of information that is voluntarily disclosed to the Department of Homeland Security, but also grants companies immunity from civil suits based on the information they voluntarily disclosed. The Restore FOIA Act would protect records containing truly sensitive information pertaining to critical infrastructure safety, but would ensure that industries could not use the loophole to immunize themselves from liability by voluntarily revealing harmful information to the Department of Homeland Security.

Senators Cornyn and Leahy, thank you again for being such strong leaders on this issue and for holding this hearing today. I am guessing that it is no coincidence that this hearing is being held just a day before Freedom of Information Day, March 16, and I look forward to working with you in the future on these issues.

Statement by **Meredith Fuchs**, General Counsel, National Security Archive, George Washington University
March 15, 2005

Hearing on "Openness in Government and Freedom of Information: Examining the OPEN Government Act of 2005"

Room 226 of the Dirksen Senate Office Building
Senate Committee on the Judiciary Subcommittee on Terrorism, Technology and Homeland Security
U.S. Senate

Mr. Chairman and members of the Committee, thank you for this opportunity to speak with you about the Freedom of Information Act and the necessary reforms that would be enacted by the OPEN Government Act of 2005. I wish to commend the co-sponsors of the OPEN Government Act of 2005, Senators Cornyn and Leahy – each of whom has an established record as a defender of open government – for their efforts to ensure that our federal government is accountable and responsive to its citizens.

I have extensive experience with the Freedom of Information Act. The National Security Archive, of which I am General Counsel, ranks as one of the most active and successful non-profit users of the Freedom of Information Act: Our work has resulted in more than six million pages of released documents that might otherwise be secret today. We have published more than half a million pages on the Web and other formats, along with more than 40 books by our staff and fellows, including the Pulitzer Prize winner in 1996 on Eastern Europe after Communism. We have conducted two recent studies of federal agency administration of the FOIA, including one that focused entirely on the problem of delay and backlog. We won the George Polk Award in April 2000 for "piercing self-serving veils of government secrecy." We have partners in 35 countries around the world doing the same kind of work today, opening the files of secret police, Politburos, military dictatorships, and the Warsaw Pact. We use the United States' model of a transparent democracy to advocate for openness abroad.

1. **An Informed Citizenry Builds A Stronger Nation**

An informed citizenry is one of our nation's highest ideals. Thus, much of our public policy is predicated on the idea that competition in the marketplace for ideas should be fair and unfettered. To this end, we support a free press, a diverse scholarly community, and an inquiring citizenry – all dedicated to ferreting out and publishing facts. The Freedom of Information Act is a critical component in this effort to permit public access to facts – facts about government. In a world in which war and terrorism are commonplace, an essential component of national security is an informed citizenry that, as a result of its education about issues, believes in and strongly supports its government. This is glaringly apparent at a time when American soldiers are being called on to risk their lives to protect democratic ideals, when the public is held in a balance of terror, and when our resources are committed to establishing and maintaining our defense.

Our freedom of information laws are the best mechanism for empowering the public to participate in governance. An open government is an honest government that will engender the loyalty and support of its citizens. The fact of the matter is, however, that there is a bureaucratic resistance – to some extent justified – to opening government proceedings and filing cabinets to public scrutiny. National security is a very real and important concern that unfortunately leads to a certain level of reflexive secrecy. But, often the secrecy reflex should have given way to the right to know and, indeed, the need to know. Thus, the law must impose pressure to disclose information on government agencies, including a real opportunity for independent disclosure decisions, exposure of recalcitrant or unacceptable handling of information requests, and penalties for disregard of the public's legal right to information about the activities of the government

Just last summer, Congressman Shays of Connecticut gave a striking example of the paradox caused by the secrecy system running up against the public interest in disclosure. He described an incident in 1991 when a Department of Defense inspector general classified a study that found that 40 percent of chemical masks for the military leaked. It was classified, so, according to Congressman Shays, no one was doing anything to solve the problem. Congressman Shays described how he was gagged from speaking about it for six years when it finally was disclosed and his constituents – American soldiers who fought in the Gulf War – were able to begin to understand their Gulf War illnesses. The rest is history, so to speak. Isn't it important for the security of the nation and for the safety of the public for these kinds of problems to be confronted instead of being locked away in secret vaults?

Indeed, this is the lesson of the inquiries concerning the September 11 attacks on the United States. It was most directly addressed by Eleanor Hill, Staff Director, Joint House/Senate Intelligence Committee Investigation into September 11 Attacks. In the "Joint Inquiry Staff Statement" of October 17, 2002, Ms. Hill explained,
"the record suggests that, prior to September 11th, the U.S. intelligence and law enforcement communities were fighting a war against terrorism largely without the benefit of what some would call their most potent weapon in that effort: an alert and committed American public. One needs look no further for proof of the latter point than the heroics of the passengers on Flight 93 or the quick action of the flight attendant who identified shoe bomber Richard Reid."

This conclusion is echoed in the Report of the 9/11 Commission, which includes only one finding that the attacks might have been prevented. This occurs on page 247 and is repeated on page 276 with the footnote on page 541, quoting the interrogation of the hijackers' paymaster, Ramzi Binalshibh. Binalshibh commented that if the organizers, particularly Khalid Sheikh Mohammed, had known that the so-called 20th hijacker, Zacarias Moussaoui, had been arrested at his Minnesota flight school on immigration charges, then Bin Ladin and Mohammed would have called off the 9/11 attacks. News of that arrest would have alerted the FBI agent in Phoenix who warned of Islamic militants in flight schools in a July 2001 memo that vanished into the FBI's vaults in Washington. The Commission's wording is important here: only "publicity" could have derailed the attacks.

We see in examples again and again that an informed public is an empowered public that can protect the health, safety and security of their own communities. Documents disclosed under FOIA have repeatedly been used to expose potential conflicts of interest that directly relate to public welfare, such as National Institute of Health researchers who had close ties to the pharmaceutical industry. The result of disclosure: review and reform of NIH's ethical rules. As you can see from the list of news stories published in the last few years that I have appended to my testimony, there are numerous examples of information being released in documents requested under FOIA that has empowered citizens to protect their families and communities from risks like lead in the water, mercury in fish, crime hubs, and the like. I remember when a foreign official visited my office on the eve of his own country implementing a freedom of information law and asked, "What if the records show that the government did something wrong?" My answer to him – and to you – is that is what the FOIA is about and that is what the citizens of this country deserve: a government that can acknowledge it errors, compensate for them, and then do better the next time. That is what the black farmers who were subjected to radiation experiments in this country are entitled to. It is what the soldiers who were unwittingly exposed to chemical and biological agents in tests by the U.S. military are entitled to. And, it is what will ultimately keep our nation strong.

2. **Justice Delayed is Justice Denied**

A key part of empowering the public, however, is giving them the information they need in sufficient time for them to act. The problem of delay in the processing of FOIA requests has been a persistent problem. When first enacted, the Freedom of Information Act had nothing in it to force agencies to respond within a reasonable timeframe. In 1974, Congress amended FOIA and established administrative deadlines of ten working days for processing FOIA requests and twenty working days for administrative appeals, and a one-time, ten working day extension in "unusual circumstances." Unfortunately most FOIA requests seems to fall into the loophole for "unusual circumstances." Congress tried again in 1996 to address the problem both by increasing the mandatory processing time to take into account the reality of the administrative processing burden and also by narrowing the loophole to cover only "exceptional circumstances" and clarify that routine, predictable agency backlogs for FOIA requests do not constitute exceptional circumstances for purposes of the Act, unless the agency demonstrates reasonable progress in reducing its backlog of pending requests.

My organization oversaw a 35 agency audit to determine whether agencies had made progress in reducing backlogs. We found that as of November 2003 there still were backlogs as long as 16 years at some agencies. I have appended to my testimony a graph that shows the range of delays that we were able to identify.

You all know the old adage that "justice delayed is justice denied." Well, in the case of FOIA that certainly is true. My own organization has many examples of long delayed requests that resulted in no information being available for reasons that simply

are unacceptable. For example, we made requests to the Air Force in 1987 for records on the visit by former Philippine President Ferdinand Marcos to US Air Bases as he was driven into exile in 1986. When we recently refiled the request we were told that records on the subject would have been destroyed many years ago. We made a request to the Defense Intelligence Agency in 1993 for records concerning the heroin trade in Colombia. A document was located and sent to the Coast Guard for review and release in 1995. Nine years later we were told that the Coast Guard lost the document. Finally, we have many requests that languished for 8, 9, 10 or 11 years when we finally were informed that during the pendency of our request, the records were accessioned to the National Archives and Records Administration. In one case, we had completed and published two document sets on U.S.-Japanese relations while we waited. How much worse must the problem be for journalists who are trying to uncover breaking news or individuals who are trying to protect their families and communities or advocacy groups who are working hard to protect the health and safety of the public? These noble efforts should not be undermined by the failure of the FOIA system to identify and disclose information that the public has a right and a need to know. Something has to be done.

The OPEN Government Act of 2005 will go far to motivate agencies to process FOIA requests and to process in a timely fashion. The Act includes a provision that would limit the ability of agencies to withhold some information in litigation if they cannot justify their belated responses to a FOIA request. This provision, perhaps more than any other, may be the key to solving the delay problem. Some may criticize it out of fear that it will result in a flood of troubling information disclosures. The reality is that despite 3.6 million FOIA requests reported in FY 2004, there were nothing approaching that many FOIA lawsuits filed in federal court during FY 2004 and the provision only comes into play in litigation. That requires the requester to have the resources to bring suit. It also requires a judge to decide that the penalty meets the statutory standard of "clear and convincing" evidence that there was good cause for failure to comply with the time limits. Further, it applies only to the discretionary exemptions, and has no impact on the issues that Congress has identified as most needing protection from disclosure. It would not undermine the national security protection of Exemption 1; it would not endanger personal privacy concerns protected by the Privacy Act of 1974; and, it would not lead to disclosure of information that Congress has mandated should be secret, such as intelligence sources and methods. With all these protections built into the proposal, the bottom line is that it is unlikely to lead to any dire consequences.

On the other hand, there is little in the law as it is written today that puts real pressure on agencies to get their FOIA systems working smoothly. I would liken the expected impact of the proposed penalty for delay provision to the impact that automatic declassification in Executive Order 12958 had on the declassification of historical records. Even though automatic declassification has never been imposed on any agency – the deadline was extended both by President Clinton and by President Bush – the threat of it resulted in a dramatic increase in declassification activity. The fear that agencies could lose control over their declassification decisions focused the agencies on setting up processes for systematic declassification. The penalty provision in the OPEN Government Act of 2005 will have just that impact. It will spur agencies to upgrade their

FOIA processing to meet the requirements of the law. If agencies comply with the law, they will have nothing to fear.

Another provision that will put some needed pressure on agencies, especially those that are obstructive, is the requirement that the Attorney General notify the Office of Special Counsel of any judicial finding that agency personnel have acted arbitrarily or capriciously with respect to withholding documents. The provision does not change the Office of Special Counsel's existing authority to determine whether disciplinary action against the involved personnel is warranted, but it makes clear that the Attorney General of the United States will take action when agency personnel ignore their legal obligations.

Our audit found that the backlogs I have described cannot be detected by Congress in the annual reports each agency is required to publish concerning their FOIA processing. For example, if an agency told you that its median response time for FOIA requests is 169 days, would you be surprised to learn that the same agency had unprocessed requests as old as 3400 days? Well, that was the case with the Air Force when we conducted our audit. What about an agency that reports its median processing time as 55 days. Would it surprise you to know that the agency, the Department of Commerce, had requests still pending as old as 2400 days. How can Congress engage in oversight if the information it is provided is meaningless or misleading? How can a FOIA requester persuade a court that an agency has not demonstrated "exceptional circumstances" justifying delay if the requester has no data to present to the court?

The problem is not necessarily that the statistics are wrong, but simply that the reports do not offer the information needed by Congress and the public. For instance, we found that agencies exclude from their median processing times long periods of delay after their receipt of FOIA requests while the request is "perfected" or fee disputes are resolved. Agencies also frequently close requests by sending the requester a letter inquiring whether there is any "continuing interest" in the records and then closing the request if a response is not received within a short period. In addition, in some cases the medians are actually the median of medians reported by each major agency component. As a result, there is no way to compare FOIA processing across the government or to assess the tremendous disparities between agencies' workloads, backlogs and processing times. In fact, I feel no hesitation in saying that many of the conclusions drawn from the annual reports are faulty. This does a disservice to Congress, the public, and the agencies.

The OPEN Government Act of 2005 would improve reporting by requiring a fixed, standard method for calculating response times – so that reliable comparison can be made across agencies – and statistics on the range of response times, the average and median response times, and the oldest pending FOIA requests. It also requires agencies to set up tracking number and FOIA hotlines that ensure that requests are logged, are not lost, and are monitored. It imposes a discipline on agencies and empowers FOIA requesters to engage in a back and forth with agency FOIA personnel to facility processing.

3. **Independent Review Will Reduce Litigation And Improve The Quality of Disclosure Decisions**

Another aspect of the OPEN Government Act of 2005 that I believe will make the FOIA system work better for the public is the proposal to set up an Office of Government Information Services and a FOIA ombudsman within the Administrative Conference of the United States. So long as the ombudsman program does not impact the ability of requestors to litigate FOIA claims, it may resolve problems and alleviate the need for litigation. These sorts of independent ombudsmen and information commissioners are gaining popularity in other nations with freedom of information laws as well.

