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INFORMATION POLICY IN THE 21st CENTURY: A REVIEW OF THE FREEDOM OF INFORMATION ACT

HEARING

BEFORE THE

SUBCOMMITTEE ON GOVERNMENT MANAGEMENT, FINANCE, AND ACCOUNTABILITY

OF THE

COMMITTEE ON GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED NINTH CONGRESS

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INFORMATION POLICY IN THE 21st CENTURY: A REVIEW OF THE FREEDOM OF INFORMATION ACT

WEDNESDAY, MAY 11, 2005

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON GOVERNMENT MANAGEMENT,
FINANCE, AND ACCOUNTABILITY,
COMMITTEE ON GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:05 p.m., in room 2247, Rayburn House Office Building, Hon. Todd Russell Platts (chairman of the subcommittee) presiding.

Present: Representatives Platts, Waxman, Towns, Duncan, and Maloney.

Staff present: Mike Hettinger, staff director; Dan Daly, counsel; Tabetha Mueller, professional staff member; Jessica Friedman, legislative assistant; Nathaniel Berry, clerk; David Rapallo, minority counsel; Adam Bordes, Anna Laitin, and David McMillen, minority professional staff members; and Jean Gosa, minority assistant clerk.

Mr. PLATTS. A quorum being present, this hearing of the Government Reform Subcommittee on Management, Finance, and Accountability will come to order.

The information age has given us unprecedented capabilities to disseminate and collect information. With the worldwide deployment of the Internet, information is available from around the globe 24 hours a day, 7 days a week. It has changed the way citizens get information from their government and how government serves its citizens.

At the same time, technological advances subject us to new threats, both to our security and our right to privacy. One could argue that effective information policy in government has never been more important than it is today and that the balancing act has never been more difficult.

The Freedom of Information Act [FOIA], was signed into law almost 40 years ago in 1966. Enacted after 11 years of debate, FOIA established a statutory right of public access to executive branch information.

FOIA provides that any person has a right to obtain Federal agency records. Originally, the act included nine categories of information protected from disclosure. Congress has added additional exemptions over time. Recent legislative proposals would make sig-

nificant changes to the exemptions and create new deadlines for agency compliance.

As Congress considers changing FOIA, it is important to understand the underlying intent of the act and how recent changes in technology and national security have affected FOIA implementation. Balancing the need for open government with the need to protect information vital to national security and personal privacy is a constant struggle. Federal departments and agencies are operating in the post-September 11 information age and face 21st century security information management and resource challenges.

This hearing will give the subcommittee members an opportunity to hear the Department of Justice, the agency responsible for providing for the guidance Government-wide, and the National Archives and Records Administration which faces a huge task of electronically archiving millions of Government documents. Witnesses from these agencies will testify on their experience implementing FOIA.

The subcommittee will also hear from FOIA requesters to understand the opportunities to improve the process for obtaining information.

We are pleased to have two panels of distinguished witnesses here today. Our first panel includes the honorable Allen Weinstein, Archivist of the United States from the National Archives and Records Administration and Mr. Carl Nichols, Deputy Assistant Attorney General at the Department of Justice Civil Division, Federal Programs Branch. These executive branch witnesses are joined by Ms. Linda Koontz, the Director of Information Management for the Government Accountability Office.

Our second panel will include Mr. Jay Smith, chairman of the Newspaper Association of America and president of Cox Newspapers; Mr. Ari Schwartz, associate director of the Center for Democracy and Technology and Mr. Mark Tapscott, director of the Center for Media and Public Policy of the Heritage Foundation. We certainly appreciate all of our witnesses being here today and we look forward to your oral testimonies.

Before I recognize our ranking member, Mr. Towns, I have two items I'd like to submit for the record. My esteemed colleague, Mr. Shays of Connecticut, has asked to have information included on the use of FOIA exemptions by the National Science Foundation.

[The information referred to follows:]

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BERNARD SANDERS, VERMONT,
INDEPENDENT

May 9, 2005

The Honorable Todd Russell Platts, Chairman
House Government Reform Committee
Subcommittee on Government Management, Finance and Accountability
Rayburn House Office Building, B-371 C
Washington, D.C. 20515

Dear ~~Mr.~~ Todd Chairman:

Attached please find a letter dated May 9, 2005 from Ms. T. Irene Sanders, Executive Director, for the Washington Center for Complexity and Public Policy.

I am requesting the attached letter as well as other information given to your Subcommittee by Ms. Sanders concerning National Science Foundation FOIA Exemptions be made part of the hearing record entitled, *Information Policy in the 21st Century: A Review of the Freedom of Information Act* scheduled for Wednesday May 11, 2005.

Thank you for your consideration.

Sincerely,

Christopher Shays
Chairman

May 9, 2005

Honorable Todd Russell Platts, Chairman
Subcommittee on Government Management, Finance and Accountability
U.S. House of Representatives
B-371 C, Rayburn House Office Building
Washington, DC 20515

re: Use of FOIA Exemptions by NSF to Cover Bad Practice

Dear Mr. Chairman:

This letter accompanies background material sent to your office about a FOIA request made by the Washington Center for Complexity and Public Policy to the National Science Foundation (NSF) on October 5, 2004.

In the FOIA request, I asked for the release of information related to NSF proposal # 0433490 entitled—*Workshop on Complex Adaptive Systems Research: Implications for Public Policy-making.* As Principal Investigator (PI) for this proposal, I initiated the FOIA request after it became clear to me and my colleagues that NSF was using the Privacy Act and FOIA exemptions to hide its severely flawed and poorly managed proposal review process.

According to NSF, it received over 700 proposals for the specific 2004 competition in which we submitted our proposal. Of those 700 proposals, only 37 or slightly over 5%, were funded. The total amount awarded to the 37 successful projects was $21.7 million.

As Principal Investigator for the proposed project, I was allowed to read and share with my colleagues the comments of individuals who reviewed our proposal on behalf of NSF. After reading the reviews for our proposal and talking with other scientists about their experiences with NSF, including the NSF Program Officer who handled the reviews for our proposal, we became much more concerned about the integrity of the NSF proposal review process than we were about our project not being funded.

At this time in our nation's history there is great concern about how federal funds are allocated, and on what basis and whose interests are being served. It is our opinion that as a federally funded organization, NSF has an obligation to the public to ensure that its research funds are allocated in an unbiased manner to projects that respond to the strategic needs and interests of this country.

With that as the underlying premise, my colleagues and I decided to attempt a "review of the reviewers," using our proposal as a case study. Through such a review we hoped to contribute to the general understanding of the NSF proposal review and grant-making process, and thus its impact on the advancement of science.

In our FOIA request we specifically asked for: 1) the names and titles of individuals who reviewed our proposal either individually or as part of a review panel; 2) the instructions they received regarding the review process; and 3) an explanation about how reviewers are selected and what compensation they receive for this work. NSF provided some information about its peer review process. However, citing the Privacy Act and FOIA exemptions [U.S.C. 552 (b) 5 and 6], it denied our request for the names of individuals who reviewed the proposal, thus making it impossible for us to conduct a thorough "review of the reviewers."

In a letter to me denying our request for the names of reviewers, NSF's General Counsel, Lawrence Rudolph, made a series of odd statements. "In highly specialized scientific fields many clues to a reviewer's identify may be present in a written review. Even the style or distinctive syntax of the reviewer may give away his or her identify. Providing the names of reviewers who actually reviewed particular proposals will so narrow the possibilities as to enable PIs to directly match reviewer names to their individual reviews." We were not sure what to make of this, except that it seemed like a coy legal maneuver encouraging us to "pin the tail on the reviewer," while being blindfolded by NSF's improper use of FOIA exemptions to hide the true identities of reviewers.

After completing the NSF appeals process and receiving a final denial from NSF's General Counsel, an interesting twist of fate confirmed our suspicions and revealed more about NSF's use of FOIA exemptions to cover its poor management practices than did the months of correspondence with NSF. On February 11, 2005, I received an email invitation from NSF to participate as a reviewer for a new competition; an invitation, which I declined in light of our recent FOIA experience.

This invitation, however, revealed a number of contradictions in the official information received from NSF as a result of our FOIA request. Specifically it showed that 1) NSF reviewers are not carefully selected nor are their credentials always known to NSF; 2) Instructions to reviewers are not clear; 3) NSF's communication with reviewers is incomplete and inconsistent; and 4) NSF uses an honor system (self-reporting conflicts of interests) with reviewers who are not carefully selected and whose credentials are not always known to NSF.

In conclusion, we hope that the information provided to you about our FOIA experience with NSF will lead to inquiries about NSF's improper use of FOIA exemptions to perpetuate a severely flawed system that is responsible for making critical decisions about the annual allocation of close to five billion dollars of scientific research funds. Please let me know if you have questions or need additional information.

Sincerely,

T. Irene Sanders

T. Irene Sanders, Executive Director
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Mr. PLATTS. Senator Cornyn of Texas has requested that a statement be inserted into the record as well.

Without objection, it is now ordered.

[The prepared statement of Senator Cornyn follows:]

U.S. Senator John Cornyn

Privacy, Security and Information: A Look at FOIA in the Post-9/11 World
Oversight Hearing:
"Information Policy in the 21st Century: A Review of the Freedom of Information Act"

House Government Reform Subcommittee on
Government Management, Finance, and Accountability
Wednesday, May 11, 2005, 2:00 p.m., Rayburn House Office Building Room 2247

I would like to offer my thanks and congratulations to Representatives Tom Davis, chairman of the House Government Reform Committee; Henry A. Waxman, the committee's ranking member; Todd Platts, chairman of the Subcommittee on Government Management, Finance, and Accountability; and the subcommittee's ranking member, Edolphus Towns. I am pleased that the subcommittee is holding this hearing today on the topic of open government and the Freedom of Information Act.

The cause of open government is one that is near and dear to my heart. 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.

On March 15, 2005, during the first-ever National Sunshine Week, I chaired a Senate Judiciary subcommittee hearing entitled "Openness in Government and Freedom of Information: Examining the OPEN Government Act of 2005." The hearing was the third in a series of bipartisan events in which Senator Patrick Leahy and I have joined forces to promote the cause of open government. 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 (S. 394) – legislation that promotes accountability, accessibility, and openness in the federal government, principally by strengthening and enhancing FOIA. And on March 10, Senator Leahy and I joined forces again to introduce the Faster FOIA Act of 2005 (S. 589). Moreover, two days after the hearing, on March 17, the Senate Judiciary Committee approved the Faster FOIA Act and sent the legislation to the full Senate.

I am pleased that distinguished Representatives of both parties have seen fit to introduce companion bills in the House. I am especially gratified that my fellow Texan, Representative Lamar Smith, has decided to sponsor the OPEN Government Act (H.R. 867) and has agreed to co-sponsor the Faster FOIA Act. And I'm pleased that Representative Brad Sherman, with whom I am also working to reform the Presidential succession law, is sponsoring the Faster FOIA Act (H.R. 1620).

I'm also grateful that a number of members of Congress, on both sides of the aisle, have agreed to co-sponsor either or both bills – including Senators Lamar Alexander, Chuck Grassley, Johnny Isakson, Dick Durbin, Russ Feingold, and Ben Nelson, as well as Representatives

Michael McCaul, Jerry Moran, Ron Paul, Brian Baird, Howard Berman, Rick Boucher, Henry Cuellar, Major Owens, Mark Udall, and Lynn Woolsey.

The Faster FOIA Act would simply 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.

The OPEN Government Act 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 Texas Attorney General Greg Abbott as well as a broad coalition of open government advocates and organizations across the ideological spectrum, including the following organizations:

American Association of Law Libraries
American Civil Liberties Union
American Library Association
American Society of Newspaper Editors
Associated Press Managing Editors
Association of Alternative Newsweeklies
Association of Health Care Journalists
Center for Democracy & Technology
Coalition of Journalists for Open Government
Committee of Concerned Journalists
Common Cause
Education Writers Association
Electronic Privacy Information Center
Federation of American Scientists/Project on Government Secrecy
Free Congress Foundation/Center for Privacy & Technology Policy
Freedom of Information Center, Univ. of Mo.
The Freedom of Information Foundation of TX
The Heritage Foundation/Center for Media and Public Policy
Information Trust
League of Women Voters of the United States
Magazine Publishers of America
National Conference of Editorial Writers
National Freedom of Information Coalition
National Newspaper Association
National Press Club
National Security Archive/Geo. Wash. Univ.
Newspaper Association of America
OMB Watch
OpenTheGovernment.org
People for the American Way
Project on Government Oversight
Radio-Television News Directors Association
Reporters Committee for Freedom of the Press
Society of Environmental Journalists

I have also discussed these efforts with various senior officials throughout the Administration on a variety of occasions.

I would like to make just a few comments on the written testimony of the Justice Department submitted to this House subcommittee late yesterday evening. At the March 15 Senate hearing I chaired, I noted:

> I am 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.

The Justice Department's written testimony raises questions. As far as I can tell, the written testimony does not specifically withdraw the Department's previous comment, or specifically oppose (at least not by name) either of the two bills that Senator Leahy and I have introduced. Yet the testimony nevertheless makes clear that the Department sees no reason to amend FOIA (other than to reverse at least a portion of a unanimous U.S. Supreme Court ruling, *Department of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001), that construed one of the exemptions under FOIA more narrowly than the Department would have preferred – a proposal I am happy to study and to consider).

Moreover, the testimony explicitly opposes any effort to amend FOIA in order to reverse the effects of another Supreme Court decision on FOIA legislation – as section 4 of the OPEN Government Act would do. I would like to take a moment to explain my concerns with this particular portion of the testimony.

Under traditional "prevailing party" statutes, a party that clearly loses a lawsuit – such as through a judgment on the merits, or a settlement agreement enforced through a consent decree – must pay the reasonable attorneys' fees of the prevailing party. In a recent 5-4 decision, however, the Supreme Court held that a party does *not* have to pay the attorney's fees of the other party, notwithstanding the application of a prevailing party statute, "where there is no judicially sanctioned change in the legal relationship of the parties" – such as when a defendant belatedly gives the plaintiff everything that is asked, perhaps in order to avoid a judgment from the court itself. *Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources*, 532 U.S. 598, 605 (2001). In other words, under this legal interpretation, a party would not be entitled to attorneys' fees even if the lawsuit was the primary or even sole "catalyst" of the change.

I make no comment on the correctness of the Court's *Buckhannon* ruling as a *legal* matter. As a *policy* matter, however, *Buckhannon* raises serious and special concerns within the FOIA context.

Under *Buckhannon*, it is now theoretically possible for an obstinate government agency to substantially deter many legitimate and meritorious FOIA requests. Here's how: A government agency refuses to disclose documents even though they are clearly subject to FOIA. The FOIA requestor has no choice but to undertake the time and expense of hiring an attorney to file suit to compel FOIA disclosure. Some time after the suit is filed, the government agency eventually decides to disclose the documents – thereby rendering the lawsuit moot. By doing so, the agency can cite *Buckhannon* for the proposition that, because there is no court-ordered judgment favoring the requestor, the requestor is not entitled to recover attorneys' fees.

This straightforward application of the *Buckhannon* ruling effectively taxes all potential FOIA requestors. As a result, many attorneys could stop taking on FOIA clients – and many FOIA requestors could stop making even legitimate and public-minded FOIA requests – rather than pay what one might call the "*Buckhannon* tax."

How pervasive is this problem in reality? Let me state upfront that I believe strongly that the vast majority of federal employees and officials are good people who go to work every morning hoping to do the best job that they can. In fact, I believe that a robust and fully effective FOIA system would help demonstrate just how often government officials do a good job.