There is a good example of how an independent review mechanism aside from litigation in the courts can work in the functioning of the Interagency Security Classification Appeals Panel (ISCAP), which has ruled for openness in some 60% of its cases, although the total number of cases is quite small and involves mostly historical rather than current information. ISCAP works well because it has credibility as a result of its balanced membership and because it has binding authority unless an appeal is made to the President of the United States.

Nonetheless, many good examples exist of ombudsmen and information commissioners who do not have binding authority, but whose opinions carry weight. Key provisions that would help this alternative dispute process work would be the requirement that agencies engage in the process in good faith, authority for the ombudsman to hold hearings or take testimony, and publication of the ombudsman's opinions. A wonderful example of an ombudsman who lacks binding authority, but nonetheless resolves disclosure disputes, is the Committee on Open Government in New York State. The Committee furnishes advisory opinions, which it publishes for public review, and submits an annual report to the Governor and the State Legislature describing the Committee's experience and recommendations for improving the open government laws.

The Administrative Conference historically was the type of institution that merited the respect of other government agencies. Thus, it is an appropriate place in which to house a FOIA ombudsman. It will have no apparent conflict of interest in attempting to mediate and resolve disputes. It requires the funding and support necessary to make the program work, however. I urge Congress, therefore, to provide sufficient funding and, with the passage of the OPEN Government Act of 2005, clearly establish the statutory intent to open the government as much as possible to public scrutiny as is consistent with the needs of national security. With an established track record, independence, congressional support, publicity and an expressed statutory intent to maximize disclosure, the ombudsman proposal may improve FOIA processing for all requesters and minimize litigation for agencies.

4. **Recognizing the Goal of Having an Open Government**

Finally, I wish to commend the OPEN Government Act of 2005's directive that the Office of Personnel Management examine how FOIA can be better implemented at the agency level, including an assessment of the benefit of performance reviews, job classification and training related to FOIA. The people who process these FOIA requests are serving a significant public interest and are the focal point for the competing pressures of secrecy and disclosure. The system will work better if the incentives are changed to make everyone in the bureaucracy comply with FOIA, so the FOIA personnel are able to fulfill their mission.

I am grateful for your time today. I will be pleased to answer your questions.

Statement by **Meredith Fuchs**, General Counsel, National Security Archive, George Washington University
March 15, 2005

Hearing on "Openness in Government and Freedom of Information: Examining the OPEN Government Act of 2005"

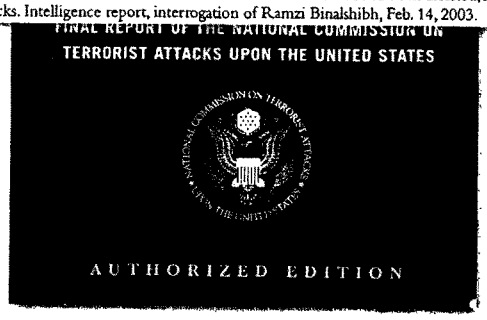
Room 226 of the Dirksen Senate Office Building
Senate Committee on the Judiciary Subcommittee on Terrorism, Technology and Homeland Security
U.S. Senate

Openness Equals Security

THE 9/11 COMMISSION REPORT

However, publicity about Moussaoui's arrest and a possible hijacking threat might have derailed the plot.[107] [page 276]

107. According to Ramzi Binalshibh, had KSM known that Moussaoui had been arrested, he would have cancelled the 9/11 attacks. Intelligence report, interrogation of Ramzi Binalshibh, Feb. 14, 2003. [page 541]



Statement by **Meredith Fuchs**, General Counsel, National Security Archive, George Washington University
March 15, 2005

Hearing on "Openness in Government and Freedom of Information: Examining the OPEN Government Act of 2005"

Room 226 of the Dirksen Senate Office Building
Senate Committee on the Judiciary Subcommittee on Terrorism, Technology and Homeland Security
U.S. Senate

21st Century FOIA Success Stories

"Feds Don't Track Airline Watchlist Mishaps," The Associated Press State & Local Wire, July 24, 2003, at State and Regional, by David Kravets. Exposed problems of delay and "false positives" caused by management of aviation security program.

"Extra IDs a Liability for Hill, 13 Other Bases," Deseret Morning News (Salt Lake City), Aug. 21, 2003, at B1, by Lee Davidson. Disclosed security risk of unaccounted for identification badges and contractors who did not have criminal background checks.

"Mission of Sacrifice Series: Casualties of Peace, Part One of Seven Parts," Dayton Daily News (Ohio), Oct. 26, 2003, at A1, by Russell Carollo and Mei-Ling Hopgood. Exposed never-before-released statistics on the dangers faced by Peace Corps volunteers.

"Documents Say 60 Nuclear Chain Reactions Possible," Las Vegas Review-Journal (Nevada), Nov. 26, 2003, at 5B, by Keith Rogers. Nevada state officials learned of the possibility of an uncontrolled nuclear chain reaction inside the planned Yucca Mountain nuclear waste repository.

"Stealth Merger: Drug Companies and Government Medical Research; Some of the National Institutes of Health's Top Scientists Are Also Collecting Paychecks and Stock Options from Biomedical Firms. Increasingly, Such Deals Are Kept Secret," The Los Angeles Times, Dec. 7, 2003, at A1, by David Willman. Exposed potential conflicts of interest inside national top health research institution.

"Northwest Gave U.S. Data on Passengers; Airline Had Denied Sharing Information for Security Effort," The Washington Post, Jan. 18, 2004, at A1, by Sara Kehaulani Goo. Airlines provided passenger data to government without informing passengers.

"Chemawa Warnings Date to '89," The Oregonian, Feb. 20, 2004, at A1, by Kim Christensen and Kara Briggs. Documents show repeated warnings by Indian Health Service regarding school's "holding cells," lack of supervision and poor medical service.

"D.C. Knew of Lead Problems in 2002; Timing of E-Mails Contradicts Claims," The Washington Post, Mar. 29, 2004, at A1, by Carol D. Leonnig and David Nakamura.

"Group: Industry Exceeds Clean Water Act," Waste News, Apr. 12, 2004, by Bruce Geiselman. EPA documents show more than 60 percent of industrial and municipal facilities nationwide exceeded Clean Water Act permit limits during the eighteen month period.

"Rat-Poison Makers Stall Safety Rules; EPA Had Drafted Regulations to Protect Children, Animals," The Washington Post, Apr. 15, 2004, at A3, by Juliet Eilperin. Documents expose risk of rat poison to children.

"Navy Confirms Weapons Facility Was Temporarily Decertified," The Associated Press State & Local Wire, Apr. 24, 2004, at State and Regional. Confirms an incident at a local Navy submarine facility where a nuclear missile was mishandled.

"Eating well: Second Thoughts on Mercury in Fish," The New York Times, 13 March 2002, p. F5, by Marian Burros. Risk of mercury to pregnant women and children exposed.

"Reagan, Hoover, and the UC Red Scare," San Francisco Chronicle, 9 June 2002, p. A1, by Seth Rosenfeld. FOIA documents obtained after a 17-year legal battle showed the FBI had conducted unlawful intelligence activities at the University of California, the nation's largest public university, in the 1950s and 1960s.

"Sailors exposed to deadly agents," The Deseret News (Salt Lake City, Utah), 24 May 2002, p. A1, by Lee Davidson. 7 years after FOIA documents showed the Army exposed hundreds of sailors to germ and chemical warfare tests in the 1960s, the Pentagon acknowledged using chemical and biological warfare agents in the tests.

"Widespread Water Violations Decried," By Eric Pianin, The Washington Post, 7 August 2002. Nearly one-third of major industrial facilities and government-operated sewage treatment plants have significantly violated pollution discharge regulations during a two year period.

"The Vertical Vision/ Part I: The Widow-Maker," By Alan C. Miller and Kevin Sack, The Los Angeles Times, 15 December 2002. Military documents chronicled the troubled history of the most dangerous airplane flying in the U.S. military -- the Marine Corps' Harrier attack jet.

"Doomed plane's gaming system exposes holes in FAA oversight," By Gary Stoller, USA Today, 17 February 2003. Documents connected the Sept. 2, 1998, crash of Swissair Flight 111 with the flight's entertainment system.

"Study details MTA woes; Buses average breakdown every 976 miles of service; Peer agencies more reliable; Report details problems with maintenance, safety," By Stephen Kiehl, The Baltimore Sun, 21 April 2003. Buses operated by the Maryland Transit Administration are more prone to breakdowns than buses in comparable transit agencies.

"NASA mistakes, optimism cost taxpayers billions," Florida Today, 15 June 2001. Document shows projected $4.3 billion cost overrun on international space station.

"Hundreds of defects reported along Zephyr's track," Associated Press, 10 June 2001. In 5 years prior to fatal Amtrak derailment March 17, 1500 defects found on Iowa tracks.

"Mishandling of informant hurt cases, DEA concedes; Crime: Because the system missed warnings of operative's misdeeds, many charges have been dismissed or weakened," Los Angeles Times, 5 June 2001. DEA and prosecutors ignored warnings for 12 years, 280 cases.

"Ritalin prescribed unevenly in U.S.," Cleveland Plain Dealer, 6 May 2001. DEA data shows dramatic variations by county in prescription rates for drug.

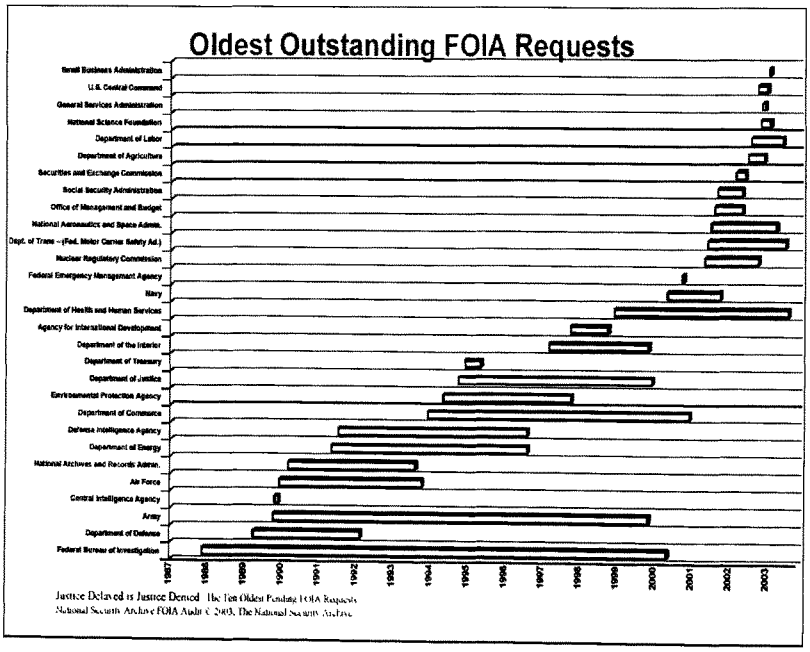
Statement by **Meredith Fuchs**, General Counsel, National Security Archive, George Washington University
March 15, 2005

Hearing on "Openness in Government and Freedom of Information: Examining the OPEN Government Act of 2005"

Room 226 of the Dirksen Senate Office Building
Senate Committee on the Judiciary Subcommittee on Terrorism, Technology and Homeland Security
U.S. Senate

THE TEN OLDEST FOIA REQUESTS: BACKLOGS STILL EXIST

(As of November 2003)



Statement by **Meredith Fuchs**, General Counsel, National Security Archive, George Washington University
March 15, 2005

Hearing on "Openness in Government and Freedom of Information: Examining the OPEN Government Act of 2005"

Room 226 of the Dirksen Senate Office Building
Senate Committee on the Judiciary Subcommittee on Terrorism, Technology and Homeland Security
U.S. Senate

Annual Reports Mask the Seriousness of the Backlog: Comparison of Median Processing Times to Age of Ten Oldest Pending FOIA Requests

(As of November 2003)

- **AGENCY FOR INTERNATIONAL DEVELOPMENT** (Ten Oldest FOIA Requests pending as long as 1500 to 1250 business days; Median Days To Process requests pending at end of FY 2002 reported as 356);
- **AIR FORCE** (Ten Oldest FOIA Requests pending approximately 3400 to 2300 business days; Median Days To Process requests pending at end of FY 2002 reported as 169);
- **ARMY** (Ten Oldest FOIA Requests pending as long as 3500 business days; Median Days To Process requests pending at end of FY 2002 reported as 25);
- **CENTRAL INTELLIGENCE AGENCY** (Ten Oldest FOIA Requests pending as long as 4090 to 3400 business days; Median Days To Process requests pending at end of FY 2002 reported as 601);
- **DEFENSE INTELLIGENCE AGENCY** (Ten Oldest FOIA Requests pending approximately 3000 to 1300 business days; Median Days To Process requests pending at end of FY 2002 reported as 890);
- **DEPARTMENT OF COMMERCE** (Ten Oldest FOIA Requests pending approximately 2400 to 650 business days; Median Days To Process request pending at the end of FY 2002 reported as 55);
- **DEPARTMENT OF DEFENSE** (Ten Oldest FOIA Requests pending approximately 4170 to 2700 business days; Median Days To Process requests pending at end of FY 2002 reported as 87);
- **DEPARTMENT OF ENERGY** (Ten Oldest FOIA Requests pending approximately 3100 to 1790 business days; Median Days To Process request pending at the end of FY 2002 reported as 97);
- **DEPARTMENT OF JUSTICE, OFFICE OF INFORMATION AND PRIVACY** (Ten Oldest FOIA Requests pending approximately 2250 to 900 business days; Median Days To Process request pending at the end of FY 2002 reported as 2-295);

- **DEPARTMENT OF TREASURY** (Ten Oldest FOIA Requests pending approximately 2130-2010 business days; Median Days To Process request pending at the end of FY 2002 reported as 1-545)
- **ENVIRONMENTAL PROTECTION AGENCY** (Ten Oldest FOIA Requests pending approximately 2250 to 1500 business days; Median Days To Process request pending at the end of FY 2002 reported as 11-483);
- **FEDERAL BUREAU OF INVESTIGATION** (Ten Oldest FOIA Requests pending approximately 3970 to 830 business days; Median Days To Process requests pending at end of FY 2002 reported as 90);
- **NATIONAL ARCHIVES AND RECORDS ADMINISTRATION** (Ten Oldest FOIA Requests pending approximately 3390 to 2540 business days; Median Days To Process request pending at the end of FY 2002 reported as 887).

Statement by **Meredith Fuchs**, General Counsel, National Security Archive, George Washington University
March 15, 2005

Hearing on "Openness in Government and Freedom of Information: Examining the OPEN Government Act of 2005"

Room 226 of the Dirksen Senate Office Building
Senate Committee on the Judiciary Subcommittee on Terrorism, Technology and Homeland Security
U.S. Senate

Countries with Information Commissioners or Ombudsmen

1. Belgium
2. Canada
3. Estonia
4. France
5. Hungary
6. Ireland
7. Japan
8. Latvia
9. Mexico
10. New Zealand
11. Portugal
12. Slovenia
13. Sweden
14. Thailand
15. United Kingdom

WASHINGTON LEGISLATIVE OFFICE
Laura W. Murphy
Director

915 15th Street, NW Washington, D.C. 20005
(202) 544-1681 Fax (202) 546-0738

STATEMENT OF LISA GRAVES

SENIOR COUNSEL FOR LEGISLATIVE STRATEGY

AMERICAN CIVIL LIBERTIES UNION

WASHINGTON NATIONAL OFFICE

ON S. 394, THE "OPEN GOVERNMENT ACT"

BEFORE THE

TERRORISM, TECHNOLOGY AND HOMELAND SECURITY SUBCOMMITTEE

OF THE UNITED STATES SENATE COMMITTEE ON THE JUDICIARY

MARCH 15, 2005

Good morning Chairman Kyl, Ranking Member Feinstein and Members of the Subcommittee on Terrorism, Technology and Homeland Security. Thank you for the invitation to testify today before this subcommittee of the Senate Judiciary Committee on behalf of the American Civil Liberties Union. We are pleased to testify in support of the "Openness Promotes Effectiveness in Our National (OPEN) Government Act," S. 394, which was introduced last month by Senator Cornyn and Senator Leahy. This bill makes agency compliance with the Freedom of Information Act (FOIA)[1] a priority, not an afterthought.

The American Civil Liberties Union is a nationwide, non-partisan organization of more than 400,000 members dedicated to protecting the principles of liberty, freedom, and equality set forth in the Bill of Rights to the United States Constitution and in our nation's civil rights laws. For 85 years, the ACLU has sought to preserve the Constitution's checks and balances that help secure our freedoms. We support S. 394 because it will help increase the transparency of government by strengthening FOIA.

FOIA was passed nearly 40 years ago to give the American people a statutory right to access information freely about their government—a government, in the immortal words of the President Abraham Lincoln, "of the people, by the people, for the people." The Declaration of Independence proclaimed that the just power of government derives "from the consent of the governed," but it took nearly 200 years for federal law to recognize that this consent must be informed in order to be meaningful. The Supreme Court has made clear that "disclosure, not secrecy, is the dominant objective"[2] of FOIA; but secrecy, not openness, seems to be the dominant trend.

Government secrecy can be an enemy of democracy. As President John F. Kennedy stated, "The very word 'secrecy' is repugnant in a free and open society; and we as a people are inherently and historically opposed to secret societies, to secret oaths, and to secret proceedings." Of course, this does not mean that every piece of information the government has can, or should, be made open to the public. There are limits, many of which the ACLU supports, to protect other important national and individual interests, but we, as a people, must continue to resist the culture of secrecy when it unnecessarily permeates the government, no matter which party is in power. When it comes to information about how the government is using its vast powers, ignorance is definitely not bliss. The ACLU supports S. 394 because this much-needed bill will help buck the growing trend of hiding government action from public scrutiny. The OPEN Government Act will help shine the spotlight on government action so the American people can judge the use of that power, for themselves, unfiltered from spin.

The OPEN Government Act takes incremental but important steps toward improving FOIA procedures. It would improve the FOIA process by 1) making compliance with FOIA a priority instead of an afterthought, 2) bringing FOIA into the 21st Century, 3) protecting incentives for enforcement of FOIA and 4) emphasizing that the core purpose of FOIA is disclosure, not secrecy. This bipartisan legislation represents carefully crafted and rather modest adjustments to FOIA to enhance the government's accountability to the public it serves.

The Procedures the OPEN Government Act Would Require Would Strengthen Government Accountability and Increase the Free Flow of Information.

The OPEN Government Act consists of a series of much-needed corrections to policies that have eroded the promises of FOIA. These include ensuring requesters will have timely information on the status of their requests, creating enforceable time limits for agencies to respond to requests, clarifying news media status rules that recognize the reality of freelance journalists and the Internet, and providing strong incentives – including both carrots and sticks – for agency employees to improve FOIA compliance. This bill has thirteen sections containing many important improvements to FOIA procedures, but I would like to highlight the four most critical effects of the bill if passed.

What the Bill Would Do:

Make Agency Compliance with FOIA a Real Priority, Rather than an Afterthought. The OPEN Government Act makes compliance with FOIA a real priority for agencies rather than tertiary obligation. Section 6 of the OPEN Government Act would finally create a consequence for the failure of an agency to comply with the time limits set by Congress. Specifically, if an agency fails to respond within the 20-day limit set by FOIA it could not assert some of the exemptions from disclosure set forth in FOIA.[3] This penalty could be overcome if the agency had clear and convincing evidence of good cause for missing Congress's deadline. The improvements in Section 6 of the OPEN Government Act are long overdue. A deadline without consequence is hardly a deadline--it is merely a hope or a wish.

The exceptions to the disclosure requirement for missing a deadline are important features of the enforcement component of the bill, and they demonstrate the reasonable approach taken by this legislation. The OPEN Government Act specifically allows three exceptions to penalty for missing a deadline: first, if disclosure would endanger the national security of the United States; second, if disclosure would violate personal privacy rights; or third, if disclosure would be prohibited by law. The exceptions are wise and warranted by making it so that agency mistakes or delay will not result in disclosures that would violate the law, would help the enemies of the U.S., or would violate a person's privacy rights. Section 6 of the OPEN Government Act is by far the most important provision of the bill.

The annual reports currently required by FOIA demonstrate that far too often requests for information under FOIA are not handled promptly, not just days past the deadlines established by FOIA but sometimes years pass before information is divulged.[4] The ACLU has experienced lengthy delays in the handling of its FOIA requests. For example, in October 2003, the ACLU filed a FOIA request for information about detainees held overseas by the United States and filed a lawsuit in June 2004 asking that the government comply with FOIA. In August 2004, a federal court ordered the federal government to disclose documents responsive to that FOIA request.[5] As a result of these disclosures, the public has learned about Executive Branch policy decisions about so-

called "ghost" detainees, individuals kept from inspection by the Red Cross, as well as information about torture and abuse of detainees.
The underlying disclosures raise very troubling issues, but the fact of disclosure—even as a result of court order—demonstrates the continuing vitality of the democratic principle of an open society. As the famously conservative historian Raoul Berger argued, the notion that the Executive Branch should not have to conduct its affairs in a goldfish bowl should be met with the response that "the alternative is not to conduct its operations in a dark room"-- the "plain fact is that the executive branch was meant to operate in a goldfish bowl . . . that is one of the presuppositions of a democratic government."[6]

The OPEN Government Act supports accountable, democratic government by giving teeth to the deadlines established by FOIA. Setting a consequence for failure to meet FOIA deadlines will undoubtedly require the commitment of more resources by agencies to respond to requests, but the American people are the government's customers and their requests for information about their government should be handled promptly.

Help Bring FOIA into the 21st Century.
The OPEN Government Act would help bring FOIA into this century. Significantly, the OPEN Government Act would amend FOIA to keep it up to date with recent changes in the way government does business and the way people get news.

In this era of outsourcing, it is important that the freedoms protected by the Constitution and federal law are not circumvented by assigning government record keeping functions to private contractors. Section 10 of the bill makes clear that agency records kept by the government's private contractors are subject to FOIA.

Just as the OPEN Government Act would properly extend FOIA to government contractors, we hope Congress will consider how to extend privacy protections, like those in the Privacy Act, to government contractors. Last month, the data company ChoicePoint disclosed that it sold the personal information of 145,000 consumers to a group of identity thieves. ChoicePoint is not merely a private aggregator of personal information--it has contracts with at least 35 government agencies, including an $8 million contract with the Justice Department that allows FBI agents to tap into the company's vast database of personal information on individuals. Government security and intelligence agencies are barred by the Privacy Act of 1974 from maintaining dossiers on individuals not suspected in wrongdoing, and they should not be allowed to circumvent these important privacy protections by contracting out those dossiers to data aggregators like ChoicePoint, commercial entities which put profit ahead of privacy.

Additionally, Section 3 of the OPEN Government Act would also clarify independent journalists are not barred from obtaining fee waivers under FOIA simply because they are not affiliated with a well-established media company. The Internet has dramatically expanded the power of individuals to report on the world around them, including the government through "web logs," also known as "blogging." This democratization of the flow of information is transforming the way people learn about their government and the world around them. The OPEN Government Act establishes reasonable criteria for

allowing individual web loggers, or "bloggers," who meet certain criteria to access information held by the government at the same reduced expense as media corporations.

Protect Incentives for the Enforcement of FOIA.

Section 4 of the OPEN Government Act would clarify that a federal court may require the government to pay reasonable attorney fees and costs to a FOIA requester who substantially prevailed in his claim and whose pursuit of information was the catalyst for voluntary or unilateral change by the agency.[7] This amendment is needed to clarify that the "catalyst rule" for recovery of fees continues to be allowed in FOIA cases, even though the Supreme Court recently limited this rule in a different statutory area.[8] It is clearly within the province of Congress to create incentives to enforce FOIA rights by private individuals.

Moreover, it would be consistent with OPEN Government Act's effort to give teeth to the deadlines imposed by FOIA to clarify that a court has discretion to award attorney fees if a party prevails in a suit for the expedited processing of a FOIA request. Without expedited processing, the public may not get key information from the government until well after it is needed. It may also be helpful to clarify that S. 394's definition does not intend to change what it means to be a "prevailing" party under FOIA or impose additional hurdles for reasonable fees for information seekers who have to go to court to get the information requested.[9] The addition of a new definition in this area may unsettle the law, and is not necessary to accomplish the much-needed clarification referred to as the "*Buckhannon* fix."

The OPEN Government Act's fix for attorney fees is important and reasonable. An agency should not be able escape the reasonable costs of enforcement by the public when the lawsuit led the agency to choose to change course rather than await a final court order on the merits of the plaintiff's claim. It is contrary to the public interest to allow an agency to drag its feet and then suddenly divulge documents to try to moot out a plaintiff's case after years of fees and costs have already been expended to obtain documents the government should have disclosed long ago under the principles of FOIA.

Emphasize that FOIA Creates a Strong Presumption in Favor of Disclosure.

In Section 2, the bill sets forth findings to clarify that FOIA establishes a "strong presumption in favor of disclosure."[10] FOIA creates nine exemptions from disclosure, but over the past forty years the Executive Branch has vacillated about how to interpret those exemptions--whether federal agencies should invoke those exemptions and withhold information from the public when there is a "substantial legal basis for doing so," or whether federal agencies should disclose information even when a discretionary exemption of FOIA applied unless it was "reasonably foreseeable that disclosure would be harmful to an interest protected by the law."[11] Section 2 of the OPEN Government Act would help clarify that FOIA should be interpreted generally by the Executive Branch in favor of disclosure versus withholding information.

Such legislative history is typically given some weight by courts interpreting ambiguous statutory provisions, but the standard set forth in Section 2 of the OPEN Government Act could be made stronger if it were embodied in an amendment to the text of FOIA, rather

than left to Executive or Judicial Branch interpretations. We recommend that you consider amending the bill to make Section 2 more binding.