Nevertheless, the temptation to take advantage of the *Buckhannon* decision in the FOIA context is very real. Indeed, in just the short time my office has been provided to respond to the Department's testimony, we have already collected various examples. I attach letters from FOIA practitioners and requestors here.

One letter from Clark Hoyt, Washington Editor for Knight Ridder, describes an effort to secure information about the Department of Veterans Affairs and its efforts to examine the processing of disability claims by veterans. The letter notes: "My personal view is that the agency was following a pattern of stonewalling until it knew it could resist no longer. It forced us to spend thousands of dollars to compel its adherence to the law, delayed our stories by many months and then caved at the last minute, knowing it had no chance of winning in court. The final step in this pattern was the filing for summary judgment, which ignored the agency's flagrant violations of the Act's time limitations for production and seeks to avoid paying the plaintiff's legal fees. This is a reprehensible pattern, and I'm delighted that the Cornyn-Leahy bill would address it directly."

The National Security Archive has a similar tale to tell. And as the Archive's General Counsel, Meredith Fuchs, concludes: "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."

And there are other examples.[1] Indeed, according to one *former* FOIA attorney: "I generally represent my clients on a *pro bono* basis. However, I am no longer able to take most FOIA cases because I know it is highly likely that the agency will turn over the documents after I file suit and then refuse to pay attorneys' fees and expenses."

One final point about the Department's written testimony. The testimony cites as authority a passage from the *Buckhannon* majority opinion, authored by Chief Justice Rehnquist, stating that the fears of abuses, such as those described in this statement, are "entirely speculative and unsupported by any empirical evidence."

This quotation warrants several comments.

First, the examples provided here, and collected under extraordinarily short time constraints, should put to rest any claim that members of Congress are somehow wildly speculating about problems in the administration of FOIA.

Second, the effort to cite *Buckhannon* is itself curious. After all, the Chief Justice was referring only to the litigants in the case – *not to policymakers* – in stating that fears of such abuses are "entirely speculative and unsupported by any empirical evidence." *Id.* at 608. Indeed, he makes clear later in the opinion that the Court is *not* "determin[ing] which way these various policy arguments cut," but is instead ruling solely on the basis of the *legal* issues presented in the case. *Id.* at 610.

What's more, the Chief Justice specifically points out that the "fear of mischievous defendants only materializes in claims for equitable relief, for so long as the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case." *Id.* at 608-9. *So the Chief Justice was not even referring to FOIA plaintiffs.* After all, FOIA plaintiffs do not generally pursue monetary damages, because FOIA does not provide for monetary damages. As one commentator has noted:

> *Buckhannon*'s bar on catalyst attorneys' fees threatens FOIA actions to an even greater extent than it does traditional civil rights litigation. Many civil rights claims for damages are immune from *Buckhannon*'s greatest impact because 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, when defendants voluntarily remedy civil rights plaintiffs' injunctive claims, courts will not dismiss a plaintiff's action as moot if the defendant might repeat the challenged conduct. Although those conditions will aid some civil rights plaintiffs in avoiding

[1] *See, e.g., Landers v. Department of Air Force*, 257 F. Supp. 2d 1011, 1012-13 (S.D. Ohio 2003) ("After this litigation had been initiated, the Defendant produced responsive documents to the Plaintiff and requested that the Court, as a result, dismiss this lawsuit as moot. . . . It could not be questioned that this lawsuit was the catalyst which led to the disclosure of the documents, the production of which the Plaintiff had requested. Without filing this lawsuit, the Defendant would not have complied with its statutory duty to produce the requested documents. Nevertheless, the Plaintiff is not entitled to recover his attorney's fees, since he obtained no relief from this Court. . . . Aware of *Buckhannon*, the Plaintiff argues that this Court should, nevertheless, exercise its equitable discretion and award him attorney's fees. Since this Court is without such discretion, it declines that request.").

> *Buckhannon*, they will rarely assist a FOIA fee claimant. Plaintiffs never claim damages under FOIA because the law does not provide for them, and they rarely seek ongoing injunctive relief or declaratory judgments. Nearly all FOIA actions simply demand a one-time release of documents. Therefore, . . . government defendants could moot virtually all 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 would be able to enforce FOIA against intransigent government agencies. Furthermore, even in those cases, agencies would be able to prolong the litigation without fear of paying costs for their opponents. These bars to access, expediency, and enforceability directly contravene the purposes of amendments to FOIA and, as noted above, would greatly diminish FOIA's value for public interest actions--the very claims that FOIA fees promote.

David Arkush, *Preserving "Catalyst" Attorneys' Fees Under the Freedom of Information Act in the Wake of* Buckhannon Board and Care Home v. West Virginia Department of Health and Human Resources, 37 Harv. C.R.-C.L. L. Rev. 131, 137-38 (2002).

Even the concurring opinion of Justice Antonin Scalia acknowledges that the *Buckhannon* ruling will "sometimes den[y] fees to the plaintiff with a solid case whose adversary slinks away on the eve of judgment." *Id.* at 618 (Scalia, J., concurring). And as always, Justice Scalia is careful to distinguish the legal arguments in the case, which the Supreme Court must entertain, from the policy arguments, which are the province of the Congress to resolve. *See id.* at 616.

I find the actions of the Justice Department, described above, curious. Accordingly, and assuming that my schedule permits, I will plan to raise this issue at a Senate Judiciary Committee hearing currently scheduled for the afternoon of Thursday, May 12. That hearing will consider a number of Justice Department nominations, including a nomination to the position of Assistant Attorney General for the Office of Legal Policy – an office that plays a role in coordinating various legal policy issues for the Department, including FOIA policy.

Again, I would like to congratulate the members of this committee and subcommittee for today's hearing. I look forward to future bipartisan efforts to enhance the openness, accountability, and accessibility of our government, consistent with the founding principles of our nation.

KNIGHT RIDDER

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April 21, 2005

James C. Ho
Chief Counsel
U.S. Senator John Cornyn, Chairman
U.S. Senate Judiciary Subcommittee on Immigration, Border Security & Citizenship
Dirksen Senate Office Building
Room 139
Washington, DC 20510

Dear Mr. Ho:

Early in 2004, Chris Adams and Alison Young, investigative reporters in the Knight Ridder Washington bureau, began looking into how promptly and correctly the Department of Veterans Affairs processes disability claims by veterans. Historically, veterans have endured long waits and inconsistent decisions by the VA, many of which are overturned on appeal. With thousands of new combat veterans from the wars in Afghanistan and Iraq likely to be filing with the agency, we wanted to see if it had fulfilled promises to reform its procedures.

Adams and Young made their first requests to the VA in February, 2004, for records and databases related to claims handling. Having no success in obtaining what they were after, they filed the first of 30 FOIA requests in April. Despite the requirements of the Freedom of Information Act, the VA delayed, ignored or rejected the requests, frequently missing the Act's deadlines by weeks or months. The agency asserted a number of reasons for denying our requests, including in some cases business confidentiality for records that were as much as 50 years old. Throughout the process, agency officials acted as though the request for information that was clearly public was somehow inappropriate. I want to stress that, at no time, were we asking for confidential information, such as individuals' medical records or any other catetgory that would be exempt under FOIA.

In the spirit of Sen. Cornyn's view that freedom of government information is an important value because the government works for the people, not the other way around, our intention was to assess how well the Department of Veterans Affairs is serving veterans who have made enormous sacrifices to defend the American people.

Basically our requests centered on two classes of records. First we wanted to get copies of the various electronic databases that the VA maintains to assess just how well it is performing in handling claims. Second, we wanted documentation of the agency's oversight of the officially designated Veterans Service Officers, who are charged by the government with helping millions of veterans file their claims for compensation for service connected disabilities, injuries and illnesses.

When we contacted officials about obtaining copies of the VA databases, we first asked for the technical layout of the electronic files. We needed this information to know if the databases we were seeking actually contained data that would be useful for us. The VA never produced the technical layouts and only produced the databases in November and December, after we filed suit.

When we asked for records on the revocation, suspension or denial of VA accreditation of Veterans Service Officers, the agency took three months to deny our request, but at the same time offered to give up 275,000 pages of irrelevant documents at a cost of $41,250. We appealed to the VA's chief FOIA officer and on Sept. 30, got letters and memos on the revocation of accreditation for two people. On Oct. 8, we got more records on another person.

On Nov. 1, 2004, we filed suit in U.S. District Court for the District of Columbia, seeking to compel the VA to live up to the requirements of the Freedom of Information Act. Our case, No. 04-1896 (GK), was assigned to Judge Gladys Kessler.

On Feb. 15, 2005, the judge ordered the VA to speed up the production of records for purposes of discovery. Her order produced another 2,250 documents on the issues of Veterans Service Officers and an admission from the VA that the agency had disciplined only two individuals since 1999, despite the fact that other VA records indicated widespread failures on the part of VSOs to adequately represent the interests of veterans filing claims.

Ultimately, the VA provided all the records we sued over, the last of which was received on March 9, 2005, three days after we published our package of stories detailing the failings of the VA to properly handle claims. In thousands of cases, Knight Ridder reported, veterans die years after they file their claims -- still without a decision.

The VA has now filed a motion for summary judgment on the grounds that it fully complied with FOIA in our case. We will file in opposition and will seek sanctions against the agency -- including mandatory FOIA training for key personnel, an agreement by the agency to abide by the law and recovery of our substantial attorney fees, which are in excess of $30,000, and climbing.

My personal view is that the agency was following a pattern of stonewalling until it knew it could resist no longer. It forced us to spend thousands of dollars to compel its adherence to the law, delayed our stories by many months and then caved at the last minute, knowing it had no chance of winning in court. The final step in this pattern was the filing for summary judgment, which ignored the agency's flagrant violations of the Act's time limitations for production and seeks to avoid paying the plaintiff's legal fees. This is a reprehensible pattern, and I'm delighted that the Cornyn-Leahy bill would address it directly.

Please let me know if there is any other information you need. Also feel free to contact our investigations editor, Jim Asher, who worked closely with our FOIA attorney in the case. Jim can be reached at 202-383-6053.

You can read the stories by Adams and Young on our Web site, www.krwashington.com. I am appending our complaint filed in federal district court.

I can't tell you how much we appreciate your interest in our case and in the much broader issue of openness in government.

Best regards,

Clark Hoyt
Washington Editor
Knight Ridder

** TOTAL PAGE.04 **

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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

An Independent non-governmental research institute and library located at the George Washington University, the Archive collects and publishes declassified documents obtained through the Freedom of Information Act. Publication royalties and tax deductible contributions through The National Security Archive Fund, Inc. underwrite the Archive's Budget.

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

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VIA E-MAIL

May 10, 2005

The Honorable John Cornyn
United States Senate
517 Hart Senate Office Building
Washington, D.C. 20510-4304

The Honorable Patrick Leahy
United States Senator
433 Russell Senate Office Bldg
Washington, DC 20510

Dear Senator Cornyn and Senator Leahy:

It is my understanding that Congress is considering changing the language of the Freedom of Information Act (FOIA) to allow for the recovery of attorneys' fees and expenses if the agency turns over the requested documents after a suit is filed, regardless of whether or not a court orders the agency to turn over the documents. I think such a change would serve the public interest.

In the following two cases, I filed suit, and shortly after I filed suit, the agency turned over the requested documents and I did not recovery attorney fees.

Forest Guardians v. U.S. Fish and Wildlife Service, 04-N-1396 (OES)(D.Colo. 2004)

Forest Guardians v. U.S. Fish and Wildlife Service, 04-MW-2529 (OES)(D.Colo. 2005)

I generally represent my clients on a *pro bono* basis. However, I am no longer able to take most FOIA cases because I know it is highly likely that the agency will turn over the documents after I file suit and then refuse to pay attorneys' fees and expenses.

Thank you for your consideration of this important issue.

Sincerely,

/s Robert Ukeiley
Robert Ukeiley, Esq.

C

Motions, Pleadings and Filings

United States District Court,
S.D. Ohio,
Western Division.
Mark E. LANDERS, Plaintiff,
v.
DEPARTMENT OF THE AIR FORCE, Defendant.
No. C-3-00-567.

March 7, 2003.

Action was brought against the Department of the Air Force under the Freedom of Information Act (FOIA). After decision was entered holding the case moot due to Air Force's production of the requested documents, plaintiff moved for statutory award of attorney fees as the prevailing party. The District Court, Rice, Chief Judge, held that plaintiff was not a prevailing party for purpose of attorney fee award.

Motion denied.

West Headnotes

Records ⇐68
326k68 Most Cited Cases
Plaintiff in Freedom of Information Act (FOIA) action against the Department of the Air Force was not a "prevailing party" for purpose of a statutory award of attorney fees, even though the lawsuit was the catalyst which led to the disclosure of the documents that plaintiff requested, where the suit was dismissed as moot when the Air Force produced responsive documents after the suit was filed; plaintiff obtained no relief from the court. 5 U.S.C.A. § 552(a)(4)(E).
***1011** Gary Alan Loxley, Dayton, OH, for Plaintiff.

Gregory Gordon Lockhart, Dale Ann Goldberg, United States Attorney's Office, Dayton, OH, for Defendant.

DECISION AND ENTRY OVERRULING PLAINTIFF'S MOTION FOR ATTORNEY'S FEES (DOC. # 41)

RICE, Chief Judge.

Plaintiff brought this litigation under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, seeking both a declaration that the Defendant has violated that statute by failing to produce documents in response to his request under the FOIA, ***1012** and an order of the Court directing the Defendant to produce those documents. The Plaintiff also sought an award of reasonable attorney's fees, in accordance with § 552(a)(4)(E). After this litigation had been initiated, the Defendant produced responsive documents to the Plaintiff and requested that the Court, as a result, dismiss this lawsuit as moot. *See* Doc. # 18. On February 25, 2002, this Court entered a Decision, concluding that the Defendant's production of documents had rendered this lawsuit moot. *See* Doc. # 30.

This case is now before the Court on the Plaintiff's Motion for Attorney's Fees (Doc. # 41). The award of attorney's fees in an action under the FOIA is governed by 5 U.S.C. § 552(a)(4)(E), which provides that a District Court "may assess against the United States reasonable attorney fees and other litigation costs reasonably incurred in any case under this section in which the complainant has substantially prevailed." For reasons which follow, the Court concludes that the Plaintiff has not "substantially prevailed" in this litigation and that, therefore, he is not entitled to an award of attorney's fees. [FN1]

FN1. As a consequence, it is not necessary

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> to address the Defendant's assertion that the Court should deny Plaintiff's request for attorney's fees, because it was not made within 14 days of the entry of judgment, as is required by Rule 54(d)(2) of the Federal Rules of Civil Procedure.

In *Buckhannon Board & Care Home, Inc., v. West Virginia Dept. of Health and Human Resources,* 532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001), the Supreme Court addressed statutes which provide that the "prevailing party" can recover attorney's fees. In particular, the *Buckhannon* Court rejected the proposition that the catalyst theory was a proper basis for awarding attorney's fees under such statutes and held that a "prevailing party" is one who has been awarded relief by the court, either through a judgment on the merits or a court-ordered consent decree. Therein, the Supreme Court reiterated that it has interpreted fee shifting provisions consistently. *Id.* at 603 n. 4, 121 S.Ct. 1835 (citing *Hensley v. Eckerhart,* 461 U.S. 424, 433 n. 7, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)). In light of *Buckhannon,* the courts which have considered the question have held that "substantially prevailed," as used in the FOIA, should be interpreted consistently with the definition of "prevailing party." *Oil, Chemical and Atomic Workers v. D.O.E.,* 288 F.3d 452 (D.C.Cir.2002); *Union of Needletrades, Industrial and Textile Employers v. United States Immigration and Naturalization Service,* 202 F.Supp.2d 265 (S.D.N.Y.2002). Thus, those courts have held that the plaintiff in an action under the FOIA must have been awarded relief, such as a judgment on the merits or a court-ordered consent decree, in order to be entitled to recover attorney's fees under that statute. This Court finds the result reached and the rationale employed by those decisions to be compelling and will, therefore, follow them.