Challenges to the Free Flow of Information

The OPEN Government Act takes important steps toward keeping the promises made by FOIA. S. 394 improves FOIA and government openness not by making more records subject to disclosure, or by eliminating FOIA exemptions, but by helping ensure that agencies follow the law and disclose information that FOIA requires them to disclose.

Additional bipartisan legislation to clarify the reach of the substantive exemptions to FOIA, particularly Exemption One relating to national security assertions, would be most helpful and fully consistent with the principles of a free and open society. In the wake of 9-11 there is an epidemic of over-classification. Senator Cornyn recently commented on this over-classification in his article for the LBJ Journal of Public Affairs, where he noted that:

- Thomas H. Kean, chair of the 9-11 Commission, has stated that in reviewing government documents for the Commission's report, "three-fourths of what I read that was classified shouldn't have been."
- Carol A. Haave, the Bush Administration's Deputy Undersecretary of Defense Counter-Intelligence and Security, told Congress in August of 2003 that "we overclassify information . . . say 50-50," or at least half of the time.
- The Secrecy Report Card of OpenTheGovernment.org noted that in 1995 3.5 million documents were classified compared with 14 million in 2003, a 400 percent increase, that is reflected in the fact that "today we spend $6.5 billion annually to classify documents compared to just $54 million to declassify documents—an overwhelming ratio of 120 to 1."

The fact is that false claims of government secrecy have distorted our history, hidden government error, and created a gulf between the government and the governed whose consent is necessary for its legitimacy.[12] One of the things that makes our country unique and powerful as a democracy is our commitment to openness and to holding our leaders accountable to the rule of law. We should not retreat from these principles, even in times of international instability.

The OPEN Government would take good steps toward enforcing our bedrock principles. As Phyllis Schlafly of Eagle Forum has observed, "[t]he American people do not, and should not, tolerate government secrecy. The Freedom of Information Act and many other laws embrace the limited-government principle that 'government by the people' requires government disclosure to the people."

Conclusion

FOIA's basic purpose "is to ensure an informed citizenry, vital to the function of a democratic society, needed to check against corruption and to hold the governors

accountable to the governed." [13] The ACLU commends Senator Cornyn and Senator Leahy for introducing the OPEN Government Act. We urge other Members to join them in support of this good government measure that would strengthen our Nation's democracy and help citizens examine the manner in which our laws are executed by government officials and our values are preserved.

Endnotes

1 5 U.S.C. § 552 (1966), *as amended* in 1974, 1976, 1986, 1996, and 2002.

2 *Department of the Air Force v. Rose*, 425 U.S. 352 (1976).

3 5 U.S.C. § 552(b).

4 5 U.S.C. § 552(e).

5 *See ACLU v. Department of Defense*, Docket No. 4 Civ. 4151 (S.D.N.Y. Aug. 17, 2004) (available at http://www.aclu.org/torturefoia/SignedOrder_081804.pdf).

6 *See* Raoul Berger, *Executive Privilege: A Constitutional Myth* (1974).

7 The fee provision of FOIA can be found in Section 552(a)(4)(E) of the Act.

8 *Buckhannon Board and Care Home, Inc. v. West Virginia Dep't of Health & Human Resources*, 532 U.S. 598 (2001),

9 We hope the definition in S. 379 would not narrow the law on attorney fees in FOIA case or reduce the standard to a mathematical counting of the number of requests or claims won versus lost. In FOIA fees litigation, the court's inquiry has focused on eligibility and entitlement to fees. *See, e.g., Church of Scientology v. Harris*, 653 F.2d 584 (D.C. Cir. 1981).

10 *Department of State v. Ray*, 502 U.S. 164 (1991).

11 *Compare* Attorney General Memorandum of October 12, 2001 (available at http://www.usdoj.gov/04foia/011012.htm) *with* Attorney General Memorandum, October 4, 1993 (http://www.usdoj.gov/oip/foia_updates/Vol_XIV_3/page3.htm).

12 *See* E.O. 12958 (Apr. 17, 1995).

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

Statement of Senator Patrick Leahy
Hearing on "Expanding Openness in Government and Freedom of Information"
Subcommittee on Terrorism, Technology and Homeland Security
Tuesday, March 15, 2005

I am glad that whatever the weather, the Senate Judiciary Committee is participating in Sunshine Week by means of this hearing and our efforts to strengthen the Freedom of Information Act. This past weekend, in addition to the NCAA ski championships held in Vermont and a number of NCAA basketball conference tournaments around the country, most Americans saw in the Parade Magazine in their Sunday newspapers a reminder that sunshine is a great disinfectant to abuses of power and wrongdoing. The weekly magazine reminded us of a story it ran in January 2004 about a Massachusetts couple who relied on state FOIA laws to expose their town's plans to reopen a dormant and potentially polluted landfill. The story spotlights the power of and the need for government sunshine laws.

I am delighted to join the Senator from Texas in our efforts to strengthen and improve our open government laws. This is the first Judiciary Committee hearing on the Freedom of Information Act, which we call "FOIA," since 1992. There has not been significant legislation regarding FOIA since 1996, when I was the principal author of the Electronic Freedom of Information Act Amendments, a set of modifications that updated FOIA for the Internet Age. In recent years, I have fought against the rolling back of citizens' rights in this regard, and expressed concerns in 2002 over a bipartisan agreement in the Homeland Security legislation that was contrary to those efforts. Until this year, I have been unable to convince a single Republican to join my effort. Senator Cornyn and I have now cosponsored two FOIA bills together; we are building a great bipartisan partnership. You can be sure that I will keep working on him to join me on this third bill, the Restore FOIA Act, which I plan to reintroduce today.

The enactment of FOIA was a watershed moment for democracy. This bulwark of open government is under assault. Liberals and conservatives both recognize a dangerous trend toward over-classification, at enormous cost to the taxpayers and risk to our citizens. On March 3, 2005, J. William Leonard, the Director of Information Security Oversight, testified before a House committee that the number of classification decisions has increased from nine million in 2001 to 16 million in 2004. In 2003 alone, the cost of classifying documents was $7 billion.

Preserving our right to open government is not only significant in the area of national security. Some of the most important revelations discovered through FOIA requests directly impact our cities and neighborhoods. When the public is shut out, bad things

happen. That was the subject of the *Parade Magazine* story I mentioned a few moments ago, about Linda and Mike Raymond, who live in Woburn, Massachusetts. Their town is a blue-collar suburb of Boston best known as the setting for the book and film, *A Civil Action*. In the 1980s, after rates of leukemia spiked upward, local industries were sued for polluting the area's water. Four years ago the Raymonds discovered that the city's landfill, dormant for 15 years, was bustling with truck traffic. Linda Raymond contacted Woburn officials, but they stonewalled her. The Raymonds relied on the state FOIA law to get answers. They educated the community and held public officials accountable. The Raymonds' triumph spotlights the power of and the need for government sunshine laws.

This is a success story from the states, but there is much work to be done to ensure that our Federal FOIA law is properly enforced. A month ago, Senator Cornyn and I introduced S.394, the OPEN Government Act of 2005. It is a collection of commonsense modifications designed to update FOIA and improve the timely processing of FOIA requests by Federal agencies. It was drafted after a long and thoughtful process of consultation with individuals and organizations that rely on FOIA to obtain information and share it with the public, including the news media, librarians, and public interest organizations representing all facets of the political spectrum.

Chief among the problems with FOIA implementation is agency delay. In 2003, a non-governmental organization, the National Security Archive, looked into just how long some FOIA requests are left unfulfilled. The group, which is represented on our panel today, found that the oldest requests dated back to the late 1980s, before the collapse of the Soviet Union. The oldest of these was a request to the FBI for information on the Bureau's activities at the University of California. First filed in November 1987, this request was partially fulfilled in 1996 after extensive litigation. According to the National Security Archive, the documents that were released revealed "unlawful FBI intelligence activities and the efforts to cover up such conduct." After a 2002 article in the *San Francisco Chronicle*, and inquiries from Senator Feinstein, the Bureau acknowledged that there were at least 17,000 pages of records that still had not been produced. Since then, some data has been released, but the requestor recently told me that he believes more than 15,000 pages remain outstanding.

This is an example of a more extreme case, but delays are too commonplace in the system. Last week, Senator Cornyn and I introduced a second bill, S.589, the Faster FOIA Act, which would create a commission to study agency delay. The commission would be charged with reviewing, among other facets, the system of processing fees and fee waivers, which are often cited as causes of delay and are sometimes the subject of litigation. Over the past two years, at my request, the Government Accountability Office (GAO) has reviewed the available data on fee issues. I am grateful for their efforts and look forward to the results of their study later this year.

One of the problems faced by GAO, and anyone else who has looked into agency delay, is the lack of comprehensive reporting data. We address this problem in the Open Government Act, by calling for more detailed reporting from agencies on FOIA

processing. The commission created by the Faster FOIA Act will serve to ensure all voices are heard as we craft future modifications to strengthen the law.

Earlier, I mentioned a third piece of legislation that deserves serious consideration in this Congress. After 9/11, we saw the single greatest rollback of FOIA in history tucked into the charter for the Department of Homeland Security. This provision created an opportunity for big polluters or other offenders to hide mistakes from public view just by stamping 'critical infrastructure information' at the top of the page when they submit information to the Department. I am fighting to repeal this law and replace it with a reasonable compromise called the Restore FOIA Act, which would protect both sensitive information and the public's right to know. The OPEN Government Act, the bill Senator Cornyn and I introduced together in February, takes one step forward by requiring reports on the law's use, but Restore FOIA is a more comprehensive approach and I will continue to push for its enactment.

The Constitution reflects the Founders' confidence in a government that welcomes rather than fears dissenting or offensive views. The public's right to know, backed up by FOIA, is a cornerstone of our democracy, guaranteeing a free flow of information that delivers America's promise of government by, of, and for the people.

No generation can afford to take these protections for granted, because they can quickly and easily be taken away – once gone, they are difficult to get back. The recent damage done to FOIA will take great effort to undo. But I hope it can always be said that each generation of Americans did all that it could to preserve the public's right to know for the next generation of Americans.

#####

Written Testimony submitted to the Senate Judiciary Subcommittee on Terrorism, Technology and Homeland Security
Freedom of Information Act (FOIA) hearing- March 15, 2005
Lisa Lechowicz
Chief Executive Officer
Health Data Management, Inc.

Mr. Chairman (Mr. Cornyn), thank you for the opportunity to insert written testimony into the record of this hearing on the Freedom of Information Act (FOIA). I appreciate your willingness to schedule this important Subcommittee hearing.

As stated in the findings of S.1394, "The Open Government Act of 2005," FOIA should establish 'a strong presumption in favor of disclosure' as stated by the U.S. Supreme Court in the U.S. Department of State v Ray, 502 U.S. 164 (1991). Unfortunately, this statement of policy is not consistent with the actual experience of my company, HDM Corp., with its FOIA request to the Centers for Medicare and Medicaid Services (CMS). Our experience has been that there is a strong presumption in favor of nondisclosure at CMS with respect to FOIA requests.

Before discussing our experience, I want to briefly describe my company, of which I am the Chief Executive Officer. HDM is an Omaha-based company dedicated to helping clients find a better way to process health care transactions. The company processes more than 30 million health care claims a year. It has been named one of Omaha's fastest growing small businesses.

I have included a detailed timeline as an attachment to this testimony which gives the chronology of my company's very difficult on-going experience with FOIA and CMS. To give a brief summary of this timeline, HDM made its request under FOIA to CMS in August 18, 2003 after informal requests proved fruitless. HDM was seeking a copy of a tax-payer funded contract entered by CMS for certain services related to Medicare claims processing. This FOIA request was very important to HDM as it was seeking clarity as to the scope of services covered by this public contract.

It is important to note that Congressman Lee Terry of Nebraska requested a copy of the Medicare claims processing contract on behalf of HDM. In the beginning of 2004, an employee of CMS indicated to Congressman Terry's staff that it had no intention of releasing the document as CMS claimed it included proprietary information.

With respect to the timeline, on March 26, 2004, after the deadline for response to our administrative appeal passed, HDM filed suit seeking release of this contract and all related documents from CMS. As a result of our suit, on May 18, 2004, CMS finally released the original relevant contract, albeit with significant pieces of it still missing. Finally, on September 3, 2004, CMS released the final document related to this FOIA request, over one year after the request had been made. The litigation in this matter is

still ongoing, as HDM has filed an appeal to the 8th Circuit Court of Appeals seeking reimbursement of attorney's fees incurred in this FOIA folly.

As this brief summary illustrates, there was a strong inclination at CMS towards secrecy and non-disclosure. I believe this unresponsiveness, delay and outright obstructionism is inconsistent with the intended purpose of FOIA. FOIA was established to help ensure that the public could be informed as to its government's activities. As stated in the findings to S.394, our constitutional democracy is based on the consent of the governed. It is extremely difficult for the governed to consent if it takes more than one year to receive all of the relevant documents subject to a FOIA request (as in this case with HDM from a single government contract). Moreover, it seems highly unfair and burdensome that the governed would have to file a lawsuit in order to stay informed as to its government's activities (as in this case with HDM), and then have to foot the bill for the cost of extracting the documents.