It could not be questioned that this lawsuit was the catalyst which led to the disclosure of the documents, the production of which the Plaintiff had requested. Without filing this lawsuit, the Defendant would not have complied with its statutory duty to produce the requested documents. Nevertheless, the Plaintiff is not entitled to recover his attorney's fees, since he obtained no relief from this Court. Accordingly, the Court concludes that the Plaintiff did not substantially prevail and that, therefore, he is not entitled to recover his attorney's fees under § 552(a)(4)(E).

Aware of *Buckhannon,* the Plaintiff argues that this Court should, nevertheless, exercise its equitable discretion and award ***1013** him attorney's fees. Since this Court is without such discretion, it declines that request. In *Alyeska Pipeline Serv. Co. v. Wilderness Society,* 421 U.S. 240, 95 S.Ct. 1612, 44 L.Ed.2d 141 (1975), the Supreme Court reiterated that the American Rule applies in federal courts, so that each party is responsible for paying its own attorney's fees, unless Congress has provided otherwise by statute. [FN2] Thus, this Court is without equitable discretion to award attorney's fees to Plaintiff. Moreover, it is axiomatic that this Court cannot require the United States to pay an opposing litigant's attorney's fees, unless it has waived its sovereign immunity. *Library of Congress v. Shaw,* 478 U.S. 310, 106 S.Ct. 2957, 92 L.Ed.2d 250 (1986). The United States has not waived its sovereign immunity to permit a District Court to exercise its equitable discretion to require the Government to pay an opponent's attorney's fees.

> FN2. Therein, the Supreme Court also acknowledged that a federal court retains the inherent authority to award attorney's fees when one party has litigated in bad faith. Herein, the Plaintiff does not assert that the Defendant has so litigated.

Accordingly, the Court overrules Plaintiff's Motion for Attorney's Fees (Doc. # 41).

257 F.Supp.2d 1011

Motions, Pleadings and Filings (Back to top)

- 3:00CV00567 (Docket) (Nov. 30, 2000)

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JOHN CORNYN
TEXAS

United States Senate

WASHINGTON, DC 20510-4305

March 16, 2005

The Honorable Alberto R. Gonzales
Attorney General of the United States
Department of Justice
Room 4400
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001

Dear General Gonzales:

During your confirmation hearing before the Senate Judiciary Committee on January 6, 2005, you expressed your commitment to work with Senator Leahy and me on the issue of openness in government. I am pleased to report to you that, in the ensuing months, substantial progress has been made on this issue in the United States Senate.

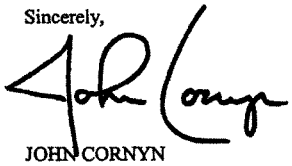
Last month, Senator Leahy and I introduced the OPEN Government Act of 2005 – legislation to promote accessibility, accountability, and openness in government, principally by strengthening the procedures that govern the administration of the Freedom of Information Act. I am pleased to report that this bipartisan effort has already been joined by Senators Isakson and Alexander, and I am grateful that the Justice Department's website notes that the bill "holds the possibility of leading to significant improvements in the Freedom of Information Act."

I chaired a Senate Judiciary subcommittee hearing yesterday morning to examine the provisions of the OPEN Government Act, and heard testimony from FOIA experts across the political spectrum – including an expert from the office of Texas Attorney General Greg Abbott. As you will recall from your past experiences with Texas law, many of the key provisions contained within the OPEN Government Act are derived from Texas law – including the establishment of a FOIA hotline to empower requestors to track their requests, as well as the imposition of consequences for agencies that fail to comply with the statutory deadlines to respond to requests. According to the Texas Building and Procurement Commission, Texas agencies answered approximately 2 million requests for information in the 2002-03 fiscal year. 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" – but it does demonstrate that the provisions of the OPEN Government Act have been tested in a state that handles a substantial workload of requests.

I am also pleased to report that, just last week, Senator Leahy and I introduced the Faster FOIA Act of 2005 – legislation to establish an advisory commission to study delays in the processing of FOIA requests. Senator Grassley has agreed to co-sponsor that measure, and I am hopeful that that legislation will also be enacted into law.

Congratulations again on your continued service to your country and to the President. I look forward to working with you to improve openness in government and on other issues of importance to our nation.

Sincerely,



JOHN CORNYN
United States Senator

Mr. PLATTS. It is now my pleasure to yield to the ranking member, the gentlemen from New York, Mr. Towns, for the purposes of an opening statement.

Mr. TOWNS. Thank you very much, Mr. Chairman. What I would like to do is to yield to the ranking member of the full committee.

Mr. WAXMAN. You may go ahead.

Mr. TOWNS. Well, I'm allowing you to go first.

Mr. PLATTS. Mr. Waxman from California is recognized.

Mr. WAXMAN. Well, I thank you very much for yielding to me. I would have waited my turn, but I'll take your generosity.

Thank you, Chairman Platts, for holding today's hearing. Our subject today is the law that keeps Government open and accountable, the Freedom of Information Act. The premise of the Freedom of Information Act is that our democracy depends on informed citizens. Yet over the past 4 years we have witnessed an unprecedented assault on the Freedom of Information Act and our Nation's other open Government laws.

The Bush administration has undermined the Nation's sunshine laws while simultaneously expanding the power of Government to act in the shadows. The presumption of disclosure under the Freedom of Information Act has been overturned. Public access to Presidential records has been curtailed.

Classification and pseudo-classification are on the rise. These trends are ominous and they are carefully documented in a report my staff prepared last fall.

I would like to ask unanimous consent to make this report part of the hearing record.

Mr. PLATTS. Without objection it is so ordered.

[The prepared statement of Hon. Henry A. Waxman follows:]

Statement of Rep. Henry A. Waxman, Ranking Minority Member
Committee on Government Reform
Subcommittee on Government Management, Finance, and Accountability
Hearing on "An Introduction to the Freedom of Information Act"

May 11, 2005

Thank you, Chairman Platts, for holding today's hearing. Our subject today is the law that keeps government open and accountable: the Freedom of Information Act.

The premise of the Freedom of Information Act is that our democracy depends on informed citizens. Yet over the past four years, we have witnessed an unprecedented assault on the Freedom of Information Act and our nation's other open government laws.

The Bush Administration has undermined the nation's sunshine laws while simultaneously expanding the power of government to act in the shadows. The presumption of disclosure under the Freedom of Information Act has been overturned. Public access to presidential records has been curtailed. Classification and pseudo-classification are on the rise.

These trends are ominous, and they are carefully documented in a report my staff prepared last fall. I ask unanimous consent to make this report part of the hearing record.

A bipartisan group of Senators and Representatives have taken important steps to improve the operations of the Freedom of Information Act. They have introduced two bills that aim to speed up agency response to FOIA requests and fix weaknesses in the Act. I look forward to this Committee's consideration of the two bills and hope that we will be able to work together to improve the Freedom of Information Act.

But the Bush administration's wholesale assault on open government demands that Congress do more. This week, I will be reintroducing the Restore Open Government Act. The legislation restores the presumption that government operations should be transparent. It overturns President Bush's executive order curtailing public access to presidential records, prohibits the executive branch from creating secret presidential advisory committees, and eliminates unnecessary secrecy at the Department of Homeland Security.

In addition, this year's version of the bill addresses the disturbing new trend of agencies relying on undefined new pseudo-classifications to protect information from public disclosure. The best known of these designations are "Sensitive but Unclassified" and "For Official Use Only," but there are many others. Most of these designations have no statutory or regulatory basis, yet they are being used to keep important information from the public.

Open and accountable government is a bedrock principle of our democracy. Secrecy breeds arrogance and abuse of power; sunshine fosters scrutiny and responsible government. The bill I will introduce this week restores the presumption that a strong government must remain open to scrutiny.

Mr. Platts, I want to thank you again for holding this hearing and for your interest in the Freedom of Information Act.

UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON GOVERNMENT REFORM — MINORITY STAFF
SPECIAL INVESTIGATIONS DIVISION
SEPTEMBER 14, 2004

SECRECY IN THE BUSH ADMINISTRATION

PREPARED FOR

REP. HENRY A. WAXMAN

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EXECUTIVE SUMMARY

Open and accountable government is one of the bedrock principles of our democracy. Yet virtually since inauguration day, questions have been raised about the Bush Administration's commitment to this principle. News articles and reports by independent groups over the last four years have identified a growing series of instances where the Administration has sought to operate without public or congressional scrutiny.

At the request of Rep. Henry A. Waxman, this report is a comprehensive examination of secrecy in the Bush Administration. It analyzes how the Administration has implemented each of our nation's major open government laws. The report finds that there has been a consistent pattern in the Administration's actions: laws that are designed to promote public access to information have been undermined, while laws that authorize the government to withhold information or to operate in secret have repeatedly been expanded. The cumulative result is an unprecedented assault on the principle of open government.

The Administration has supported amendments to open government laws to create new categories of protected information that can be withheld from the public. President Bush has issued an executive order sharply restricting the public release of the papers of past presidents. The Administration has expanded the authority to classify documents and dramatically increased the number of documents classified. It has used the USA Patriot Act and novel legal theories to justify secret investigations, detentions, and trials. And the Administration has engaged in litigation to contest Congress' right to information.

The records at issue have covered a vast array of topics, ranging from simple census data and routine agency correspondence to presidential and vice presidential records. Among the documents that the Administration has refused to release to the public and members of Congress are (1) the contacts between energy companies and the Vice President's energy task force, (2) the communications between the Defense Department and the Vice President's office regarding contracts awarded to Halliburton, (3) documents describing the prison abuses at Abu Ghraib, (4) memoranda revealing what the White House knew about Iraq's weapons of mass destruction, and (5) the cost estimates of the Medicare prescription drug legislation withheld from Congress.

There are three main categories of federal open government laws: (1) laws that provide public access to federal records; (2) laws that allow the government to restrict public access to federal information; and (3) laws that provide for congressional access to federal records. In each area, the Bush Administration has acted to restrict the amount of government information that is available.

Laws That Provide Public Access to Federal Records

Beginning in the 1960s, Congress enacted a series of landmark laws that promote "government in the sunshine." These include the Freedom of Information Act, the Presidential Records Act, and the Federal Advisory Committee Act. Each of these laws enables the public to view the internal workings of the executive branch. And each has been narrowed in scope and application under the Bush Administration.

Freedom of Information Act

The Freedom of Information Act is the primary law providing access to information held by the executive branch. Adopted in 1966, FOIA established the principle that the public should have broad access to government records. Under the Bush Administration, however, the statute's reach has been narrowed and agencies have resisted FOIA requests through procedural tactics and delay. The Administration has:

- Issued guidance reversing the presumption in favor of disclosure and instructing agencies to withhold a broad and undefined category of "sensitive" information;
- Supported statutory and regulatory changes that preclude disclosure of a wide range of information, including information relating to the economic, health, and security infrastructure of the nation; and
- Placed administrative obstacles in the way of organizations seeking to use FOIA to obtain federal records, such as denials of fee waivers and delays in agency responses.

Independent academic experts consulted for this report decried these trends. They stated that the Administration has "radically reduced the public right to know," that its policies "are not only sucking the spirit out of the FOIA, but shriveling its very heart," and that no Administration in modern times has "done more to conceal the workings of government from the people."

The Presidential Records Act

The Presidential Records Act, which was enacted in 1978 in the wake of Watergate, establishes the important principle that the records of a president relating to his official duties belong to the American people. Early in his term, President Bush issued an executive order that undermined the Presidential Records Act by giving former presidents and vice presidents new authority to block the release of their

records. As one prominent historian wrote, the order "severely crippled our ability to study the inner workings of a presidency."

The Federal Advisory Committee Act

The Federal Advisory Committee Act prevents secret advisory groups from exercising hidden influence on government policy, requiring openness and a balance of viewpoints for all government advisory bodies. The Bush Administration, however, has supported legislation that creates new statutory exemptions from FACA. It has also sought to avoid the application of FACA through various mechanisms, such as manipulating appointments to advisory bodies, conducting key advisory functions through "subcommittees," and invoking unusual statutory exemptions. As a result, such key bodies as the Vice President's energy task force and the presidential commission investigating the failure of intelligence in Iraq have operated without complying with FACA.

Laws that Restrict Public Access to Federal Records

In the 1990s, the Clinton Administration increased public access to government information by restricting the ability of officials to classify information and establishing an improved system for the declassification of information. These steps have been reversed under the Bush Administration, which has expanded the capacity of the government to classify documents and to operate in secret.

The Classification and Declassification of Records

The classification and declassification of national security information is largely governed by executive order. President Bush has used this authority to:

- Reverse the presumption against classification, allowing classification even in cases of significant doubt;
- Expand authority to classify information for longer periods of time;
- Delay the automatic declassification of records;
- Expand the authority of the executive branch to reclassify information that has been declassified; and
- Increase the number of federal agencies that can classify information to include the Secretary of Health and Human Services, the Secretary of Agriculture, and the Administrator of the Environmental Protection Agency.

Statistics on classification and declassification of records under the Bush Administration demonstrate the impact of these new policies. Original decisions to classify information — those in which an authorized classifier first determines that disclosure could harm national security — have soared during the Bush Administration. In fiscal years 2001 to 2003, the average number of original decisions to classify information increased 50% over the average for the previous five fiscal years. Derivative classification decisions, which involve classifying documents that incorporate, restate, or paraphrase information that has previously been classified, have increased even more dramatically. Between FY 1996 and FY 2000, the number of derivative classifications averaged 9.96 million per year. Between FY 2001 and FY 2003, the average increased to 19.37 million per year, a 95% increase. In the last year alone, the total number of classification decisions increased 25%.

Sensitive Security Information

The Bush Administration has sought and obtained a significant expansion of authority to make designations of Sensitive Security Information (SSI), a category of sensitive but unclassified information originally established to protect the security of civil aviation. Under legislation signed by President Bush, the Department of Homeland Security now has authority to apply this designation to information related to any type of transportation.

The Patriot Act

The passage of the Patriot Act after the September 11, 2001, attacks gave the Bush Administration new authority to conduct government investigations in secret. One provision of the Act expanded the authority of the Justice Department to conduct secret electronic wiretaps. Another provision authorized the Justice Department to obtain secret orders requiring the production of "books, records, papers, documents, and other items," and it prohibited the recipient of these orders (such as a telephone company or library) from disclosing their existence. And a third provision expanded the use of "sneak and peak" search warrants, which allow the Justice Department to search homes and other premises secretly without giving notice to the occupants.

Secret Detentions, Trials, and Deportations

In addition to expanding secrecy in government by executive order and statute, the Bush Administration has used novel legal interpretations to expand its authority to detain, try, and deport individuals in secret. The Administration asserted the authority to:

- Hold persons designated as "enemy combatants" in secret without a hearing, access to a lawyer, or judicial review;

- Conduct secret military trials of persons held as enemy combatants when deemed necessary by the government; and
- Conduct secret deportation proceedings of aliens deemed "special interest cases" without any notice to the public, the press, or even family members.

Congressional Access to Federal Records

Our system of checks and balances depends on Congress being able to obtain information about the activities of the executive branch. When government operates behind closed doors without adequate congressional oversight, mismanagement and corruption can flourish. Yet despite Congress' constitutional oversight role, the Bush Administration has sharply limited congressional access to federal records.

GAO Access to Federal Records

A federal statute passed in 1921 gives the congressional Government Accountability Office the authority to review federal records in the course of audits and investigations of federal programs. Notwithstanding this statutory language and a long history of accommodation between GAO and the executive branch, the Bush Administration challenged the authority of GAO on constitutional grounds, arguing that the Comptroller General, who is the head of GAO, had no "standing" to enforce GAO's right to federal records. The Bush Administration prevailed at the district court level and GAO decided not to appeal, significantly weakening the authority of GAO.

The Seven Member Rule

The Bush Administration also challenged the authority of members of the House Government Reform Committee to obtain records under the "Seven Member Rule," a federal statute that requires an executive agency to provide information on matters within the jurisdiction of the Committee upon the request of any seven of its members. Although a district court ruled in favor of the members in a case involving access to adjusted census records, the Bush Administration has continued to resist requests for information under the Seven Member Rule, forcing the members to initiate new litigation.

Withholding Information Requested by Congress

On numerous occasions, the Bush Administration has withheld information requested by members of Congress. During consideration of the Medicare legislation in 2003, the Administration withheld estimates showing that the bill would cost over

$100 billion more than the Administration claimed. In this instance, Administration officials threatened to fire the HHS Actuary, Richard Foster, if he provided the information to Congress. In another case, the Administration's refusal to provide information relating to air pollution led Senator Jeffords, the ranking member of the Senate Committee on Environment and Public Works, to place holds on the nominations of several federal officials.

On over 100 separate occasions, the Administration has refused to answer the inquiries of, or provide the information requested by, Rep. Waxman, the ranking member of the House Committee on Government Reform. The information that the Administration has refused to provide includes:

- Documents requested by the ranking members of eight House Committees relating to the prison abuses at Abu Ghraib and elsewhere;
- Information on contacts between Vice President Cheney's office and the Department of Defense regarding the award to Halliburton of a sole-source contract worth up to $7 billion for work in Iraq; and
- Information about presidential advisor Karl Rove's meetings and phone conversations with executives of companies in which he owned stock.

The 9-11 Commission

On November 27, 2002, Congress passed legislation creating the National Commission on Terrorist Attacks upon the United States (commonly known as the 9-11 Commission) as a congressional commission to investigate the September 11 attacks. Throughout its investigation, however, the Bush Administration resisted or delayed providing the Commission with important information. For example, the Administration's refusal to turn over documents forced the Commission to issue subpoenas to the Defense Department and the Federal Aviation Administration. The Administration also refused for months to allow Commissioners to review key presidential intelligence briefing documents.

The Collective Impact

Taken together, the actions of the Bush Administration have resulted in an extraordinary expansion of government secrecy. External watchdogs, including Congress, the media, and nongovernmental organizations, have consistently been hindered in their ability to monitor government activities. These actions have serious implications for the nature of our government. When government operates in secret, the ability of the public to hold the government accountable is imperiled.

Mr. WAXMAN. A bipartisan group of Senators and Representatives have taken important steps to improve the operations of the Freedom of Information Act. They have introduced two bills that aim to speed up agency response to FOIA requests and fix weaknesses in the act.

I look forward to this committee's consideration of the two bills and hope that we will be able to work together to improve the Freedom of Information Act. But the Bush administration's wholesale assault on open Government demands that Congress do more. This week I will be reintroducing the Restore Open Government Act. The legislation restores the presumption that Government operations should be transparent. It overturns President Bush's Executive order curtailing public access to Presidential records. It prohibits the executive branch from creating secret Presidential advisory committees and eliminates unnecessary secrecy at the Department of Homeland Security.

In addition, this year's version of the bill addresses the disturbing new trend of agencies relying on undefined new pseudo-classifications to protect information from public disclosure. The best known of these designations are "sensitive but unclassified" and "for official use only."

But there are many others. Most of these designations have no statutory or regulatory basis, yet they are being used to keep important information from the public. Open and accountable government is the bedrock principle of our democracy. Secrecy breeds arrogance and abuse of power. Sunshine fosters scrutiny and responsible government. The bill I will introduce this week restores the presumption that a strong government must remain open to scrutiny.

Mr. Chairman, I want to thank you again for holding this hearing and for your interest in the Freedom of Information Act and I want to thank Ranking Member Towns for yielding his time.

Mr. PLATTS. Thank you, Mr. Waxman. I appreciate the ranking member keeping me in proper order of seniority. I didn't see you come in, Mr. Waxman. It was appropriate that you were recognized next.

I now yield to Mr. Towns.

Mr. TOWNS. Thank you very much, Mr. Chairman, for holding this hearing on Government Information Policy and the Freedom of Information Act. It is a pleasure to have such a broad range of witnesses. Their diverse views will afford us a better context for balancing the interests of government accountability and national security.

Like most of us I believe the cornerstone of a free and democratic society rests upon the principle of public access to governmental activity. By ensuring such access to governmental institutions and deliberations we are less likely to make ill-advised decisions concerning the welfare of our country and more accountable for the decisions we have made.

We must also reassess the deficiencies associated with processing FOIA requests. A more technological advanced public information process should result in improvement to the timely and efficient disclosure of agency records.

That doesn't, however, seem to be what has happened. In 2004, agencies reported having 160,000 outstanding FOIA requests. From the prior 2003 cycle, an increase of about 15 percent. Another way to put it: We are going in the wrong direction.

Nevertheless, the sheer volume of requests is having a severe impact on agency resources and information technology components and it may be impacting the time it takes for certain agencies to complete FOIA requests. In 2004 alone the Federal Government received roughly 4 million FOIA requests, an increase of 25 percent over 2003.

Knowing this, perhaps the agency community should reexamine its methods of utilizing information technology in the FOIA process.

In closing, I look forward to hearing from both panels. I hope our subcommittee can become a catalyst for more effective and practical public information policies.

Mr. Chairman, at this time I would like to submit a letter written by a constituent of Senator Leahy's named Charlotte Dennett. Her correspondence details the difficulty many individuals face in receiving timely and complete responses from the Government to their FOIA request. I am asking unanimous consent that this be included in today's hearing record.

Mr. PLATTS. Without objection, it is so ordered.

[The prepared statement of Hon. Edolphus Towns follows:]

Congressman Ed Towns
Committee on Government Reform
Freedom of Information Act Review
May 11, 2005

Thank you, Mr. Chairman, for holding our first subcommittee hearing on government information policy and the Freedom of Information Act. It's a pleasure to have such a broad range of witnesses. Their diverse views will afford us a better context for balancing the interests of government accountability and national security.

Like most of us, I believe the cornerstone of a free and democratic society rests upon the principle of public access to governmental activities. By ensuring such access to governmental institutions and deliberations, we are less likely to make ill-advised

decisions concerning the welfare of our country and more accountable for the decisions we have made.

First enacted in 1966, FOIA remains the bedrock of public access and disclosure for all government activities and deliberations. In the four decades since its enactment, however, our nation has been significantly transformed through both technological advancement and national security vulnerabilities. Unfortunately, these competing interests are fostering an environment where some are seeking greater disclosure through more efficient electronic means, while others believe we ought to limit public access to government information in the interest of national security. From this perspective, now is an appropriate time for Congress to reexamine current policies concerning access to and disclosure of government information.

We must also reassess the deficiencies associated with processing FOIA requests. A more technologically advanced public information process should result in improvements to the timely and efficient disclosure of agency records. That doesn't, however, seem to be what has happened. For 2004, agencies reported having 160,000 outstanding FOIA requests from the prior 2003 cycle, an increase of about 15 percent.

Nevertheless, the sheer volume of requests is having a significant impact on agency resources and information technology components, and may be impacting the time it takes for certain agencies to complete FOIA requests. In 2004 alone, the federal government received roughly four million FOIA requests—an increase of 25% over 2003. Knowing this, perhaps the agency community should reexamine its

methods for utilizing information technology in the FOIA process.

In closing, I look forward hearing from both panels, and hope our subcommittee can become a catalyst for more effective and practical public information policies. Thank you, Mr. Chairman.

Mr. TOWNS. On that note I yield back.

Mr. PLATTS. Thank you, Mr. Towns.

We now recognize the gentlelady from New York, Mrs. Maloney, for purposes of an opening statement.

Mrs. MALONEY. Thank you very much. I request permission to place my statement in the record.

Mr. PLATTS. It is so ordered.

Mrs. MALONEY. I would like to be associated with the comments of my two colleagues and mention that along with Steven Horn in 1996 we authored and passed the electronic Freedom of Information Act of 1996, trying to move FOIA into the 21st century. Some agencies have been better than others in complying.

But I feel very, very strongly that the law needs to be strengthened. Many constituents will say that they file a Freedom of Information Act on such basic things as the Government taking of their property and they can't get a response for years and years and years and years and that when they do get a response three-fourths of it is blacked out and it says we have made a decision that you don't have a right to see this.

I think one thing that we have to work on in this committee and others is, in addition to the two bills that Mr. Waxman mentioned and I am co-sponsoring the bill that he is introducing which I strongly support, is some type of review when government makes a decision to darken out information and not supply it to the public.

In some cases it has been whistle-blowers who can't even get the information of why they lost their job or whatever. I think that a strong government is one that allows people to see what is going on, that can make it stronger and make better decisions.

But I think we need a level to oversee the governmental decisions when they decide to black out entire sections and that all you are left with is, I made a phone call to someone, as opposed to why the action took place in the first place. So I think it is a very important law, but I think it is one that definitely needs to be strengthened.

I yield back and would like to place in the record my statement. Thank you.

Mr. PLATTS. It is so ordered. Thank you, Mrs. Maloney.

[The prepared statement of Hon. Carolyn B. Maloney follows:]

Representative Carolyn B. Maloney (NY-14)
"Information Policy in the 21st Century – A Review of the Freedom of Information Act"
May 11, 2005

I would like to thank Chairman Platts
and Ranking Member Towns
for holding this important hearing today
about ensuring that the American people
have access to their government.

The issue of openness in government
is important to me,
and I believe it is critical to our democracy.

In the 104th Congress I worked
with former representatives Steve Horn
and Randy Tate in a bipartisan effort
to pass the "Electronic Freedom of Information
Act of 1996"
which was intended to provide
for greater efficiency
in providing public access to information
and to provide for public access
to information in an electronic format.

This legislation,
which became public law on October 2, 1996,
was intended to bring FOIA
from the technological stone age
into the information age.

It included several critical provisions
including the elimination
of a legal distinction
between government records stored on paper
and stored electronically,
encouraging federal agencies
to offer online access
to government information,
and to reduce the time for agencies
to respond to freedom of information requests.

Unfortunately, the FOIA process
has not progressed as well as we had hoped.

Some agencies and departments
are doing a better job of fulfilling

freedom of information requests
and some continue to lag behind.

Currently, there are bills before Congress
that would strengthen the FOIA process
including the "Faster FOIA Act of 2005"
and the "Openness Promotes Effectiveness
in our National (OPEN) Government Act
of 2005".

As a cosponsor of each of these bills,
I believe that they should be considered
by the full committee as soon as possible
so that the American people will have faith
in their government.

I look forward to hearing
the witnesses' testimonies.

Thank you.

Mr. PLATTS. We will now move to our first panel of witnesses. I would ask each of our witnesses in this first panel and any others who will be advising you as part of your testimony here today to rise and be sworn in with the oath.

[Witnesses sworn.]

Mr. PLATTS. Thank you. You may be seated. The clerk will note that the witnesses affirmed the oath. We appreciate your written testimonies that you provided. We would ask that you try to stay within about a 5-minute timeframe for your opening statements here today.

Dr. Weinstein, I know that you are going to have to leave after the presentations of the panel. We appreciate your being here for your testimony and your insights and your staff who will remain with us.

STATEMENTS OF ALLEN WEINSTEIN, ARCHIVIST OF THE UNITED STATES, ACCOMPANIED BY MICHAEL KURTZ, ASSISTANT ARCHIVIST FOR RECORDS PROGRAMS, NATIONAL ARCHIVES AND RECORDS ADMINISTRATION; CARL NICHOLS, DEPUTY ASSISTANT ATTORNEY GENERAL, FEDERAL PROGRAMS BRANCH, CIVIL DIVISION, U.S. DEPARTMENT OF JUSTICE; AND LINDA KOONTZ, DIRECTOR OF INFORMATION MANAGEMENT, GOVERNMENT ACCOUNTABILITY OFFICE

STATEMENT OF ALLEN WEINSTEIN

Mr. WEINSTEIN. Thank you, Mr. Chairman. Good afternoon, Mr. Chairman and members of the subcommittee and subcommittee staff. I am Allen Weinstein. I am Archivist of the United States. It is my distinct pleasure to be with you this afternoon.

I am accompanied today by Dr. Michael Kurtz, Assistant Archivist for Records Programs at the Archives. Dr. Kurtz has responsibility for managing the bulk of our FOIA operations. He is very experienced in the implementation of FOIA in the National Archives.

As we discussed last week, Mr. Chairman, I am most appreciative of your understanding regarding my schedule today. I am actually, at this moment, chairing a board meeting of the National Historic Publications and Records Commission, NHPRC, at the Archives. So I am going back to that. I will have to excuse myself after my opening statement, after listening to the other opening statements.

But this is such an important subject and it is my first invitation to testify before the subcommittee, I wanted to make every effort to attend. Dr. Kurtz will stay. He will answer any operational questions that you might have regarding our FOIA implementation.

Now, Mr. Chairman, as I told you in your office, I have a rather unique perspective on FOIA, which is that I was a FOIA litigant long before I was implementing FOIA. Back in the 1970's, with the assistance of the American Civil Liberties Union, I sued the Federal Bureau of Investigations for its files on the Alger Hiss case.

As it turned out, when I received those files in 1975 and 1976 it was one of the first times that major files of historical significance were released by the Bureau to a litigant, maybe the first time, I don't really know. So I have watched the experience that

way. I have been a litigant. I have watched others. I have used the materials under FOIA request. I find myself now in the position of implementing FOIA matters.

To summarize my statement, Mr. Chairman, the National Archives and Records Administration is our Nation's record keeper, as you know. The National Archives was created in 1934 and our mission is to preserve and maintain the permanently valuable records of the Government of the United States, records that document the rights of citizens, the actions of Government officials and the national experience.

We acquire, preserve and make available for research records of enduring value created or received by organizations of the Federal Government. We have been making records available to the public since long before FOIA was adopted. The vast majority of NARA's holdings are unrestricted and available for research by the public.

By one count—I can't verify this, I have only been there 2½ months—but by one count there are 1 billion documents alone in the National Archives Building downtown. I am going to count every one of those so I will become an expert.

Mr. PLATTS. Mr. Weinstein, would you just bring the mic a little closer to you? We are having sound trouble.

Mr. WEINSTEIN. I'll be back to the committee once I have counted all those documents to assure that there are 1 billion there. If there are any missing, you will be the first to hear about it.

Now, the vast majority of our holdings, as I said, are unrestricted, available for research. Many records are open for research at the time they are first accessioned into NARA. A researcher does not need to use FOIA to have access to our open records. We make available millions of pages through hundreds of thousands of researches every year in this manner. In fact, the last fiscal year NARA answered 1,100,000 written requests, excluding FOIAs, for access to accessioned documents.

The FOIA is used at the National Archives for the much more limited basis of requesting that records of executive branch agencies in our holdings that have access restrictions. FOIA is also used to request Vice Presidential and Presidential records from the administrations of Presidents Ronald Reagan, George H.W. Bush and William Clinton under the provisions of the Presidential Records Act. Clinton Presidential records will become subject to FOIA on January 20, 2006.