Because of my experience with FOIA as the Chief Executive Officer of a small business, I offer my support for S.394. Specifically, I would like to state my strong support for the following sections of this bill:

Section 4 – Recovery of Attorney Fees and Litigation Costs
Section 5 – Disciplinary Actions for Arbitrary and Capricious Rejections of Requests
Section 6 – Time Limits for Agencies to Act of Requests
Section 7 – Individualized Tracking Numbers for Requests and Status Information

In conclusion, I believe this legislation concerning FOIA is very important as it promotes transparency and openness in the activities of our government. I would be happy to go into more detail at any point if any Members of the Senate Judiciary Committee or their staff would like to contact me on this important subject. Thank you for this opportunity to submit testimony into the record for this hearing.

Attachment enclosed also to be inserted into the hearing record.

TIMELINE OF CMS FOIA REQUEST BY HDM

August 18, 2003 – HDM requests documents from CMS under FOIA

August 25, 2003 – Supplemental request submitted

October 1, 2003 – CMS Freedom of Information Group Director acknowledges receipt of August 18 request, refers request to the "Director, OICS/AGG," asking for the documents to be provided to his division "within 10 working days."

- FOIA request form listed "date received" as 8/18/03, "due date" as 10/20/03.

- FOIA request form shows one hour spent by CMS employee in locating 453 pages, and that all pages could be released as there was no concern about their disclosure

Beginning of 2004 - Congressman Lee Terry of Nebraska requested a copy of the Medicare claims processing contract on behalf of HDM. An employee of CMS indicated to Congressman Terry's staff that it had no intention of releasing the document as CMS claimed it included proprietary information.

January 20, 2004 – FOIA response transmittal with check mark next to "All documents are provided."

January 28, 2004 – "Interim Response" issued by CMS Director
Only copies of COB Solicitation, Notice of Solicitation, and the bulk of Statement of Work provided

- Remainder of COB contract and its 37 amendments withheld
- No redacted documents produced
- All other documents withheld

February 13, 2004 – Memo from CMS employees concerning HDM's request indicates which documents were withheld, and that CMS did not intend to release any others.

February 23, 2004 – HDM submits administrative appeal of CMS's January 28 response to CMS's Deputy Administrator and COO.

March 26, 2004 – After deadline for response to appeal passed, HDM filed suit, seeking release of COB contract and all related documents from CMS.

April 14, 2004 – Email from CMS employees states that some of the documents withheld on February 13 would now be released, due to fears raised by the litigation.

April, 2004 – Series of internal CMS email shows numerous inquiries about whether the complete COB contract had been gathered for HDM's FOIA request.

May 18, 2004 – CMS releases original COB contract to HDM

- All 37 amendments missing
- Attachments missing

May 27, 2004 – CMS employee forwards majority of amendments to COB contract to winning bidder for review and redaction recommendations.

- Further communication on June 9 concerning specific amendments
- Further communication on June 22 concerning specific attachments, as well as a section of the winning bid proposal

June 21, 2004 – CMS releases 541 pages of documents, consisting of heavily-redacted versions of Amendments.

- Documents were redacted by winning bidder, not by CMS
- Amendment 9 and most of Amendment 30 not released in any form

July 29, 2004 – CMS releases 91 pages of documents, including Coordination of Benefits Service Selection Plan and Sample Technical Evaluation Report.

August 2, 2004 – HDM sends CMS letter discussing threatened motion to compel immediate release of complete COB contract.

August 12, 2004 – "Final Response" to FOIA request: CMS releases copies of original contract, all 37 amendments, and two attachments.

August 13, 2004 – CMS files Motion for Summary Judgment on the basis that it had released all requested records.

August 31, 2004 – CMS produces 28 pages of documents pertaining to HDM's FOIA request and its processing.

September 3, 2004 – CMS releases 103 pages of employee performance evaluations related to HDM's CMS FOIA request.

December 20, 2004 - The Federal District Court entered an Order disposing of all pending motions in this case and dismissing the Complaint.

January 3, 2005 – HDM files motion seeking attorney's fees.

February 22, 2005 - Court denies motion for fees on basis HDM is not a prevailing party since CMS eventually released the documents prior to entry of a court order.

March 1, 2005 – HDM files appeal to 8th Circuit.

Testimony Before the
Subcommittee on Terrorism, Technology and
Homeland Security of the Senate Judiciary Committee

of

Mr. Walter Mears

Openness in Government and Freedom of Information:
Examining the OPEN Government Act of 2005

March 15, 2005

Testimony of Mr. Walter Mears

I appreciate the opportunity to be here today, in familiar territory. I spent more than 40 years as an Associated Press Washington reporter, editor and bureau chief, so I am no stranger to congressional hearing rooms. But this is my first experience on this side of the table.

I hope that what I have to say will be useful. I also hope that if it is not, you will do what we do as reporters, and ask questions that will get information you need. Insofar as I can provide it, I will.

To that disclaimer I will add another: I am not an expert on the legal aspects and the fine print of freedom of information law. So I hope that you will allow me to interpret my franchise broadly, so that I can speak about what I know best – the crucial importance of a free flow of information about government to the people. Too many people in government have, or acquire, an instinct to limit that flow because they think things work better without people they regard as nosy outsiders prying into what they consider their business.

It's not their business. It is all of our business. That is what a free, democratic government is about – you can't have one unless people know what is going on behind government doors. I believed that as a reporter, and I believe it today as a retired American, watching government from a distance.

President Bush spoke to Russia's President Putin at the Kremlin about the need for a free press in a democracy. What was true at the Kremlin also is true in Washington. The free flow of information is vital to a free press, and to a free people.

There is a difficult balance to be kept in this, especially since September 11 brought home to all of us the menace of terror in our midst. No reporter I know would demand or publish anything that would serve the purposes of a terrorist. The problem in times like these is to judge what would or would not weaken America against terrorism.

Tom Curley, the president of the Associated Press, has made that point well. He said that the battle against terrorism has followed the pattern of all eras when concern for security has moved to the forefront. There are real issues of public safety. But, historically, government goes too far in limiting information in the name of security.

Curley said the United States was attacked in large part because of the freedoms it cherishes. The strongest statement we could make to an enemy is to uphold these values.

They would be upheld by the Open Government Act of 2005. I know that you will hear from people more expert than I on the legal aspects and detailed provisions of the bill. I would like to offer some observations about the findings that preface it. First, the informed consent of the voters and thus the governed is crucial to our system of self government. That was the mission that guided me through my career as a political reporter, from the state house in Vermont to the Capitol to the eleven presidential campaigns I covered for the AP.

Secondly, the bill also would have Congress find that "the American people firmly believe that our system of government must itself be governed by a presumption of openness." I wish that an act of Congress could make that so. In my experience, many – too many – people do not believe that, and are willing to let the government determine what we – and therefore they – ought to know. We journalists work every day to change that because if people don't know what is going on, going right, and sometimes going wrong in government, there is no informed consent of the governed.

This is not only an era of tension about terror and security; it also is one of cynicism, about news and those of us who produce it – and also about government and those who lead it. So that's us, and it also is you. A Pew Research poll this winter showed that only 31 percent of the public consistently focuses on what we call hard news– about Washington, politics, international affairs, local and state government, and economics. More than half the people said that they often do not trust what news organizations tell them.

The freer the flow of information, and the better the job we do in delivering it, the more likely that we can meet the standard on which the bill's preamble quotes Justice Hugo Black:

"The effective functioning of a free government like ours depends largely on the force of informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees."

The Freedom of Information Act (FOIA) gets straight to that point: We use it to get data on the quality of government service. In a more perfect world, that would be an aim shared by those of us who cover government and those who run it. Sometimes it is, and information flows because the people who control it realize that it belongs to the people whose taxes pay their salaries. Too often it is not, sometimes for valid reasons of security

and privacy, on which you will hear no argument from us. But more often it is because when people get into government they tend to get proprietary and protective.

I have seen that happen with colleagues who left the news business to go into government positions, often as spokesmen, public information officers. The latter title belies the instinct to withhold information, treat what is rightfully public as though it was somehow private.

There are far more PIOs in the government, and here in Congress, now than when I was reporting. When I covered the Senate 30 years ago, press secretaries were rare – most senators had staffers who handled that part of the work along with other duties. Senator Mike Mansfield never had a press secretary when he was majority leader. Those were simpler times, of course. The 24-hour news cycle hadn't arrived, and if you wanted to know what was happening on the Senate floor, you went there – you didn't turn on the television.

In the executive branch, according to Newsday, the number of public relations employees increased by 9 percent during the four years that ended last September. PR spending went up by $50 million over three years. But adding public information officers doesn't add public information. That has been increasingly restricted during the same period.

As an AP veteran I take pride on objectivity. We are concerned with what is happening now, and we should be. But I do not mean to limit my observations to the Bush years. This is not new business. I remember writing a story that angered Lyndon Johnson when he was president – he wasn't satisfied with the way the PR people in his executive branch agencies were getting out his chosen messages. So he called in their supervisors and told them that if they didn't do better, he'd replace the whole bunch of them with Johnson City high school seniors. The White House wouldn't comment on my story, but as soon as it hit the wire Johnson's people denied it all. Then they set about trying to find out who leaked it to me.

While restrictions on information have tightened in this administration, I believe that whoever had been in office, regardless of party, when those terrorists destroyed the World Trade towers, the administration would have erred on the side of security.

That makes this legislation especially vital in a difficult time. There is a need to reinforce the public's right to know.

It was encouraging to see that Attorney General Gonzales has told you he will examine Justice Department policies and practices under FOIA. It will be more encouraging

should he amend the restrictive lines set by his predecessor, who essentially flipped the policy from one favoring disclosure to one in which agencies were assured that the Justice Department would defend decisions to withhold information.

I would submit that overdone secrecy raises rather than reduces the risk that really vital secrets will be breached. The greater the mass of secret information, the greater the possibility that it will leak – and that without sensible priorities for withholding information, things that shouldn't get out will get out. During the Civil War, a censor tried to prevent an early AP Washington correspondent from filing a story reporting that Confederate forces were marching up the Shenandoah Valley, but finally passed it when the reporter pointed out that the Confederates already knew where they were. That is not a bad guideline about information that obviously is known to the other side. It should be available to Americans, too.

There is a valid need for secrecy in some government operations. But the presumption should be in favor of openness, not clamping down on information.

Too often, security becomes an excuse for shielding embarrassing information, and secrecy can conceal mismanagement or wrongdoing. I remember our coverage of Richard Nixon when he tried to use national security as part of the Watergate cover-up. Forgetting history risks repeating it.

And much of the information pried loose only by the pressure of FOIA action has nothing to do with security at all. Some examples:

■ The AP found that researchers at the National Institutes of Health were collecting royalties on drugs and devices they were testing on patients who did not know of their financial interests in the products. That breached an NIH promise to Congress in 2000, and the practice ended under a new policy announced when the story hit the wire.

■ Bureau of Land Management records obtained under FOIA showed that oil and gas companies were covering only a fraction of the cost of plugging old wells and reclaiming land, leaving behind millions of dollars in potential cleanup costs.

■ The New York Daily News found that the federal courthouse in lower Manhattan had maintenance and cleaning costs double those at state court buildings a block away. In 1997, it cost $84,812 to polish the brass in entrances to the building.

But along with those FOIA success stories there are too many stories of information blocked by delays, by attempts to raise the cost of asking for data, and by agencies bent

on secrecy. One remarkable example: when Terry Anderson, the former AP man held hostage for seven years in Lebanon, filed a FOIA request for information about his captivity, he says he was told he couldn't have all he sought because of the privacy rights of the kidnappers.

The OPEN government act you are considering will plug some holes and repair some problems in the FOIA, which has been updated only twice since it was enacted in 1966. For that it should be approved. But beyond the specific steps it would take, I think the message behind this measure is even more important.

Its enactment would once again declare that the public has a right to obtain information from federal agencies, and that the presumption must be in favor of disclosure, not secrecy. This hearing, and I hope a full discussion of freedom of information in the full Senate and in the House, will serve that mission well.

As you begin this legislative work, we in the news media are undertaking a project entitled the Sunshine in Government Initiative, with a similar mission – to promote policies that make government more accessible, accountable and open, and to educate the public on the importance of those policies.

One of the guiding principles of that initiative is that a democratic government must function with a presumption of openness, balanced with legitimate national security needs and individual privacy. What you are trying to do by law, we are trying to do by example and with our reporting.

A new Associated Press study shows that federal agencies have been curtailing information flows since 1998, while requests for information have increased. The real clampdown followed the 9/11 attacks, but the trend began before President Bush came to office.

There is a growth in classified documents – by 60 percent between 2001 and 2003.
And it is not all federal. Since 9/11, at least 20 states have proposed or adopted new laws to control public records, according to the National Conference of State Legislatures. Those changes are intended to prevent would-be terrorists from seeing evacuation, emergency and security information. But in the process, there are new limits on all sorts of records ranging from birth and death data to architectural drawings of public buildings.

We newspeople are the highest profile advocates, and users of FOIA. But it is not only a tool for reporters and investigators. Most FOIA requests do not come from us at all, but from veterans or retirees, trying to get information about their government benefits. That

fact is worth emphasizing because it makes the case that access to information is best for everyone.

A final thought on one provision of your bill, the creation of a new freedom of information ombudsman to keep watch on compliance and try to find solutions to FOIA disputes short of going to court. I hope that the position would be a platform to keep this whole information issue on the public agenda. It is too vital to let it slide out of view.