But I should stress that records of the judicial branch, the legislative branch, as you know, donated historical materials and the Nixon Presidential historical materials are not subject to FOIA.

When records are accessioned by NARA, these records become a permanent part of the history of this Nation. They are no longer working papers of the agencies that created or received them, but are transformed into historically valuable documents necessary for understanding the policies, programs and actions of the various departments and agencies of the executive branch.

Once these records are in our legal custody it becomes NARA's responsibility to make access determinations consistent with provisions of FOIA. This is very important because the passage of time often diminishes the need to restrict many types of information. Information that may be sensitive at the earlier stages of the record's

life cycle has often lost its sensitivity once it is among our holdings. And we make access decisions based upon this changed status.

While it is our responsibility to make access determinations on the records that are subject to FOIA in our custody, there are two areas over which we have no discretion to make access decisions. The first exception, as you know, for national security information that is classified pursuant to the current Executive order, FOIA Exemption B–1. This information can only be declassified by the agency that classified it. The lengthy referral process necessary to review records for declassification is the primary reason for the backlogs at many agencies, including NARA currently face.

Mr. Chairman, I just want to assure the members of this committee that I am dismayed by the backlog. Anything we can do to address that situation we are going to do. But give us a little time.

The second exception is for information that cannot be released under other statutes passed by the Congress, FOIA Exemption B–3.

While the passage of time lessens the need to restrict most types of information, we recognize that some information continues to be sensitive for many years. I believe that NARA's greatest strength in implementing our FOIA policy is that the spirit of the FOIA is consistent with NARA's mission.

The FOIA is a disclosure statute and NARA is an agency dedicated to ensuring that the records of our national history are available to the public in the most complete format possible. Our mission of openness is complimented by the extremely knowledgeable FOIA staff, Dr. Kurtz among them, which has for many years had experience in processing FOIA requests.

Furthermore, we have developed electronic tracking and reduction systems to streamline our FOIA processing. While NARA faces many challenges in implementing our FOIA program, one of the most difficult is providing access to electronic records. We are accessing an increasing volume of records that are born digital. All of these record systems pose and present access problems. These records are often produced on different types of hardware, using a wide range of software. Searching, reviewing, redacting and providing access to these records continues to be a very serious challenge for us.

The second challenge we face is the timeliness issue. While we have been successful in responding to a high percentage of our FOIA requests within the 20-day time period, requests for records of high researcher interest and/or of recent origins in many instances cannot be completed within the 20-day period.

Part of this problem can be explained by the lengthy process necessary for declassifying documents. It must be understood, however, that documents that concern very sensitive privacy matters, Exemption B–6; law enforcement issues, Exemption B–7; business information, Exemption B–4 or vulnerability assessments of systems and facilities, Exemption B–2, simply cannot be carefully processed within the 20-day period. This is especially true if the request is for voluminous records or multiple files.

Mr. Chairman, this concludes my formal opening remarks. I just wanted to make one additional point. No one in Government that I know of treats the FOIA issue with more seriousness than my col-

leagues and I do at NARA. So, this committee will have the benefit of our cooperation and our support as it goes on with its work.

Thank you very much.

[The prepared statement of Mr. Weinstein follows:]

STATEMENT

PROFESSOR ALLEN WEINSTEIN
Archivist of the United States

Before the Subcommittee on Government Management, Finance, and Accountability
Committee on Government Reform
House of Representatives

"Information Policy in the 21st Century: A Review of the Freedom of Information Act"

May 11, 2005

Good afternoon Mr. Chairman and Members of the Subcommittee. I am Professor Allen Weinstein, Archivist of the United States, and it is my distinct pleasure to be with you this afternoon. I am accompanied today by Dr. Michael Kurtz, Assistant Archivist for Records Programs, Washington, DC. Dr. Kurtz has responsibility for managing the bulk of our FOIA operations and will be happy to answer any operational questions that you might have regarding our FOIA implementation.

INTRODUCTION

The National Archives and Records Administration (NARA) is our nation's record keeper. NARA is an independent agency created by statute in 1934, to safeguard records of all three branches of the Federal Government. NARA's mission is to ensure that Federal officials and the American public have ready access to essential evidence — records that document the rights of citizens, the actions of government officials, and the national experience. Indeed, the National Archives has been making records available to public requesters long before the FOIA was even enacted.

NARA carries out this mission through a national network of archives and records services facilities stretching from Washington, DC, to the West Coast, including Presidential libraries documenting administrations of Presidents back to Herbert Hoover. Additionally, NARA publishes the *Federal Register*, administers the Information Security Oversight Office, and makes grants for historical documentation through the National Historical Publications and Records Commission. NARA meets thousands of information needs daily, ensuring access to records on which the entitlements of citizens, the credibility of government, and the accuracy of history depend. We work to preserve and provide access to the records of our Government, whether those records are the Declaration of Independence, service records of military veterans, electronic cables from the State Department, or documentation on homeland security issues.

NARA acquires, preserves, and makes available for research records of permanent value created or received by organizations of the Federal Government. Dispersed among our records are billions of pages of textual documents, still and motion pictures, maps and drawings, audio and video recordings, and electronic records. Generally, historical records do not come into our custody until they are 20-30 years old. The major exception is Presidential records, which come to us immediately upon the end of a President's term of office. Because of their age or subject matter, most records in NARA's holdings are unrestricted and are available for research without filing a Freedom of Information Act (FOIA) request. Among the publicly available records are: genealogical and family history materials; court records (except grand jury materials and sealed court records); records that do not contain national security classified information or other information subject to access restrictions; and records comprising the John F. Kennedy Assassination Records Collection. In fiscal year 2004, NARA provided access to 141,345 items (boxes of textual records or items in other media types) to researchers visiting our facilities across the country.

NARA'S RESPONSIBILITIES UNDER THE FOIA

When NARA receives records from Executive branch agencies that have access restrictions, those records are processed for public disclosure in accordance with the provisions of the FOIA. NARA accepts FOIA requests for the Executive branch agency records in its legal custody and the operational records that NARA creates while conducting government business. NARA also accepts FOIA requests for Presidential and Vice Presidential records, beginning with the presidential papers of the Reagan administration, pursuant to the provisions of the Presidential Records Act (PRA). Judicial branch records, records of the Congress and Legislative branch agencies, donated historical materials, and Nixon Presidential Historical Materials among NARA's holdings are not subject to the provisions of the FOIA. NARA is not responsible for responding to FOIA request for records solely in our physical custody, such as records that we store for federal agencies at our regional records centers. Note, moreover, that FOIA requests comprise less than 1% of the requests received and/or processed by NARA in any given fiscal year.

When records are accessioned into the National Archives (i.e., transferred into NARA's legal custody), these records become a permanent part of the history of this nation. They are no longer working papers of the agency that created them but are transformed into historically valuable records necessary for understanding the policies, programs, and actions of the various departments and agencies of the Executive branch of the Federal government. At the time of transfer, it becomes NARA's responsibility to make access determinations consistent with the provisions of the FOIA. This is very important because the passage of time has often diminished the need to restrict certain types of information, such as policy deliberations, certain law enforcement information, or records containing information regarding personal privacy which is over 75 years old or relates to individuals who are deceased. Information that may be sensitive at the earlier stages of the records life cycle when the records were still with the originating agency has often lost its sensitivity once it is among the holdings at NARA. We make access

determinations based on this changed status. This approach is standard archival policy that NARA has employed for many years. It goes without saying, however, that records of very recent origin, such as the records of closed Independent Counsels and independent commissions, Presidential records subject to the provisions of the PRA, and contemporary electronic records are subject to a more stringent review than the older records in our custody.

While it is NARA's responsibility to make access determinations on the records subject to the FOIA in our legal custody, NARA may consult with the originating agencies concerning particularly sensitive records which are not classified. There are two areas, however, where we have no discretion to make the access decisions. The first exception is for national security information that is properly classified pursuant to the executive order. The current order, Executive Order 12958, as amended, and all previous orders state that only the agency that classified the information under review may declassify that information. This requirement means that all classified information in our custody must be referred to the original classifying agency for declassification review. In the past as required under the executive orders, some agencies have provided us with guidelines for use in declassifying older records. We still apply these guidelines unless the originating agency has rescinded them in writing. If the information cannot be declassified using the guidelines, the information is referred to the original classifying agency. If referral is necessary, NARA must await the determination of the originating agency prior to disclosing a record containing classified equities. The review process often takes months or years to complete.

The second exception is for information that is prohibited from disclosure under another statute passed by Congress, as incorporated into exemption (b)(3) of the FOIA. There are many statutes that have provisions proscribing the disclosure of information. Mainly, these statutes apply to specific types of information wherever it occurs, including grand jury information, atomic energy information, census information, electronic surveillance information, information on intelligence sources and methods, and income tax return information. As NARA has no discretion to disclose information protected by statute, we must protect the information no matter where it appears among the records in our holdings.

While we believe that the need to restrict certain types of information has been lessened by the passage of time, we certainly accept that some information continues to be sensitive even after many years. We apply the provisions of the FOIA to identify and withdraw such records. We conduct line-by-line reviews of previously unopened records that are requested under the provisions of the FOIA. As mentioned previously, we withdraw information as required for reasons of national security or under statute. We also withdraw some law enforcement information, private information concerning individuals, and information subject to other FOIA exemptions if the information requires protection. Only a very small percentage of our holdings have been withdrawn from disclosure under FOIA.

STRENGTHS IN PROCESSING FOIA REQUESTS

Perhaps NARA's greatest strength when it comes to processing FOIA requests is that the spirit of the FOIA is consistent with NARA's core mission and function. The FOIA is a disclosure statute enacted to ensure a right of access to records created by the executive branch agencies. Likewise, NARA ensures ready access to the essential evidence that documents the rights of American citizens, the actions of Federal officials, and the national experience. We strive to make it easy for citizens to access the historically valuable records among our holdings. The provisions of the FOIA provide the guidance that helps us fulfill our mission.

NARA is fortunate to have an extremely knowledgeable FOIA staff. We have a diverse group of staff, with years of experience in FOIA review and declassification, who are familiar with the records among our holdings. Many have advanced degrees in history or a related discipline, which helps our processors put the records in their proper historical context and make connections between major government initiatives and activities. This proves to be of great assistance when making access determinations on archival records. Supervisors are extremely supportive in ensuring that staff with regular or recurring FOIA duties are properly trained and mentored. Our FOIA staff is afforded the opportunity to expand their FOIA experience by attending both internal and external training on the FOIA and related access topics. That training is reinforced by the internal oversight process, which ensures that newer FOIA staff members are comfortable with making access determinations.

NARA staff members who process FOIA requests conduct extensive research to assist in making appropriate access determinations. We refer to government publications, the social security death index, related open records, and works by notable scholars when making access determinations on historical records. In every instance we employ the appropriate oversight to ensure that we are making only authorized disclosures. To assist the agency in this endeavor, NARA organized a specialized staff, which I will discuss in more detail shortly, with our most experienced reviewers. This staff, in conjunction with NARA's Office of General Counsel, is instrumental in the formulation of policy and procedural guidance on FOIA processing and other access issues for NARA staffs across the agency.

NARA has also made an investment in FOIA processing equipment that has streamlined our FOIA process and cut down on processing times. NARA has procured two FOIA processing systems that not only support our FOIA program specifically, but also address a goal in our strategic plan to ensure that essential evidence will be easy to access regardless of where it is or where users are for as long as needed: the Archives Declassification and Redaction System (ADRRES) and the Unclassified Records Tracking System (URTS). These systems are used to track requests for access to records, process both textual and electronic records under the FOIA, produce redacted copies of documents, and track declassification decisions. These systems also serve as electronic

repositories for scanned textual records as well as on-line redaction systems. The availability of this technology has transformed the way our staffs perform FOIA review.

The administrative processing of FOIA requests at NARA involves only the review of sensitive materials for exempt information. While NARA must maintain an accurate administrative record documenting the FOIA requests we process and the determinations we make, NARA does not generally have to implement the fee waiver provisions of the statute. This is because under 5 U.S.C. 552(a)(4)(A)(vi), the FOIA fee system does not apply when a separate statutory system for collecting fees exists; NARA has such authority for charging fees for its archival records under 44 U.S.C. 2116(c). Fee waivers are considered for "JFK assassination records," because of the specific provisions of the John F. Kennedy Assassination Records Collection Act. NARA also considers fee waivers for its own agency operational records, which are not governed by 44 U.S.C. 2116(c), if the requester meets the criteria outlined in the FOIA's fee waiver guidance and our implementing regulations 36 CFR 1250.60.

Agency records pertaining to an identifiable individual which are transferred to NARA as a record which has sufficient historical value for permanent retention are exempt from the provisions of the Privacy Act. Accordingly, NARA is not required to apply the routine use, storage, publication, or access requirements of the Privacy Act to our permanent archival records. Records containing information on identifiable individuals are protected under the privacy provisions of FOIA exemptions (b)(6) and (b)(7)(C).

ELECTRONIC RECORDS

The FOIA presents NARA with many challenges. One of the most difficult issues we face is the review of electronic records. Within the last few years, we have accessioned an increasing volume of electronic records, including the records of the Special Counsel on Waco, the records of the Assassination Records Review Board, the records of the Whitewater Independent Counsel (the Fiske/Starr/Ray investigations), State Department cable traffic for the years 1973-1974, and the federal and Presidential records of the Executive Office of the President from the administration of President Clinton. All of these accessions include substantial electronic records which present us with access problems. These records were created and maintained in different systems that stored the data in different ways. Searching, reviewing, redacting, and providing access copies of the records from these divergent offices has been and will continue to be a serious issue for us. NARA is developing new technology that will enable us to share access to electronic information across space and time. However, until that system comes on-line, NARA must continue to deal with the challenges raised by the increase in permanently valuable electronic records.

TIMELINESS

A second issue regarding FOIA implementation is responding to requests in a timely manner. NARA is reasonably successful in responding to FOIA requests within the 20-day period allowed under the law. It is an unfortunate fact, however, that requests for

classified records law enforcement records, and requests for large, complex files can rarely be completed within the 20-day period. When requests are received, we divide them into simple and complex request queues and these designations are entered into our tracking system. Simple requests consist primarily of two types: 1) requests for records that are already open and available for research; and 2) requests for individual documents or small files that have not been opened for research and can be easily reviewed within the 20-day period. All remaining requests are designated as complex requests. These requests include requests for classified information, law enforcement files (such as FBI records, Department of Justice case files, and records of closed Independent or Special Counsels), and records that contain sensitive privacy information. As was mentioned earlier, NARA is not authorized under Executive Order 12958 to make declassification decisions on classified information (except for the information subject to agency guidelines), and all classified documents responsive to FOIA requests must be referred to the agency of origin or an agency with a subject matter interest in the documents. Once these documents are referred to other agencies, NARA must wait for all agencies that received the referral to respond with a declassification determination before NARA can respond to the requester. Due to backlogs, the wait for responses is often quite lengthy.

THE PRESIDENTIAL RECORDS ACT (PRA)

Another factor that delays processing at NARA are FOIA requests for records subject to the provisions of the PRA. When FOIA requests are submitted for those Presidential records that are subject to both the PRA and the FOIA, the PRA requires that NARA must inform both the current and the former Presidents that we propose to open requested records and then allow the Presidents an opportunity to review the records prior to release. Executive Order 13233 on Further Implementation of the Presidential Records Act specifies that the former President has 90 days to review such documents, and the incumbent President has no time limit. Since we are bound by the provisions of the PRA and EO 13233, it is virtually impossible to meet the 20-day time limit provisions for access to records falling under the provisions of both the FOIA and the PRA.

PROCESSING ISSUES

The time necessary to respond to requests for unclassified information is not as long. However, a request for a large file of law enforcement records or a large case file pertaining to an individual presents many problems for staff reviewing the file. The reviewer must look for information exempt from disclosure by statute, such as grand jury information or tax return information, information that may invade the privacy of the individuals discussed in the file, or law enforcement information. This process can be time consuming, usually in direct proportion to the size of the file or the complexity of the issues involved. For example, a Department of Justice file on the kidnapping of a foreign national that occurred in the 1950s contained a variety of information that required careful screening. While the vast majority of the documents were released, this file of approximately 10,000 pages took the experienced staff member several months to review. The requestor was extremely happy with the results of this process despite the need to wait several months for the process to be completed.

It has been our experience that discussions with requesters to explain the review process and the steps necessary to review the requested records will mitigate the frustration and anger that researchers often experience. Ultimately, however, the process cannot proceed any faster than the ability of the reviewer to conduct the careful review that these records require. The privacy rights of the individuals that are the subjects of these records and the protection of other sensitive information demand this careful review.

As noted above, the concerns surrounding compliance with the FOIA led NARA to create a unit to process all FOIA requests for Executive branch records in our Washington DC facilities. The Special Access/FOIA Branch, established in 1997, is responsible for responding to all requests received for records held in the Washington Metropolitan area, made under the FOIA as well as responding to mandatory declassification requests made under the current Executive Order. The ADRRES and URTS systems were developed in order to streamline the review process as much as possible. The staff of the Special Access/FOIA Branch also conducts special reviews for records that have not been previously reviewed under the FOIA for researchers who are working in our buildings. If a researcher wants access to records that have not been previously reviewed under the FOIA, the Special Access staff will review the requested boxes, if feasible, to see if the records contain any sensitive information. These special reviews often result in the determination that the records do not contain any information that requires withholding and the records can be released for research. Occasionally, a portion of the requested records can be provided to the researcher while the remaining boxes must be requested under the FOIA.

Let me say that these special reviews are conducted by our most experienced reviewers. We are very careful to make sure that the boxes released for review under these special reviews do not contain any information the disclosure of which would not be authorized under the FOIA. This process was developed to assist researchers who have often traveled long distances to do research in our research room and to prevent the need for unnecessary FOIA requests. This policy has been successful and has provided access to records for many researchers without the use of the formal FOIA process. In that regard, it has had the effect of preventing additional delays in gaining access to information in our custody and has facilitated expedited access of records to researchers who visit our facility.

Again, thank you Mr. Chairman for the invitation today and your understanding regarding my schedule. Dr. Kurtz would be happy to answer any questions that the subcommittee might have.

Mr. PLATTS. Thank you for your testimony.

Mr. Nichols.

STATEMENT OF CARL NICHOLS

Mr. NICHOLS. Thank you, Mr. Chairman and members of the committee. My name is Carl Nichols. I am the Deputy Assistant Attorney General for the Civil Division, Federal Programs Branch at the Department of Justice, which, among other things, oversees Freedom of Information Act related litigation.

I am pleased to appear before the subcommittee to address the subject of FOIA, the principal statute governing public access to Federal Government records and information. This law, which has been in effect for 38 years, has become an essential part of our democratic system of government, a vital tool used by our citizens to learn about their Government's operations and activities.

It is an honor to testify on behalf of the Government employees who respond to millions of FOIA requests processed by the executive branch every year.

The administration and the Attorney General are firmly committed to full compliance with FOIA as a means of maintaining an open and accountable system of government, while also recognizing the importance of safeguarding national security, enhancing law enforcement effectiveness, respecting business confidentiality and preserving personal privacy.

Indeed, as part of its responsibilities for the administration of FOIA, the executive branch spends in excess of $300 million per year responding to FOIA requests, only a tiny fraction of which is reimbursed to the Treasury by requesters.

The Government employees who process and respond to the 4 million FOIA requests every year are a group of dedicated public servants who discharge their duties with vigor, diligence and professionalism.

The Department of Justice is the lead Federal agency for FOIA and encourages uniform and proper compliance by all Federal agencies through its Office of Information and Privacy.

As you may recall, FOIA was strengthened by the Electronic Freedom of Information Act Amendments of 1996, referred to as E-FOIA. The amendments brought FOIA into the modern electronic age by addressing electronic record issues, timeliness of agency responses to FOIA requests and other procedural matters under the act.

The provisions increased initial time for responding to FOIA requests from 10 to 20 working days; authorized agencies to process FOIA requests in multiple tracks, encouraged agencies to negotiate FOIA request sizes and response times with requesters; and established a mechanism for the expedited processing of FOIA requests filed by members of the news media.

Additionally, pursuant to the E-FOIA amendments, all Federal agencies have established specialized FOIA Web sites that have become a major part of Government-wide FOIA administration.

The biggest challenge facing the Federal Government under FOIA is the issue of timely processing of requests. Agencies respond to FOIA requests as quickly as possible. When a complete response is not possible, letters of acknowledgment routinely are pro-

vided to inform requesters of the action being taken concerning their requests.

Many factors affect the timing of responses such as the number of incoming requests, the number of office components with responsive documents, the number of office components that must be consulted, the size and complexity of the requests, the resources available to the agency, and the availability of the records.

This administration welcomes and encourages communications between FOIA personnel and requesters, especially where a complex request is involved or where there is an issue regarding the availability of responsive records.

There are good reasons that not all Federal agencies are able to regularly comply with the strict time limits of the act, particularly those agencies required to meet large volume FOIA demands or demands for particularly sensitive needs.

Federal agencies, of course, have primary missions that place high demands on limited resources. This is especially true in the post-September 11th world. Such limited resources make it increasingly difficult to administer FOIA with the timeliness that all concerned would prefer. As a result, substantial burdens are placed upon limited agency resources and the Government employees who respond to FOIA requests. In sum, no discussion about FOIA can be complete without a serious and sustained examination of the resource and personnel needs faced by the executive branch in administering FOIA.

As members of the subcommittee are well aware, nine categories of records are considered exempt from mandatory disclosure under the act. It must be emphasized for the record that these exemptions are central to the purposes of the act because while the basic purpose of FOIA is to ensure an informed citizenry, FOIA balances society's strong interest in open government with other equally compelling public interests such as protecting national security, enhancing the effectiveness of law enforcement, protecting sensitive business information, protecting internal agency deliberations and common law privileges and, not least, preserving personal privacy.

We believe that the current system of collecting fees for FOIA requests has benefited many requesters, as evidenced by the fact that requesters currently pay a mere 2.09 percent of the total costs associated with FOIA compliance.

At the same time these fees impose a modest financial incentive upon those requesters who make FOIA requests for commercial purposes to submit reasonable described requests. The Department of Justice believes that this is important because the statute itself places few limitations on the scope of a request. Appropriate fees are necessary to provide a reasonable disincentive for frivolous or over-broad requests.

In conclusion, since its enactment in 1966, FOIA has firmly established an effective statutory means of public access, where warranted, to executive branch information. But the goal of achieving and informed citizenry must be balanced against other vital societal aims such as national security, the public's interest in effective and efficient operations of government, the prudent use of limited taxpayer dollars and the preservation of the confidentiality and se-

curity of sensitive personnel, commercial, and governmental information.

I would be pleased to address any question you or any other member of the subcommittee might have on the subject.

[The prepared statement of Mr. Nichols follows:]

Department of Justice

STATEMENT

OF

CARL NICHOLS
DEPUTY ASSISTANT ATTORNEY GENERAL
CIVIL DIVISION
DEPARTMENT OF JUSTICE

BEFORE THE

SUBCOMMITTEE ON GOVERNMENT MANAGEMENT, FINANCE, AND ACCOUNTABILITY
COMMITTEE ON GOVERNMENT REFORM
HOUSE OF REPRESENTATIVES

CONCERNING

INFORMATION POLICY IN THE 21ST CENTURY: A REVIEW OF THE FREEDOM OF INFORMATION ACT

PRESENTED ON

MAY 11, 2005

Statement of

Carl Nichols
Deputy Assistant Attorney General
Civil Division
Department of Justice

Hearing on

Information Policy in the 21st Century;
A review of the Freedom of Information Act ("FOIA")

Before the
Subcommittee on Government Management, Finance, and Accountability
Committee on Government Reform

Presented on

May 11, 2005

Introduction:

Mr. Chairman and Members of the Subcommittee: my name is Carl Nichols. I am the Deputy Assistant Attorney General for the Civil Division's Federal Program Branch at the Department of Justice which oversees, among other things, the Freedom of Information Act (FOIA) 5 U.S.C.A. § 552 (1996 & West Supp. 2004), related litigation. I am pleased to address the subject of FOIA, which is the principal statute governing public access to Federal government records and information. This law, which has been in effect for nearly thirty-eight years, has become an essential part of our democratic system of government -- a vital tool used by our citizens to learn about their government's operations and activities. It is an honor to testify on behalf of the Government employees who respond to millions of FOIA requests processed by the Executive branch every year.

The Administration and the Attorney General are firmly committed to full compliance with FOIA as a means of maintaining an open and accountable system of government, while also recognizing the importance of safeguarding national security, enhancing law enforcement effectiveness, respecting business confidentiality, and preserving personal privacy. Indeed, as part of its responsibilities for the administration of FOIA, the Executive branch spends in excess of $300 million per year responding to

FOIA requests, only a tiny fraction of which is reimbursed to the Treasury by requesters. The Government employees who process and respond to the more than 4 million FOIA requests every year are a group of dedicated public servants who discharge their duties with vigor, diligence, and professionalism.

Recent Innovations to Increase Disclosure Process:

As you know, the Department of Justice is the lead Federal agency for FOIA. We work to encourage uniform and proper compliance with the Act by all Federal agencies through our Office of Information and Privacy (OIP), which is one of the Department's forty distinct components. We have a very experienced staff in OIP who contribute decades of experience in working with FOIA and provide a perspective of long standing to any examination of its implementation.

As you may recall, FOIA and its Governmentwide administration have evolved greatly since the time of its enactment in the 1960s. It was strengthened most recently when Congress enacted the Electronic Freedom of Information Act Amendments of 1996. These amendments -- sometimes referred to as "E-FOIA" -- brought FOIA into the electronic information age by treating information maintained by agencies in electronic form in generally the same way as paper records. In summary, these amendments addressed electronic record issues, the timeliness of agency responses to FOIA requests, and other procedural matters under the Act. They covered issues of timeliness and agency backlogs of FOIA requests with provisions that, among other things, increased the initial time for responding to FOIA requests from ten to twenty working days; authorized agencies to process FOIA requests in multiple tracks; encouraged agencies to negotiate FOIA request sizes and response times with requesters; and established a mechanism for the "expedited processing" of FOIA requests filed by members of the news media.

Just as importantly, these amendments also made major changes to the operation of agency reading rooms under subsection (a)(2) of FOIA. Under that lesser-known part of the Act, agencies are required to automatically make certain categories of records -- final opinions rendered in the adjudication of administrative cases, specific agency policy

statements, and administrative staff manuals that affect the public -- available for routine public inspection and copying. The E-FOIA amendments created a new category of "frequently requested records" for such reading room treatment, and they also generally required agencies to make all categories of their reading room records more readily available to the public through on-line access, in what can be regarded as "electronic reading rooms." This latter legislative change has had a large impact on the processes of FOIA administration throughout the Executive branch, as all Federal agencies have established specialized FOIA Web sites for this and other purposes, following Justice Department guidance, that have become a major part of the Act's Governmentwide administration.

In addition, this Administration has taken expansive steps to improve the transparency, responsiveness, and efficiency of the Government to citizens and businesses through its e-Government initiatives. Indeed, citizens can now find and comment on proposed regulations from every agency through the Government's web portal (www.FirstGov.gov). Through this single point of access, they also can find benefit information on over 400 Government programs, apply for over $360 billion in Federal grants from across the Government, and find a wealth of other information within 3 clicks of a mouse. Furthermore, agencies are required, under OMB Circular A-130, to develop information dissemination plans, and agencies disseminate volumes of information through their Web sites. It is worthwhile to consider the extent to which the Internet and other information technologies may develop into an effective alternative to traditional methods of information gathering through FOIA.

Statutory Time Limits:

Because the administration of the Freedom of Information Act is decentralized throughout the Executive branch, each individual Federal agency, including the Department of Justice, is responsible for administering FOIA within it. As mentioned, the Department of Justice also works to encourage Governmentwide compliance with FOIA, in accordance with subsection (e) of the Act, and we can assure you that we take this responsibility very seriously.

On a daily basis, the Department does a great deal to promote government openness and to encourage proper compliance with FOIA Governmentwide. The Department, through OIP, provides extensive consultation and advisory assistance to all Federal agencies on a wide range of FOIA-related matters; it conducts a full range of FOIA-training programs for all agencies throughout the year; and it issues policy guidance to agencies through its *FOIA Post* publication and its "Justice Department Guide to the Freedom of Information Act." These Governmentwide policy activities are described in greater detail in the "Description of Department of Justice Efforts to Encourage Agency Compliance with the Act" (which is a part of the Department's annual report to Congress). Through these efforts, the Department continually strives to assist all Federal agencies in meeting their statutory responsibilities as best as possible with the limited administrative resources that are available to them.

To be sure, it is not always a simple matter for agencies to meet their FOIA responsibilities. Indeed, perhaps the biggest challenge facing the Federal government under FOIA is the issue of timely processing of requests. When Congress first amended the Act in 1974, it established a basic ten-working-day deadline for agency responses to FOIA requests. It did so based upon the belief, held firmly at that time, that the expected nature and volume of FOIA use would allow Federal agencies to universally meet such a deadline. That turned out to be far from the case. Both the numbers and complexity of FOIA requests were far greater than anticipated, with many FOIA requesters seeking large volumes of records or particularly sensitive kinds of records (relating to personal privacy, law enforcement, national security, or other concerns). In response, the Federal

courts (following the lead of the D.C. Circuit in *Open America v. Watergate Special Prosecution Force*, 547 F.2d 605 (D.C. Cir. 1976)), concluded that the "due diligence" requirement in FOIA may be satisfied by an agency's good faith processing of all requests on a "first-in, first-out" basis, unless a requester can make a particularized showing of exceptional need or urgency.

In 1996, when Congress acted to address this by among other things increasing the Act's basic time limit from ten to twenty working days, it did so with a similarly expressed sentiment that this might all but eliminate timeliness problems. For a number of reasons, however, these expectations have proven to have been unfounded. Simply put, FOIA's time limits, even as increased in 1996, often are unrealistic as a general rule.

It is important to note that agencies respond to FOIA requests as quickly as possible. For example, in 2003 the Veterans Administration received 1.8 million FOIA requests (more than all other Executive branch agencies combined) and responds to requests within 14 days on average. The Social Security Administration receives in excess of 700,000 FOIA requests per year and responds to simple requests on average within 19 days and complex requests within 62 days. When a complete response is not possible, letters of acknowledgement routinely are provided to inform requesters of the action being taken concerning their requests. This Administration welcomes and encourages the communication between FOIA personnel and the requesters, especially where a complex request is involved or where there is an issue regarding the availability of responsive records. Many factors enter in the time required to respond to requests, such as the number of incoming requests, the number of office components with responsive documents, the number of office components that must be consulted prior to responding to the request, the size and complexity of requests, the number of resources available to the agency, and the availability of the records.

There are good reasons that not all Federal agencies are able to regularly comply with the strict time limits of the Act. Certainly, some Federal agencies are able to do so almost without exception; others may be able to do so ordinarily, though not in all cases.