We need to find ways to keep the flow of information – not just for the press but for all Americans – a topic of national concern. With that, I thank you for what you are doing in that cause, and for inviting me to join your effort.

THE FOIA AND THE JFK RECORDS ACT
A Journalist's Perspective

My name is Jefferson Morley. I have worked as a professional journalist in Washington for the past 21 years, both as an editor and as a writer. I want to thank Senators Cornyn and Leahy for their interest in and support of the Freedom of Information Act. It is encouraging that the values of full disclosure and accountability have champions in the Congress.

I want to share with the Committee what I regard as a significant and ongoing failure of the FOIA. Because of this failure, a significant body of CIA records related to the assassination of President Kennedy in 1963 remains improperly classified and hidden from public view. This failure can only encourage conspiracy mongering and cynicism. It needs to be rectified without delay.

By way of background, my journalism has mostly focused on the international media and Washington life. I also have a special interest in the assassination of President Kennedy in 1963. I have written about the JFK assassination, most recently in the cover story of the March 2005 issue of Reader's Digest. I have also written JFK articles for the Washington Post, Washington Monthly, the New York Review of Books, Slate, and Salon.

My JFK reporting has always been characterized by original interviews, new documents and a complete absence of conspiracy theories. My goal throughout has been to expand the public record of Kennedy's murder and to clarify key outstanding factual issues of interest to the general public. That is also my goal in providing this testimony.

My investigations of the JFK story would have been impossible without the Freedom of Information Act (FOIA) and JFK Assassination

Records Act. The former, in effect for nearly 40 years, is well known. The latter is less well known but equally successful in its own way.

The JFK Records Act was unanimously approved by Congress in October 1992 and signed into law by President George H.W. Bush. It mandated the "immediate" disclosure of virtually all of the government's assassination-related records. To insure compliance, the Congress created the Assassination Records Review Board (ARRB), composed of experts from the fields of law, history, and archival science.

The law proved quite successful, drawing praise from JFK scholars and advocates of open government. Between 1994 and 1998, the ARRB and its staff reviewed and released eight hundred thousand of pages of classified JFK material. At the same, in those cases where it was appropriate, the ARRB protected the confidentiality of sensitive unrelated intelligence operations and the names of living informants.

The Act demonstrated that, in the case of a national tragedy, the values of national security and governmental accountability were mutually reinforcing. By passing and implementing the Act, the Congress and all governmental agencies showed to a sometimes skeptical public that they had gone the proverbial extra mile on for the sake of full JFK disclosure.

Or so it seemed.

The problem I have encountered is this. The results of a FOIA request that I made to the CIA in July 2003 demonstrate the existence of a significant group of JFK assassination-related records at the CIA. These records were not provided to the ARRB and its staff and were never reviewed.

There is little dispute among leading scholars of the assassination that these records are potentially significant and should be released. They concern a now-deceased operations officer named George Joannides whose existence was first uncovered by the ARRB in 1998.

Joannides's CIA career intersects at four points with the JFK story.

1) In 1963, Joannides served as the chief of anti-Castro Psychological Warfare operations in the CIA's Miami station. He also gave money

and advice to a prominent anti-Castro student group known as the Revolutionary Student Directorate or DRE. In August 1963 members of the DRE had a series of encounters with Lee Harvey Oswald.

2) After President Kennedy was killed in Dallas, funds provided by Joannides helped these exiles promote the story that Oswald was a Castro sympathizer. Via George Joannides, the CIA paid for one of the first JFK conspiracy scenarios to reach public print.

3) In 1978, fifteen years after the Dallas tragedy, Joannides was called out of retirement to serve as the Agency's Principal Coordinator with congressional investigators. Joannides did not disclose his financial relationship with Oswald's Cuban antagonists to the Congress.

4) In 1998, when the ARRB asked about Joannides in 1998, the Agency replied that he did not exist. The ARRB did its own search and found five records showing otherwise. The ARRB did not review any other Joannides records because the Agency did not provide them.

For these reasons, a dozen leading JFK authors including Gerald Posner, Norman Mailer, Don DeLillo, and G. Robert Blakey wrote a public letter to The New York Review of Books (http://www.nybooks.com/articles/16865) in December 2003 calling on the Agency to release the relevant files on George Joannnides. Despite widely divergent interpretations of the JFK story, these authors all agree that the records of Joannides's actions in late 1963 are important to clarifying the JFK story.

Nonetheless, in December 2004, the CIA responded to my Freedom of Information Act request by saying that it would not release the newly-identified Joannides material in any form, even the portions that are relevant to the Kennedy assassination.

The law governing these records in question is clear.

1) **The intent of Congress in regards to JFK Records was full disclosure:** In the debate over the JFK Records Act, many Members made clear that they intended make public all JFK assassination related records as soon as they were identified as such. The law mandates "immediate

disclosure." It was passed unanimously on Oct. 30, 1992 and signed into law by President George H.W. Bush.

2) **The JFK Records Act is still effect today:** The Act states that its provisions, as applied to federal agencies, "shall continue in effect until such time as the Archivist certifies to the President and Congress that all assassination records have been made available to the public." The Archivist has made no such determination. So the Act still has force of law.

3) **The records in question are JFK records:** In four years, the ARRB established working criteria for determining whether or not a record was "assassination related." Two former members of the ARRB, Judge John Tunheim and Anna Nelson, say that the Joannides records that I have identified meet their criteria for "assassination-related." So does Jeremy Gunn, the former general counsel of the ARRB.

4) **The CIA's has acknowledged its "continuing obligations" under the JFK Records Act:** A Sept. 1998 "Memorandum of Understanding" between the ARRB and the CIA "seeks to ensure that the CIA completes its continuing obligations under the JFK Act in a timely fashion." Point (2) (f) of the MOU provides for the transmission to the JFK Records Collection of the National Archives of "any other non-duplicate assassination-related records created or discovered by the CIA after Sept. 30, 1998." The assassination-related records of George Joannides should be reviewed and released to the Archives immediately.

Yet the records remain secret. The problem, in a nutshell, is that the JFK Records Act is in effect but the CIA refuses to comply with it.

What can be done? Congress need not recreate the ARRB to insure compliance. Congress can simply write into the Freedom of Information Act a series of provisions requiring that FOIA requests for JFK assassination records be processed under JFK Records Act criteria. Importing the language directly from the JFK Records Act would be an uncontroversial, common sense way to re-affirm the intent of Congress to achieve full disclosure.

Such an amendment to the FOIA would mandate the Agency to review and release the relevant portions of the Joannides records it has already identified. It would also insure that other newly-discovered JFK

records in federal government possession are turned over to the National Archives expeditiously.

Without such action, the CIA's flouting of the JFK Records Act is likely to continue indefinitely. The Agency, perhaps driven by its legitimate imperatives of secrecy, seems incapable of complying with the JFK Records Act.

Inevitably, such actions will call into question the Agency's good faith on the murder of a sitting president, a recipe for cynicism and conspiracy mongering. The fact that the CIA is arguing in federal court today that "national security' requires keeping secrets about JFK's assassination 41 years ago is disappointing, if not disturbing. There is no legislative, legal or moral basis for such a claim.

At a time of intelligence reform and new foreign threats, the CIA's obtuse stance undermines confidence in government and in intelligence agencies. We, as a nation, call ill-afford that. In my view, Congress needs to direct the Agency to change its behavior and come into compliance with the JFK Records Act immediately. FOIA is an appropriate and practical vehicle for delivering that message.

Thank you for your consideration.

Jefferson Morley
17 March 2005

STATEMENT OF
THOMAS M. SUSMAN
ROPES & GRAY LLP

ON THE "OPEN GOVERNMENT ACT OF 2005" (S. 394)

BEFORE THE SUBCOMMITTEE ON TERRORISM, TECHNOLOGY AND HOMELAND SECURITY
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

MARCH 15, 2004

Senator Cornyn, Senator Leahy, and members of the Subcommittee, I am pleased and honored to appear today to add my strong support for the "Openness Promotes Effectiveness in our National Government Act of 2005" (the "OPEN Government Act," S. 394). This is a balanced and modest, but extremely valuable, measure that would strengthen the Freedom of Information Act in many important respects. A long-standing commitment by both sponsors of this bill to open government has been evident, and I applaud your taking your time today to focus congressional attention on the Freedom of Information Act – for the first time in this century.

I sat in this hearing room over 30 years ago – on the other side of the dais, behind the Administrative Practice and Procedure Subcommittee's Chairman, Ted Kennedy – and heard witnesses complain bitterly about how the Freedom of Information Act (FOIA) was toothless and ineffective. The legislation later enacted – amending two exemptions, setting time limits, limiting fees, directing disclosure of segregable parts of records, and more – overhauled the FOIA in major ways. I even had the pleasure to sit in this seat in the early '90s during Senator Leahy's hearings on what became the E-FOIA, a bill that helped move agency administration of the FOIA into the electronic era.

In my 24 years of private practice I have used the FOIA in a variety ways for a variety of clients. Since the Subcommittee is hearing from representatives of the media, a think tank, an advocacy group, and a library this morning, I would like initially to advance a perspective of the business community and then end or a more personal note.

Business Use of the FOIA

Businesses use the FOIA both offensively and defensively. A few examples from my own experience include:

• To obtain agency information relating to, and in anticipation of, a significant rulemaking that can affect entire industries or products. Examples include requests to

EPA a number of years ago for all their records on dioxin, and more recently for their records on MTBE.

• To find out what an agency has done regarding other companies or other industries when it knocks on a client's door with an enforcement issue. I have used the FOIA for this purpose the FTC, Justice Department, and SEC.

• To learn more about agency contracting and purchasing decisions, and to assist clients in competing more effectively for agency contracts.

• To assist clients in litigation – either with a government agency or a regulated company. FOIA provides an alternative avenue for discovery that is not tied to a judicially imposed schedule. In one case, over a hundred FOIA requests were filed with a number of agencies to obtain information supporting a newspaper's contention that its story's assertions of U.S. government backing to libel case plaintiff were well-founded.

• To learn about FDA meetings and decisions concerning review of products – of both clients and competing companies.

• To uncover the terms of an agreement privatizing publication of a journal previously published by the National Cancer Institute.

On a much broader plane, Nobel Prize winner Joseph Stiglitz has addressed, in "The Role of Transparency in Public Life," how the marketplace generally functions more efficiently through enhanced access to information, including government information. Clearly businesses benefit both directly and indirectly from open government information.

Importance of Access to Information

Although the United States was not the first nation with open government legislation, in the quarter century following enactment of the FOIA our system has been a model for the states and for other countries – from former Soviet Block nations to provinces and municipalities in China, from Mexico to South Africa. FOIA has proved indispensable to establishing and maintaining democratic societies and open markets. The U.S. has, however, fallen behind other places in the world in using technology to advance access to and dissemination of government information. We need not only to maintain our commitment to open government, but also to ensure that resources are provided to sustain open government initiatives. The Senate Judiciary Committee has long been a promoter and protector of open government and continues that great tradition today.

S. 394 addresses some of the most important issues frustrating FOIA administration today, but it does so carefully. It recognizes that FOIA administration is not a game of "us versus them," that some issues defy simple solution, and that Congress shares the responsibility for ensuring that the law works. In the end, this legislation is sensitive to the needs of both "us and them" – the user community and government agencies.

Key Elements of S. 394

My testimony will first focus on three of the most important provisions (or elements) in S. 394. I will then provide comments on a section-by-section basis.

1. Office of Government Information Services

Section 11, establishing an Office of Government Information Services (OGIS), is the most important provision in the bill. The OGIS will assist the public in resolving disputes with agencies as an alternative to litigation, review and audit agency compliance activities, and make recommendations and reports on FOIA administration. Many states have offices that assist in FOIA administration: as we have heard this morning, the Attorney General in Texas performs this kind of function, and there are other very effective models like the New York Committee on Open Government and the Connecticut Freedom of Information Commission. Likewise, a number of foreign countries and the European Union have FOI Ombuds offices. I am confident that the OGIS will more than pay for its costs each year by diverting cases from the courts.

Appropriations for the Administrative Conference of the U.S. must be restored for this provision to work. ACUS is the right place for the OGIS, since it historically has been a nonpartisan agency dedicated to improving administrative procedures and assisting agencies to do their jobs more efficiently and effectively. (If Congress does not make the very modest investment to restore ACUS, then the OGIS should nonetheless be established and placed elsewhere, like within the National Archives and Records Administration.)

2. Recovery of Attorneys Fees in Litigation

It is imperative that Congress reverse the application of the *Buckhannon* decision in FOIA cases. While this may seem self-serving, since I have been involved in litigating a number of FOIA cases over the past 2 decades, it is especially important that a plaintiff be able to recover fees and costs in FOIA cases, even where the court does not finally adjudicate the issue of disclosure:

> First, it has been clear from time to time that the government has withheld requested information to keep it out of the public domain for as long as possible, knowing full well that the law would not ultimately support withholding. There is no recourse in such situations for requesters other than to file suit, and these cases unfortunately do not move rapidly on the courts' dockets. So when the government sees the end of the road near, it need only hand over the information to the requester and the case is moot, with no consequences to the government.
>
> Second, the government (which, of course, knows what is in the records that have been requested) has the capacity to drag out and complicate litigation, thereby raising the costs to requesters once the lawsuit has begun. I was involved in one

case – on behalf of the National Security Archive, in fact – where the government asserted that it could not confirm or deny the existence of certain CIA records that it had actually disclosed in an academic conference during our litigation. The prospect for fee and cost liability at the end of this battle is the only potential inhibition for this kind of government conduct.