But many Federal agencies, especially those required to meet large-volume FOIA demands or demands for particularly sensitive records, are unable to comply with the statute's response deadlines for their FOIA requests -- and they maintain FOIA backlogs exceeding those lengths of time. Certainly, this has varied to some degree over the years as well as from one agency to another, but in general it has always been so.[1]

The reasons for this struggle are multiple and largely intractable. First and foremost is the fact that Federal agencies have primary missions that place high demand on limited resources; this is especially true in the post 9/11 world. Such limited resources make it increasingly difficult for Federal agencies, particularly the larger agencies, to administer FOIA with the timeliness that all concerned would prefer. Nonetheless, Federal agencies now spend upwards of $300 million each year on the Act's implementation. Therefore, we must recognize the substantive burdens placed upon limited agency resources and the Government employees who respond to FOIA requests. In sum, no discussion about FOIA can be complete without a serious and sustained examination of the resource and personnel needs faced by the Executive branch in administering FOIA.

Beyond that, both the complexity and magnitude of FOIA requests received by some Federal agencies render strict compliance with the Act's existing time limits a practical impossibility for them in any event. Agencies can be required under FOIA to process extremely sensitive types of records --such as those containing law enforcement information, classified information, or confidential business data -- on a detailed, line-by-line basis.[2] Properly expending highly labor-intensive efforts on such a FOIA request can

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[1]Specific snapshots of individual agency performance in this regard can be seen in the annual FOIA reports that all agencies prepare in accordance with the requirements of the E-FOIA amendments. Pursuant to a provision of those amendments, the Justice Department makes them available at a single location on its FOIA Web site (at www.usdoj.gov/04foia/04_6.html. OIP also creates an aggregate, Governmentwide summary of these reports each year.

[2]In handling FOIA requests for records containing confidential business data, for example, Federal agencies are required not only to review the business records themselves, but also to undertake a process of coordination with the business submitter in

easily require more than twenty working days, even apart from any backlog of FOIA requests that an agency might have to begin with. In many situations, some amount of "delay" (as gauged even by the Act's extended deadlines) is simply unavoidable.

To take a case in point, one of the early FOIA cases was a Watergate-era matter in which a public interest group sought more than a half-million pages of records from the six largest investigative files of the Watergate Special Prosecution Force. This FOIA case was filed in 1976, not long before the last Watergate Special Prosecutor ceased operations, which worked out well for him because he was able to pass this massive FOIA request off to the National Archives and Records Service (still at that time part of the General Services Administration), which by inheriting it also inherited an instant FOIA backlog.[3] Even though that agency had a relatively large FOIA staff at the time, such a demand to process so many highly sensitive law enforcement records was overwhelming. While the E-FOIA increased the time limits for response from 10 to 20 days, the Government still receives requests that do not lend themselves to processing within 20 days. And it may be worth noting that for relatively new agencies, like the Department of Homeland Security, the public expected a mature FOIA operation on the day the agency began operations. However, that expectation conflicts with the reality that any new organization must have time to organize before it even can begin to respond to FOIA requests.

Another case in point is the Office of the Pardon Attorney, a component of the Justice Department that maintains only a single staff member to handle its relatively small amount of FOIA activity. Four years ago, that Office suddenly was swamped with FOIA requests for records pertaining to the many presidential pardons that were issued in

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accordance with the "submitter notice" provisions of Executive Order 12,600, 3 C.F.R. 235 (1988). *See FOIA Update*, Vol. VIII, No. 2, at 1-3. In many instances, the time periods required for this "submitter notice" process alone are irreconcilable with the time deadlines of FOIA.

[3]*See Fund for Constitutional Gov't v. Nat'l Archives & Records Serv.*, 485 F. Supp. 1 (D.D.C. 1978), *aff'd*, 656 F.2d 856 (D.C. Cir. 1981).

January of 2001. This can happen to relatively small Federal agencies as well: Not long ago, the Overseas Private Investment Corporation, a tiny agency subject to FOIA, found itself struggling with a many-fold increase in its FOIA activity due to a particular matter of great controversy that abruptly arose within the relatively narrow area of its jurisdiction.

The point here, of course, is that sudden FOIA demands can at a moment's notice render askew any regular timetable for FOIA processing and leave an agency suddenly struggling to meet its FOIA responsibilities. And just as this can happen on a large-scale basis in these above examples, it can happen just the same when an especially complex FOIA request proceeds to consume exceptionally large amounts of agency resources within its place in an existing, fairly established FOIA queue -- to the disproportionate disadvantage of later FOIA requesters who would have received a much more timely response otherwise.[4] Make no mistake: Such a situation can frustrate agency FOIA officers as well as FOIA requesters. Generally speaking they all are trying to do the best they can with what they have available to them.

An agency's ability to meet the statutory 20-day response period has been severely affected by the substantially increased number of large "database" requests filed by the media and educational institutions. Agencies are finding that it is simply not possible to process massive database requests in 20 working days without diverting substantial financial or personnel resources from FOIA staffs and from other agency staffs. The impact of these requests on other requesters in the queue and, consequently, on the overall backlog is substantial.

We should emphasize in this regard that in recent years many agencies have worked hard and well to achieve greater efficiencies in their FOIA activities -- from initial case tracking to record redaction to final correspondence management as well -- through the use of newly designed automated information systems. One of the early

[4]Without a doubt, the "multitrack processing" that is provided for in the E-FOIA amendments can lessen the overall impact of this effect, but it far from eliminates it.

leaders in the use of automation in FOIA processing was the Department of State, which began to implement such an automated system several years ago. That agency recently held a FOIA officers conference for the specialized training of its FOIA personnel, in which the Department of Justice, through OIP heavily participated, and it was proud to describe to us how its automation of its FOIA program has helped to reduce – although not eliminate – its backlog of requests.[5] Thus agencies are increasingly working to leverage the efficiencies of advanced technology in their implementation of the Act, not only through their development of Web-based information availability.

Faster agency responses can be obtained through focus on improved record management systems. Agencies that invest in record management applications and electronic record keeping will be able to gather documents much more efficiently. For example, although it has not yet reduced its backlog, the Federal Bureau of Investigation (FBI) has embarked on an approach to create one central repository for closed files, converting paper files into digital format, eliminating or transferring older files to NARA, and incorporating record management applications into new electronic record systems. Other agencies may benefit from similar steps; however, there are significant financial burdens associated with improved records management systems.

Another mechanism being employed by Federal agencies to enhance their administration of the Act is the use of contractors for various parts of FOIA administrative process. In recent years, this has become an increasingly significant part of FOIA's administration at growing numbers of Federal agencies. The Department of Justice first encouraged this, within specified bounds of the law, in a Governmentwide policy publication that it issued in 1983,[6] but recently this has become a permanent

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[5]*See FOIA Post*, "FOIA Conferences Held by Growing Numbers of Agencies" (posted 2/22/05).

[6]*See FOIA Update*, Vol. IV, No. 1, at 2.

fixture on FOIA landscape, with the Department's continued encouragement and strong support.[7]

In addition, in some instances, requesters may make very broad requests for records because they intend to use the records to conduct a far-reaching inquiry. However, in other cases, requesters may make very broad requests because they are unaware of what records are available, although they may have particular types of records in mind. In these cases, agencies can respond reduce their search time and the number of records they must provide by working with requesters to narrow the scope of the request to more accurately describe the records the requester desires.

Safeguarding Sensitive Information:

Another part of the modern-day FOIA landscape is its place in the broader debate about the methods utilized by the Executive Branch to protect sensitive information, which certainly has been a matter of greater concern in the post-9/11 environment. Unfortunately, that debate all too often sweeps so indistinctly as to conflate the *safeguarding* of information with nondisclosure under FOIA.[8] Government safeguarding labels, such as "For Official Use Only" (FOUO), for example, should not be confused with the withholding of information as FOIA-exempt -- but nevertheless they often are.[9] Contrary to some popular misconceptions, such information-safeguarding labels do not create a basis for withholding information from the public; in other words, they do not create or enlarge FOIA exemptions.

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[7]*See FOIA Post*, "The Use of Contractors in FOIA Administration" (posted 9/30/04).

[8]*See, e.g., FOIA Post*, "Critical Infrastructure Information Regulations Issued by DHS" (posted 2/27/04) (emphasizing the critical difference between "*protecting* information from public disclosure" in a FOIA sense and "the *safeguarding* of federal information" within an agency's walls).

[9]*See, e.g., Freedom of Information Act Guide & Privacy Act Overview* (May 2004), at 190-91 & nn.214-19.

Equally blurred can be the difference between an agency removing something from its Web site that was not required by FOIA to be up there in the first place, i.e., when it had been posted as a matter of administrative discretion, and something that actually was required by FOIA to be available on-line. The latter would be a FOIA issue; the former would not.

Statutory Exemptions:

As members of the Subcommittee are well aware, nine categories of records are considered exempt from mandatory disclosure under 5 U.S.C. § 552(b). Exempt records include materials related to national security, defense or foreign policy, records related solely to the internal personnel rules of an agency, records that are specifically exempted from disclosure by statute, trade secrets and commercial or financial information, internal deliberative material, personnel or medical files the disclosure of which would cause a clearly unwarranted invasion of personal privacy, law enforcement records, records related to financial institutions, and geological data.

It must be emphasized for the record that these exemptions are central to the purposes of the act, because while the basic purpose of FOIA is to ensure an informed citizenry, it balances society's strong interest in open government with other equally compelling public interests, such as protecting national security, enhancing the effectiveness of law enforcement, protecting sensitive business information, protecting internal agency deliberations and common law privileges and, not least, preserving personal privacy. The protection of personal privacy is a critical consideration in an era when the Federal government routinely collects more and more information about individuals. In order to maintain public confidence in FOIA, this type of information must be protected against unwarranted disclosure.

The current statutory scheme, as implemented by the Executive branch and as interpreted by the courts in cases such as *Department of the Air Force v. Rose*, 425 U.S. 352 (1976) & *Department of Justice v. Reporters Committee for Freedom of the Press*,

489 U.S. 749 (1989), have helped to realize the finely tuned balance between competing public interests alluded to earlier.

We would note that the Department of Justice believes that the consequences of the Supreme Court's decision in *Department of Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1 (2001) has been injurious to the sound administration of FOIA. In *Klamath*, the Supreme Court narrowly addressed the scope of FOIA's exemption 5, which exempts from disclosure "inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency." 5 U.S.C. § 552(b)(5). The court held that communications between the Department of Interior (DOI) and several Indian tribes which, as applicants for a water allocation by DOI, were "seeking a government benefit at the expense of other applicants," did not meet the threshold of exemption 5 of FOIA because the communications were not "inter-agency or intra-agency" documents. However, litigants have tried to argue beyond the narrow holding involved in the *Klamath* case. This practice has affected our ability to maintain confidentiality for our exchanges with aligned parties and our settlement exchanges with opposing parties. *Klamath* has adversely affected expectations of confidentiality for common interest and settlement exchanges in the full range of civil and criminal litigation conducted by the Department of Justice.

Relying on *Klamath's* discussion of what is an "inter-agency or intra-agency" document under exemption 5, opposing parties have begun to seek the Government's exchanges with co-parties and settlement exchanges with opposing parties through FOIA requests and related litigation. The fact that the court in *Klamath* did not distinguish between the specific communications in question in that case and the common interest exchanges and settlement exchanges has converted FOIA into a "discovery loophole" that parties are using increasingly against the Government to circumvent legal privileges and other court protections. *Klamath* has disadvantaged the Government unfairly by forcing it to disclose privileged common interest exchanges with co-parties and settlement exchanges with opposing parties. The Government is receiving an increasing number of requests for these documents. As a result, the Department of Justice in some

cases has been obliged to publicly disclose documents that ordinarily would be protected under legal privileges and other court protections. The risk of forced disclosure is deterring the sharing of information and other documents that would otherwise be confidential between parties in litigation and thereby hindering effective communication between co-parties and the efficient settlement of cases.

This use of FOIA in a manner not intended by Congress is adversely affecting the Department's joint enforcement efforts with foreign nations in the war against terrorism, with States in antitrust and environmental enforcement cases, and with private parties in civil rights cases. This unintended use is also interrupting our work across the Department in efficiently and effectively settling cases by interfering with our ability as litigants to confidentially exchange settlement proposals. We would be happy to provide further examples of how this has adversely affected the litigating components within the Department.

FOIA itself need not be amended, but the Department of Justice urges Congress to adopt confidentiality legislation to address this problem and reestablish a level playing field in litigation. This could be accomplished by employing FOIA exemption 3 for the Government's common interest exchanges with aligned parties and settlement exchanges with opposing parties. The legislation must not affect the disclosure of final settlement documents under FOIA. This would ensure that the Government's common interest and settlement exchanges in litigation remain protected from disclosure, commensurate with existing legal privileges and court practices. Protecting settlement and common interest exchanges would simply return the Government to the same footing as other litigants. Such a legislative solution also would return a reasonable balance between public disclosure and protecting certain information that, if disclosed, would impair legitimate governmental functions. We would be happy to meet with committee staff to discuss further a potential legislative solution.

FOIA Processing Fees:

FOIA sets forth differing fee levels for different categories of requesters. For example, an agency is permitted to charge a requester for document search time, duplication, and review costs if the request is made for "commercial use." 5 U.S.C. § 552(a)(4)(A)(ii)(I). If the request is made by an educational or non-commercial scientific institution, whose purpose is scholarly or scientific, or by a representative of the "news media," an agency may charge a requester only for document duplication. 5 U.S.C. § 552(a)(4)(A)(ii)(II).

We believe that the current system of collecting fees for FOIA requests has benefited many requesters, as evidenced by the fact that requesters currently pay a mere 2.09% of the total cost associated with FOIA compliance, which was in excess of $306 million in 2003. At the same time, these fees impose a modest financial incentive upon requesters who make FOIA requests for commercial purposes to submit reasonably described FOIA requests. The Department of Justice believes that this is important because the statute places few limitations of the scope of a request. *See* 5 U.S.C. § 552(a)(3)(A)(i), which states that the Government shall make any record promptly available so long as the request "reasonably describes such records." Appropriate fees are necessary to provide a reasonable disincentive for frivolous or overbroad requests.

Attorneys Fees:

Current law permits a court to assess reasonable attorney fees and litigation costs incurred when the complainant in a lawsuit challenging an agency's response (or lack thereof) to a FOIA request has "substantially prevailed." 5 U.S.C. § 552(a)(4)(E) . This interpretation of the law has evolved in part from the Supreme Court's decision in *Buckhannon Board & Care Home, Inc. v. W. Va. Dep't of Health & Human Resources*, 532 U.S. 598 (2001), and a number of recent court of appeals decisions that have applied *Buckhannon* to FOIA litigation involving the issue of which party is responsible for the payment of attorneys fees. In this line of cases, the courts rejected the so-called "catalyst

theory" as a basis for FOIA attorney fee awards. *See OCAW v. Dep't of Energy*, 288 F.3d 452 (D.C. Cir. 2002); *Union of Needletrades v. INS*, 336 F.3d 200 (2d Cir. 2003). Briefly, the catalyst theory permits an award of attorney fees if the plaintiff's lawsuit served as a "catalyst" in achieving a voluntary change in the defendant agency's conduct. Proponents of this theory believe it is necessary to encourage plaintiffs with meritorious but expensive cases to bring suit, and will prevent agencies from unilaterally mooting an action before judgment to avoid an award of attorney fees. However, in rejecting the catalyst theory, Chief Justice Rehnquist noted in *Buckhannon* that ". . . these assertions . . . are entirely speculative and unsupported by any empirical evidence." *Buckhannon*, 532 U.S. at 608. The Department of Justice believes that *Buckhannon* and its progeny represent sound public policy and should remain undisturbed.