Finally, there has been a great deal of discussion this morning about delay in agency handling of FOIA cases. Sometimes we are talking about not days or weeks, but years. The filing of a complaint in court may be the only way to get the agency's attention on a request, yet this tool is virtually out of reach if fees and costs cannot be recovered once the agency wakes up, completes processing of the request, and hands over the information.

The *Buckhannon* decision may have made sense in the context where courts had little discretion over attorneys' fees and where lawsuits may have been filed unnecessarily. But in the FOIA context, this rewards agency recalcitrance and delay. For, if an agency can hand over requested documents with impunity any time before judgment is entered, the end result will be to chill the potential for judicial review as a means of policing the system.

Let me add that most lawyers working with the media, public advocacy groups, libraries, and businesses view litigation is a last resort. Our clients would rather have timely responses from the agency. They would rather have an Office of Government Information Services to help resolve disputes. They would rather negotiate than litigate differences with agencies. But when a FOIA lawsuit is filed, the plaintiff is assuming same role as law-enforcer played by the Texas Attorney General under that state's scheme. Where a lawsuit is responsible for disclosure, a public service has been performed and recovery of fees and costs is appropriate.

3. Enhanced Congressional Oversight

Finally, a number of the provisions of S. 394 reflect a commitment by Congress to improve its ability to oversee and strengthen administration of the FOIA and related laws.

- Clause (6) of Section 2 of the bill calls for regular congressional review of the FOIA.
- Section 5 requires public reporting on sanctions.
- Section 9 clarifies and expands certain reporting requirements, making it easier to compare and assess agency performance in handling FOIA requests.
- Section 12 directs the Comptroller General to assess and make recommendations on protection and disclosure of information under section 214 of the Homeland Security Act.
- Section 13 requires an OPM report on personnel policies that affect FOIA administration.

- And the study of delay mandated by the Commission established by the "Faster FOIA Act of 2005," introduced last week, will be groundbreaking in exploring new ways to speed dissemination of information under the FOIA.

Although these provisions, alone, will do little to alter FOIA compliance, they nevertheless have symbolic as well as real significance in signaling that Congress intends the FOIA to work effectively and smoothly and will continue aggressively to oversee agencies to make sure that is the case.

Congress is indispensable to ensuring effective FOIA administration, so it is unfortunate that Congress has often been AWOL when it comes to the FOIA. Senator Cornyn, you decried that it is has been over a decade since the Senate has convened a hearing to examine FOIA compliance. Senator Leahy, you have often called for congressional vigilance in maintaining the public's access to government information. These hearings and S. 394 mark the beginning of renewed congressional interest in the FOIA; they should not mark the end.

Section-by-Section Discussion of S. 394

Section 2. Findings. Congressional findings are ordinarily used to express useful sentiments, and they do so here. While clauses 1-5 are self-evident, they state principles that are absolutely correct and bear repeating. Clause 6 may also be self-evident, but it is a necessary expression of the role of Congress in maintaining an effective FOIA.

Section 3. News Media and Fees. This section recognizes that the public get information from sources wider than newspapers and magazines, and it will surely reduce litigation and time-consuming administrative disputes. The last sentence may appear open-ended or unenforceable, but since making a false statement to the government is a federal crime under 18 U.S.C. § 1001, I think the likelihood of misuse by requesters will be minimal.

Section 4. Recovery of Fees and Costs. I earlier expressed support for reversing the effects of the *Buckhannon* decision as to FOIA cases. I do think it needs to be clear that when the Section refers to "a substantial part of its requested relief," this does not impose a standard that requires a requester to obtain, for example, a high percentage of the pages of requested documents. This kind of result would allow the government to oppose recovery wherever the complainant does not get everything requested. Clarification of the legislative language would probably be useful on this point; the objective should be simply to return recovery of fees and costs in FOIA litigation to the pre-*Buckhannon* law.

Section 5. Sanctions. The additional reporting language here is modest and useful. When the original sanctions provision was drafted in 1974, Congress anticipated that it would be rarely used, but did not expect the use to be "zero times" in 30 years. At least having automatic public notification of the Special Counsel and better documentation through public reporting can help with congressional oversight and public understanding.

Section 6. Time Limits. One of the most intractable problems with FOIA administration since the statute's enactment almost 40 years ago has been agency delay. At least once each decade since the FOIA became law, Congress has revisited this issue and made changes or adjustments. Nonetheless, delay continues to vex FOIA users across government. However, clauses (G)(i)(I) and (II) should mirror more closely – or actually refer to – exemptions 1 and 4, so there will be no gap, for example, between "proprietary information" (I) and "trade secrets and other commercial information" under FOIA's § 552(b)(4).

There may also be additional third-party interests that are not covered, but should be better protected, like those under investigation by law enforcement agencies. Unfortunately, this section may potentially have unforeseeable consequences. The Committee should consider replacing Section 6 with the provisions of the "Faster FOIA Act of 2005," so that these issues, including changing the burden to sustain withholding in the case of delay, could be considered by the proposed Commission.

Section 7. Tracking System. Agencies should long ago have established the technology and procedures mandated under Section 7, but unfortunately these directives are anything but superfluous. Most practitioners advise requesters to follow submission of requests with a phone call to obtain a tracking number; you would be surprised at how many FOIA requests simply get lost or fall through agency cracks during processing. This new system, which is already in place in many other countries, is a step forward.

Section 8. "(b)(3) Statutes." The new clause to be added to FOIA § 552(b)(3) has a number of purposes, all worthwhile. For one, it will in the future eliminate doubt about whether Congress intended, in any enactment, to establish a new (b)(3) statutory exemption to the FOIA. For another, it prevents a FOIA exemption from sneaking into the statute books without adequate congressional scrutiny. And, as a corollary, it will allow appropriate Judiciary Committee oversight of backdoor FOIA exemptions. (There is no inherent objection, as a matter of principle, to specific statutory protection for particular types of information under new (b)(3) statutes. The problem is enactment of these provisions without adequate debate and discussion of consequences.)

Section 9. Reporting Requirements. Reporting has always been an important element of FOIA accountability since the 1974 Amendments, and the adjustments called for by this Section will help clarify what agencies are doing and facilitate more informed oversight. While it may be perfectly appropriate for agencies to include first-party requests in their FOIA statistics, such often-routine requests tend to skew the totals. The Department of Justice should have done more over the years to direct agencies so that their annual reports would be more useful; now it is time for Congress to step in.

Section 10. Private Entities. This Section addresses a narrow problem of contracted record maintenance. It appears narrow enough to avoid sweeping other contract data under the FOIA unintentionally. It does not affect the vitality of the *Forsham* case, holding that research data generated by agency grantees were not subject to the FOIA if

not in the government's possession, and allows the Shelby Amendment to continue to govern public access to these data.

Section 11. OGIS. This is the most important section of S. 394. The new mediation and ombuds-type functions for FOIA administration will be lodged in a new Office in the Administrative Conference of the U.S. ACUS, before Congress allowed its funding to lapse a decade ago, had contributed mightily to the improvement of agency practices and procedures, and it can do the same for FOIA under this new provision.

Section 12. CII Report. The study called for in this Section is much-needed. Few information issues have suffered from as much misinformation as has Critical Infrastructure Information and protection of other homeland security-related information. To the extent that clause (4) might be interpreted as suggesting a predetermined conclusion that somehow there should be an ascertainable short-term cause-and-effect relationship between protecting these data and stopping terrorism, it should be rewritten more neutrally. I would not want to have to justify protection of law enforcement information by showing a drop in crime – or, conversely, to justify FOIA disclosure by showing more informed public voting.
Section 13. Personnel Report. Finally, this Section directs what may be the first organized and comprehensive look at personnel policies relating to FOIA. The basic challenges in FOIA administration are faced every day by dedicated government employees who administer the law. The more we know about this area, the more we can hold agencies accountable for the way FOIA requests are, or are not, handled quickly and appropriately.

Personal Perspective on FOIA

I cannot discuss the Freedom of Information Act and its uses without relating a story that illustrates the power of this magnificent law in a very personal arena. Almost 25 years ago I sent a FOIA request to the Department of Justice for any records relating to my father, who had been a trial lawyer in Justice in the 1920s. Since my father died when I was very young, I knew nothing about his early years as a lawyer, how he came to DOJ, what he did there, or why he relocated to Houston. All this information, and more, was contained in photocopies of the faded personnel and litigation records that I obtained through my FOIA request. Our family's understanding of our own heritage has been enriched by having this information.

Beyond any individual story, the FOIA remains a powerful tool that contributes meaningfully to our democracy. But it is still imperfect. S.394 does an excellent job of addressing some of its remaining weaknesses.

Thank you for the opportunity to testify. I look forward to working with the Committee with a view to seeing this legislation enacted during the 109th Congress.

The Heritage Foundation
214 Massachusetts Ave. N.E Washington D.C. 20002 (202) 546-4400 www.heritage.org

CONGRESSIONAL TESTIMONY

The Open Government Act of 2005

Testimony before Senate Judiciary Committee Subcommittee on Terrorism, Technology and Homeland Security United States Senate

March 15, 2005

Mark Tapscott
Director,
Center for Media and Public Policy
The Heritage Foundation

MY NAME IS MARK TAPSCOTT. I AM DIRECTOR OF THE CENTER FOR MEDIA AND PUBLIC POLICY AT THE HERITAGE FOUNDATION. THE VIEWS I EXPRESS IN THIS TESTIMONY ARE MY OWN, AND SHOULD NOT BE CONSTRUED AS REPRESENTING ANY OFFICIAL POSITION OF THE HERITAGE FOUNDATION. I APPRECIATE VERY MUCH THE OPPORTUNITY TO TESTIFY ON THE OPEN GOVERNMENT ACT OF 2005.

AMONG SECRETARY OF DEFENSE DONALD RUMSFELD'S LESSER-KNOWN MARKS OF DISTINCTION IN HIS PUBLIC SERVICE CAREER IS THE IMPORTANT ROLE HE PLAYED AS A FRESHMAN REPUBLICAN MEMBER OF THE HOUSE OF REPRESENTATIVE IN WRITING AND HELPING SECURE PASSAGE OF THE 1966 FREEDOM OF INFORMATION ACT.

RUMSFELD OFFERED AN IMPORTANT OBSERVATION DURING A FLOOR SPEECH HE DELIVERED TO THE HOUSE JUNE 20, 1966, THAT HAS GREAT RELEVANCE FOR US TODAY AS WE SEEK TO IMPROVE THE PRESENT FREEDOM OF INFORMATION ACT SYSTEM.

RUMSFELD SAID: "THE LEGISLATION WAS INITIALLY OPPOSED BY A NUMBER OF AGENCIES AND DEPARTMENTS, BUT FOLLOWING THE HEARINGS AND ISSUANCE OF THE CAREFULLY PREPARED REPORT – WHICH CLARIFIES LEGISLATIVE INTENT – MUCH OF THE OPPOSITION SEEMS TO HAVE SUBSIDED.

"THERE STILL REMAINS SOME OPPOSITION ON THE PART OF A FEW GOVERNMENT ADMINISTRATORS WHO RESIST ANY CHANGE IN THE ROUTINE OF GOVERNMENT. THEY ARE FAMILIAR WITH THE INADEQUACIES OF THE PRESENT LAW AND OVER THE YEARS HAVE LEARNED HOW TO TAKE ADVANTAGE OF ITS VAGUE PHRASES.

"SOME POSSIBLY BELIEVE THEY HOLD A VESTED INTEREST IN THE MACHINERY OF THEIR AGENCIES AND BUREAUS AND THERE IS RESENTMENT OF ANY ATTEMPT TO OVERSEE THEIR ACTIVITIES, EITHER BY THE PUBLIC, THE CONGRESS OR APPOINTED DEPARTMENT HEADS."

WHAT RUMSFELD DESCRIBED AS HAVING HAPPENED OVER THE YEARS PRIOR TO 1966 IS STILL WITH US. IT IS THE PROCESS OF CAREER FEDERAL EMPLOYEES – WHO ROUTINELY HANDLE THE VAST MAJORITY OF FOIA REQUESTS - BECOMING EVER MORE FAMILIAR WITH THE VAGUE PHRASES AND LOOPHOLES OF THE FOIA ACT AND ITS IMPLEMING REGULATIONS AND CASE LAW OVER THE YEARS.

WE SHOULD RECOGNIZE THAT IN PART THIS PROCESS RESULTS FROM THE INTENTIONAL HEALTHY INSULATION OUR SYSTEM PROVIDES TO CAREER FEDERAL EMPLOYEES TO PROTECT THEM FROM INAPPROPRIATE PRESSURE FROM POLITICAL APPOINTEES. But THAT SAME INSULATION ALSO MAKES IT MORE DIFFICULT TO HOLD EMPLOYEES ACCOUNTABLE FOR THINGS LIKE FAILING TO PROPERLY ADMINISTER THE FOIA.

LET ME SAY AT THIS POINT THAT BEFORE BECOMING A JOURNALIST I SERVED IN THE LEGISLATIVE AND EXECUTIVE BRANCHES OF GOVERNMENT. I WAS THE FOURTH GENERATION OF MY FAMILY TO SERVE IN GOVERNMENT, I HAVE THE UTMOST RESPECT AND ADMIRATION FOR CAREER FEDERAL WORKERS. EVEN SO, THEY ARE NOT EXEMPT FROM HUMAN NATURE, WHICH TOO OFTEN SEEKS THE PATH OF LEAST RESISTANCE. IN FOIA MATTERS, THAT PATH TOO FREQUENTLY INVOLVES AN ABUSE OR MISAPPLICATION OF THE LAW.

I BELIEVE THIS PROCESS OF BUREAUCRATIC STULTIFICATION ACCOUNTS FOR MOST OF THE PROBLEMS WITH THE CURRENT FOIA SYSTEM AND HELPS EXPLAIN WHY A 2003 SURVEY BY THE NATIONAL SECURITY ARCHIVE FOUND AN FOIA SYSTEM "IN EXTREME DISARRAY." THAT SURVEY COVERED 35 FEDERAL AGENCIES THAT ACCOUNTED FOR 97% OF ALL FOIAS THE PREVIOUS YEAR.

AMONG OTHER THINGS, THE NATIONAL SECURITY ARCHIVE SAID IT FOUND THAT "AGENCY CONTACT INFORMATION ON THE WEB WAS OFTEN INACCURATE; RESPONSE TIMES LARGELY FAILED TO MEET THE STATUTORY STANDARD; ONLY A FEW AGENCIES PERFORMED THOROUGH SEARCHES, INCLUDING E-MAIL AND MEETING NOTES; AND THE LACK OF CENTRAL ACCOUNTABILITY AT THE AGENCIES RESULTED IN LOST REQUESTS AND INABILITY TO TRACK PROGRESS."

IN A SECOND PHASE OF THE SAME 2003 SURVEY, THE NATIONAL SECURITY ARCHIVE ASKED THE SAME AGENCIES FOR LISTS OF THE 10 OLDEST OUTSTANDING FOIA REQUESTS IN THEIR SYSTEMS. HERE IS HOW THE ARCHIVE DESCRIBED THE RESULT:

"IN JANUARY 2003, THE ARCHIVE FILED FOIA REQUESTS ASKING FOR COPIES OF THE '10 OLDEST OPEN OR PENDING' FOIA REQUESTS AT EACH OF THE 35 FEDERAL AGENCIES THAT TOGETHER HANDLE MORE THAN 97% OF ALL FOIA REQUESTS. SIX AGENCIES STILL HAVE NOT RESPONDED IN FULL, MORE THAN TEN MONTHS LATER AND DESPITE REPEATED PHONE CONTACTS ...THE FREEDOM OF INFORMATION ACT ITSELF, AS AMENDED IN 1996, GIVES AGENCIES 20 WORKING DAYS TO RESPOND TO FOIA REQUESTS."

HAVING SPENT NEARLY TWO DECADES AS A JOURNALIST HERE IN WASHINGTON, D.C. AND HAVING FILED MORE FOIA REQUESTS THAN I CARE TO REMEMBER, THERE WERE NO SURPRISES FOR ME IN THE NATIONAL SECURITY ARCHIVE SURVEY. NOR WAS I SURPRISED IN 2002 WHEN MY OWN CENTER FOR MEDIA AND PUBLIC POLICY FOUND IN A SURVEY OF FOUR AGENCIES THAT JOURNALISTS RANKED ONLY FOURTH AMONG THE MOST ACTIVE FOIA REQUESTORS. ASK THEM WHY AND THE REPLIES INVARIABLY ARE VARIATIONS ON THIS THEME: IT WASTES TOO MUCH TIME AND THEY PROBABLY WON'T DISCLOSE WHAT I NEED WITHOUT A BIG LEGAL FIGHT, WHICH MY PAPER CAN'T AFFORD, SO WHY BOTHER?

TWO OF THE MOST SERIOUS PROBLEMS OF THE CURRENT FOIA SYSTEM ARE, ONE, THE ABSENCE OF ANY GENUINELY SERIOUS CONSEQUENCES EITHER FOR AN INDIVIDUAL FEDERAL EMPLOYEE RESPONDING TO AN FOIA REQUEST OR FOR HIS OR HER AGENCY, AND, TWO, THE ABSENCE OF A NEUTRAL ARBITER WITH AUTHORITY TO MEDIATE DISPUTES BETWEEN AGENCIES AND REQUESTORS AND TO OVERSEE ADMINISTRATION OF THE FOIA. THE OPEN GOVERNMENT ACT OF 2005 ADDRESSES BOTH OF THESE PROBLEMS EFFECTIVELY AND REALISTICALLY IN MY JUDGMENT.

TO ADDRESS THE FIRST PROBLEM, THE ACT INCLUDES PROVISIONS PROVIDING THAT WHEN AN AGENCY MISSES A STATUTORY FOIA DEADLINE IT IS PRESUMED TO HAVE WAIVED THE RIGHT TO ASSERT VARIOUS EXEMPTIONS, EXCEPT IN CASES INVOLVING NATIONAL SECURITY, PERSONAL PRIVACY, PROPRIETARY COMMERCIAL INFORMATION OR OTHER REASONABLE EXCEPTIONS. THE AGENCY CAN ONLY OVERCOME THIS WAIVER BY PRESENTING CLEAR AND CONVINCING EVIDENCE THAT IT MISSED THE DEADLINE FOR GOOD CAUSE.

THE ACT ALSO PROVIDES ENHANCED AUTHORITY FOR THE OFFICE OF SPECIAL COUNSEL TO TAKE DISCIPLINARY ACTION AGAINST GOVERNMENT OFFICIALS FOUND BY A COURT TO HAVE ARBITRARILY AND CAPRICIOUSLY DENIED A REQUESTOR SEEKING INFORMATION THAT SHOULD BE DISCLOSED. THE ACT FURTHER REQUIRES THE ATTORNEY GENERAL TO INFORM THE OFFICE OF SPECIAL COUNSEL OF SUCH COURT FINDINGS AND TO REPORT TO CONGRESS ON THOSE FINDINGS. THE OFFICE OF SPECIAL COUNSEL IS ALSO REQUIRED TO ISSUE AN ANNUAL REPORT TO CONGRESS ON ITS RESPONSE TO SUCH COURT FINDINGS.

TO ADDRESS THE SECOND PROBLEM, THE ACT ESTABLISHES THE OFFICE OF GOVERNMENT INFORMATION SERVICES WITHIN THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, WHICH IS AN

INDEPENDENT AGENCY AND ADVISORY BODY ESTABLISHED IN 1964 TO RECOMMEND IMPROVEMENTS TO CONGRESS AND EXECUTIVE BRANCH AGENCIES. MOST OF THE CONFERENCE'S MORE THAN 200 RECOMMENDED CHANGES HAVE BEEN ADOPTED, AT LEAST IN PART.

THIS OFFICE OF GOVERNMENT INFORMATION SERVICES WOULD FUNCTION AS AN FOIA OMBUDSMAN WITH AUTHORITY TO REVIEW AGENCY POLICIES AND PRACTICES IN ADMINISTERING THE FOIA, RECOMMEND POLICY CHANGES AND MEDIATE FOIA DISPUTES BETWEEN AGENCIES AND REQUESTORS.

WHILE I AM PARTICULARLY ENCOURAGED BY THESE TWO PROVISIONS OF THE ACT, I BELIEVE IT CONTAINS MANY ADDITIONAL MUCH-NEEDED REFORMS IN OTHER AREAS OF THE FOIA, INCLUDING CLOSURE OF THE OUTSOURCED DOCUMENTS LOOPHOLE, REQUIRING OPEN GOVERNMENT IMPACT STATEMENTS OF PROPOSED LEGISLATION, CHANGING THE WAY AGENCIES MEASURE AND REPORT THEIR FOIA RESPONSE TIMES, AND MUCH ELSE. IN SHORT, I BELIEVE THIS ACT AND ITS COMPANION PROPOSAL TO CREATE A 16-MEMBER OPEN GOVERNMENT COMMISSION TO STUDY FOIA RESPONSE DELAYS AND RECOMMEND NEEDED ACTIONS ARE AMONG THE MOST IMPORTANT PIECES OF LEGISLATION TO BE CONSIDERED BY THE 109TH CONGRESS.

IT IS MY HOPE THAT THOSE MEMBERS OF CONGRESS WHO CONSIDER THEMSELVES OF A CONSERVATIVE PERSUASION WILL PAY PARTICULAR ATTENTION TO THE OPEN GOVERNMENT ACT OF 2005 BECAUSE IT CAN BE AN EFFECTIVE RESOURCE FOR RESTORING OUR GOVERNMENT TO ITS APPROPRIATE SIZE AND FUNCTIONS. SUNSHINE IS THE BEST DISINFECTANT NOT ONLY IN THE PHYSICAL WORLD, BUT PERHAPS EVEN MORE SO IN FIGHTING WASTE, FRAUD AND CORRUPTION IN GOVERNMENT AND IN PROTECTING PUBLIC SAFETY:

THIS IS WELL-ILLUSTRATED BY THESE RECENT EXAMPLES OF REPORTING MADE POSSIBLE BY THE FOIA:

- MIAMI'S 47 MPH "HURRICANE:" HURRICANE FRANCES MADE LANDFALL MORE THAN 100 MILES NORTH OF MIAMI-DADE COUNTY LAST YEAR, BUT THAT DIDN'T STOP THOUSANDS OF RESIDENTS IN FLORIDA'S MOST POPULOUS COUNTY FROM RECEIVING NEARLY $28 MILLION IN FEDERAL DISASTER AID, ACCORDING TO THE *FORT LAUDERDALE SUN-SENTINEL*. USING THAT STATE'S FOIA, A TEAM OF SUN-SENTINEL REPORTERS FOUND THAT RESIDENTS USED THEIR RELIEF CHECKS TO PAY FOR THINGS LIKE 5,000 TELEVISIONS ALLEGEDLY DESTROYED BY FRANCES, AS WELL AS 1,440 AIR

CONDITIONERS, 1,360 TWIN BEDS, 1,311 WASHERS AND DRYERS AND 831 DINING ROOM SETS. ALL THIS DESPITE THE FACT FRANCES' TOP WINDS REACHED ONLY 47 MPH IN THE MIAMI-DADE AREA.

- **ILLEGAL ALIENS CONVICTED OF HORRIBLE CRIMES: LOTS OF PEOPLE KNOW THAT FEDERAL LAW REQUIRES ILLEGAL ALIENS CONVICTED OF HEINOUS CRIMES LIKE RAPE, MURDER, CHILD MOLESTATION HERE IN AMERICA TO BE DEPORTED ONCE THEY'VE SERVED THEIR JAIL TERMS. UNFORTUNATELY, IT APPEARS THAT THOUSANDS SUCH ALIENS MAY NOW BE WANDERING A STREET NEAR YOUR HOME OR YOUR CHILD'S SCHOOL BECAUSE FEDERAL IMMIGRATION OFFICIALS FAILED TO SHOW UP WHEN THESE CRIMINALS WERE RELEASED FROM JAIL. EVEN WORSE, ACCORDING TO COX NEWSPAPERS WASHINGTON BUREAU REPORTERS ELIOT JASPIN AND JULIA MALONE, THE JUSTICE DEPARTMENT WON'T RELEASE A GOVERNMENT DATABASE THAT COULD HELP JOURNALISTS AND PRIVATE CITIZENS HELP OFFICIALS FIND THESE ALIENS.**

WE ARE INDEED FIGHTING A GLOBAL WAR ON TERRORISM THAT PUTS UNUSUAL DEMANDS ON THE FOIA SYSTEM. CONSERVATIVES AND LIBERALS ALIKE SHOULD ALWAYS REMEMBER THAT AN EVER EXPANSIVE, EVER-MORE INTRUSIVE GOVERNMENT IS ULTIMATELY ANTITHETICAL TO THE PRESERVATION OF INDIVIDUAL LIBERTY AND DEMOCRATIC ACCOUNTABILITY IN PUBLIC AFFAIRS.

****

The Heritage Foundation is a public policy, research, and educational organization operating under Section 501(C)(3). It is privately supported, and receives no funds from any government at any level, nor does it perform any government or other contract work.

The Heritage Foundation is the most broadly supported think tank in the United States. During 2004, it had more than 200,000 individual, foundation, and corporate supporters representing every state in the U.S. Its 2004 income came from the following sources:

Individuals	56%
Foundations	24%
Corporations	4%
Investment Income	11%
Publication Sales and Other	5%

The top five corporate givers provided The Heritage Foundation with 2% of its 2004 income. The Heritage Foundation's books are audited annually by the national

accounting firm of Deloitte & Touche. A list of major donors is available from The Heritage Foundation upon request.

Members of The Heritage Foundation staff testify as individuals discussing their own independent research. The views expressed are their own, and do not reflect an institutional position for The Heritage Foundation or its board of trustees.

○