All in all, FOIA is working about as well as might be expected as it enters its middle age.[10] To be sure, in an area of government administration such as this, there will always be instances in which Federal agencies still can improve their delivery of services to the public as they continuously struggle to strike the best balance among their competing responsibilities. Governmentwide, more than four million FOIA requests are now made each year and, inevitably, some percentage of them will not receive the immediacy of attention that both the Department of Justice and FOIA requesters involved would like to see them receive. Especially in this era of large fiscal constraints and homeland security concerns, it is difficult for some agencies to discharge their FOIA responsibilities as well as we would all like them to. But the Department of Justice will continue to do all that it can to encourage full and uniform Governmentwide compliance with this vital access law because we are committed to its faithful implementation.

Conclusion:

[10]Beyond matters of procedural concern, there always are some substantive respects in which FOIA could benefit from further fine-tuning, such as regarding the protection of settlement discussions as noted above and perhaps also homeland security information as well. Such matters may be appropriate for future attention.

Since its enactment in 1966, FOIA has firmly established an effective statutory means of public access, where warranted, to Executive branch information in the Federal government. But the goal of achieving an informed citizenry is often counterpoised against other vital societal aims, such as national security, the public's interest in effective and efficient operations of government; the prudent use of limited tax payer dollars; and the preservation of the confidentiality and security of sensitive personal, commercial, and governmental information.

Though tensions among these competing interests are characteristic of a democratic society, their resolution lies in properly utilizing FOIA's workable statutory scheme that encompasses, balances, and appropriately protects all interests, while placing primary emphasis on the most responsible disclosure possible.

I would be pleased to address any question that you or any other Member of the Subcommittee might have on this subject.

Mr. PLATTS. Thank you, Mr. Nichols.
Ms. Koontz.

STATEMENT OF LINDA KOONTZ

Ms. KOONTZ. Mr. Chairman and members of the committee, I appreciate the opportunity to participate in the subcommittee's hearing on the implementation of the Freedom of Information Act.

As you know, under the act, agencies are required to report annually to the Attorney General providing specific information about their FOIA operations. Over the past several years we have been reviewing and summarizing these annual reports for the 24 agencies subject to the Chief Financial Officers Act and the CIA.

Based on this work a number of trends are apparent. First, citizens have been requesting and receiving an ever-increasing amount of information from the Federal Government through FOIA. Based on data reported by agencies, the number of requests received increased by 71 percent from 2002 to 2004.

In recent years the Veterans Administration and the Social Security Administration have accounted for many of the total requests. In 2004 these two agencies accounted for about 82 percent of total requests.

As more requests come in, agencies also report that they have been processing more of them, 68 percent more in 2002 to 2004. However, at the same time the number of pending requests carried over from year to year, also known as the backlog, has also been increasing, rising 14 percent since 2002.

In 2004 about 92 percent of FOIA requests Government-wide were reported to have been granted in full. A relatively small number were partially granted and about 1 percent were denied.

Without VA and Social Security 61 percent of requests were granted in full; 15 percent partially granted and 2 percent denied. However, the number of fully granted requests varied widely among the agencies in fiscal year 2004. For example, three agencies, State, CIA and the National Science Foundation make full grants of requested records in less than 20 percent of the cases they processed. We also saw this variation in previous years as well.

In regard to timeliness, reported time required to process requests varied considerably by agency. For example, 11 agency components reported processing simple requests in median times of less than 10 days. However, other agency components are taking much more time to process simple requests and in some cases reported median processing time in excess of 100 days.

However, we were unable to determine trends in processing times at the agency level because agencies have generally reported median processing time at a component level, making it difficult to drive an agency-level picture.

In addition, the use of a single median time to characterize how long processing takes instead of a range of completion times and the number of requests for each does not provide a complete picture of agency performance.

In summary, Mr. Chairman, FOIA continues to be a valuable tool for citizens to obtain information about the operations and decisions of the Federal Government. Given the steadily increasing

workload, it will remain critically important that strong oversight of FOIA implementation continue.

We look forward to working with you and your staff to ensure that agencies remain responsive to the needs of citizens. That concludes my statement. I would be happy to answer questions. Thank you.

[The prepared statement of Ms. Koontz follows:]

United States Government Accountability Office

GAO

Testimony before the Subcommittee on Government Management, Finance and Accountability, Committee on Government Reform, House of Representatives

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INFORMATION MANAGEMENT

Implementation of the Freedom of Information Act

Statement of Linda D. Koontz
Director, Information Management Issues

GAO-05-648T

GAO
Accountability* Integrity* Reliability

Highlights

Highlights of GAO-05-648T, a testimony before the Subcommittee on Government Management, Finance, and Accountability, Committee on Government Reform, House of Representatives

May 11, 2005

INFORMATION MANAGEMENT

Implementation of the Freedom of Information Act

Why GAO Did This Study

The Freedom of Information Act (FOIA) establishes that federal agencies must provide the public with access to government information, thus enabling them to learn about government operations and decisions. To help ensure appropriate implementation, the act requires that agencies report annually to the Attorney General, providing specific information about their FOIA operations. GAO has reported previously on the contents of these annual reports for 25 major agencies.

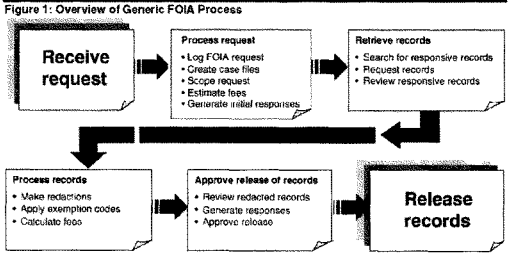
GAO was asked to describe the FOIA process and discuss the reported implementation of FOIA.

What GAO Found

Although the specific details of processes for handling FOIA requests vary among agencies, the major steps in handling a request are similar across the government. Agencies receive requests, usually in writing (although they may accept requests by telephone or electronically), which can be submitted by any organization or member of the public. Once requests are received, the agency responds through a process that includes several phases: initial processing, searching for and retrieving responsive records, preparing responsive records for release, approving the release of the records, and releasing the records to the requester. Figure 1 is an overview of the FOIA process, from the receipt of a request to the release of records.

According to data reported by agencies in their annual FOIA reports, citizens have been requesting and receiving an ever-increasing amount of information from the federal government through FOIA. The number of requests that agencies received increased by 71 percent from 2002 to 2004. Further, agencies reported they have been processing more requests—68 percent more from 2002 to 2004. For 92 percent of requests processed in 2004, agencies reported that responsive records were provided in full to requesters. However, the number of pending requests carried over from year to year—known as the backlog—has also been increasing, rising 14 percent since 2002.

Figure 1: Overview of Generic FOIA Process



Source: GAO analysis of agency information.

www.gao.gov/cgi-bin/getrpt?GAO-05-648T

To view the full product, including the scope and methodology, click on the link above. For more information, contact Linda Koontz at 202-512-6240, or koontzl@gao.gov.

Mr. Chairman and Members of the Subcommittee:

I appreciate the opportunity to participate in the Subcommittee's hearing on the implementation of the Freedom of Information Act (FOIA).[1] Generally speaking, FOIA establishes that federal agencies must provide the public with access to government information, thus enabling them to learn about government operations and decisions. Specific requests by the public for information through the act have led to disclosure of waste, fraud, abuse, and wrongdoing in the government, as well as the identification of unsafe consumer products, harmful drugs, and serious health hazards. To help ensure appropriate implementation, the act requires that agencies report annually to the Attorney General, providing specific information about their FOIA operations.

As requested, in my remarks today, I will describe the FOIA process at federal agencies and discuss the implementation of FOIA. To develop a description of the FOIA process at federal agencies, we compiled and analyzed information from Department of Justice documentation and from our previous reports.[2] To assess implementation of FOIA, we examined, consolidated, and analyzed annual report data for fiscal years 2002 through 2004 from 25 major agencies[3] (herein we refer to this scope as governmentwide). We did

[1] See 5 U.S.C. § 552.

[2] GAO, *Information Management: Progress in Implementing the 1996 Electronic Freedom of Information Act Amendments*, GAO-01-378 (Washington, D.C.: Mar. 16, 2001); *Information Management: Update on Implementation of the 1996 Electronic Freedom of Information Act Amendments*, GAO-02-493 (Washington, D.C.: Aug. 30, 2002); and *Information Management: Update on Freedom of Information Act Implementation Status*, GAO-04-257 (Washington, D.C.: Feb. 18, 2004).

[3] The agencies included the 24 agencies covered by the Chief Financial Officers Act and the Central Intelligence Agency. These 24 departments and agencies are the Departments of Agriculture, Commerce, Defense, Education, Energy, Health and Human Services, Homeland Security, Housing and Urban Development, the Interior, Justice, Labor, State, Transportation, the Treasury, and Veterans Affairs; Environmental Protection Agency; General Services Administration; National Aeronautics and Space Administration; National Science Foundation; Nuclear Regulatory Commission; Office of Personnel Management; Small Business Administration; Social Security Administration; and U.S. Agency for International Development. For fiscal year 2002, we included the Federal Emergency Management Agency. For fiscal years 2003 and 2004, we included the Department of Homeland Security, which then incorporated the Federal Emergency Management Agency.

not independently verify the accuracy of the data provided in agency annual reports. We discussed the content of this statement with an official of the Department of Justice's Office of Information and Privacy to confirm the accuracy of our information. We performed our work from April 2005 to May 2005, in accordance with generally accepted government auditing standards.

Results in Brief

Although the specific details of processes for handling FOIA requests vary among agencies, the major steps in processing a request are similar across the government. Agencies receive requests, usually in writing (although they may accept requests by telephone or electronically), which can be submitted by any organization or member of the public. Once received, the request goes through several phases, which include initial processing, searching for and retrieving responsive records, preparing responsive records for release, approving the release of the records, and releasing the records to the requester.

Citizens have been requesting and receiving an ever-increasing amount of information from the federal government through FOIA. Based on data reported by agencies in their annual FOIA reports, the number of requests received by agencies increased by 71 percent from 2002 to 2004. As more and more requests come in, agencies also report that they have been processing more of them—68 percent more from 2002 to 2004. For 92 percent of requests processed in 2004, agencies reported that responsive records were provided in full to requesters. However, the number of pending requests carried over from year to year—known as the backlog—has also been increasing, rising 14 percent since 2002.

Background

FOIA, which was originally enacted in 1966 and subsequently amended several times, establishes a legal right of access to government records and information, on the basis of the principles

of openness and accountability in government. Before the act, an individual seeking access to federal records had faced the burden of establishing a right to examine them. FOIA established a "right to know" standard for access, instead of a "need to know," and shifted the burden of proof from the individual to the government agency seeking to deny access. The act has been amended several times, including in 1974, 1976, 1986, 1996, and 2002.

FOIA provides the public with access to government information either through "affirmative agency disclosure"—publishing information in the *Federal Register* or making it available in reading rooms—or in response to public requests for disclosure. Public requests for disclosure of records are the best known type of FOIA disclosure. Any member of the public may request access to information held by federal agencies, without showing a need or reason for seeking the information.

The act prescribes nine specific categories of information that is exempt from disclosure; agencies may cite these exemptions in denying access to material (see table 1). The act also includes provisions for excluding specific sensitive records held by law enforcement agencies. The act requires agencies to notify requesters of the reasons for any adverse determination and grants requesters the right to appeal agency decisions to deny access.

Table 1: Freedom of Information Act Exemptions

Exemption number	Matters that are exempt from FOIA
(1)	(A) Specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy and (B) are in fact properly classified pursuant to such Executive Order.
(2)	Related solely to the internal personnel rules and practices of an agency.
(3)	Specifically exempted from disclosure by statute (other than section 552b of this title), provided that such statute (A) requires that matters be withheld from the public in such a manner as to leave no discretion on the issue, or (B) establishes particular criteria for withholding or refers to particular types of matters to be withheld.
(4)	Trade secrets and commercial or financial information obtained from a person and privileged or confidential.
(5)	Inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency.
(6)	Personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.
(7)	Records or information compiled for law enforcement purposes, but only to the extent that the production of such law enforcement records or information
(A)	could reasonably be expected to interfere with enforcement proceedings;
(B)	would deprive a person of a right to a fair trial or impartial adjudication;
(C)	could reasonably be expected to constitute an unwarranted invasion of personal privacy;
(D)	could reasonably be expected to disclose the identity of a confidential source, including a State, local, or foreign agency or authority or any private institution which furnished information on a confidential basis, and, in the case of a record or information compiled by a criminal law enforcement authority in the course of a criminal investigation or by an agency conducting a lawful national security intelligence investigation, information furnished by confidential source;
(E)	would disclose techniques and procedures for law enforcement investigations or prosecutions, or would disclose guidelines for law enforcement investigations or prosecutions if such disclosure could reasonably be expected to risk circumvention of the law; or
(F)	could reasonably be expected to endanger the life or physical safety of an individual.
(8)	Contained in or related to examination, operating, or condition reports prepared by, on behalf of, or for the use of an agency responsible for the regulation of supervision of financial institutions.
(9)	Geological and geophysical information and data, including maps, concerning wells.

Source: 5 U.S.C. § 552(b)(1) through (b)(9).

In addition, agencies are required to meet certain time frames for making key determinations: whether to comply with requests (20 business days from receipt of the request), responses to appeals of adverse determinations (20 business days from filing of the appeal), and whether to provide expedited processing of requests (10 business days from receipt of the request). Congress did not establish a statutory deadline for making releasable records available, but instead required agencies to make them available promptly.

We have reported several times in the past on the contents of the annual reports of 25 major agencies, covering fiscal years 1998 through 2002. We first reported information in 2001[4] on the implementation of the 1996 amendments to FOIA. At that time we recommended that Justice (1) encourage agencies to make material electronically available and (2) review agency annual reports to address specific data quality issues. Since our report was issued, Justice has taken steps to implement both of these recommendations. In 2002, we reported[5] that the number of requests received and processed appeared for most agencies—except the Department of Veterans Affairs—to peak in fiscal year 2000 and decline slightly in fiscal year 2001. In our 2004 report,[6] we reported that between 2000 and 2002, the number of requests received and processed declined when the Department of Veterans Affairs is excluded. We also reported that agencies' backlogs of pending requests were declining, and that the number of FOIA requests denied governmentwide had dropped dramatically between 2000 and 2001 and remained low in 2002.

Roles of Justice and OMB in FOIA Implementation

The Department of Justice and the Office of Management and Budget (OMB) both have roles in the implementation of FOIA. The Department of Justice oversees agencies' compliance with FOIA and is the primary source of policy guidance for agencies. OMB is responsible for issuing guidelines on the uniform schedule of fees.

Specifically, Justice's requirements under the act are to

- make agencies' annual FOIA reports available through a single electronic access point and notify Congress as to their availability;

[4] GAO, *Information Management: Progress in Implementing the 1996 Electronic Freedom of Information Act Amendments*, GAO-01-378 (Washington, D.C.: Mar. 16, 2001).

[5] GAO, *Information Management: Update on Implementation of the 1996 Electronic Freedom of Information Act Amendments*, GAO-02-493 (Washington, D.C.: Aug. 30, 2002).

[6] GAO, *Information Management: Update on Freedom of Information Act Implementation Status*, GAO-04-257 (Washington, D.C.: Feb. 18, 2004).

- in consultation with OMB, develop guidelines for the required annual agency reports, so that all reports use common terminology and follow a similar format; and
- submit an annual report on FOIA statistics and the efforts undertaken by Justice to encourage agency compliance.

Within the Department of Justice, the Office of Information and Privacy (OIP) has lead responsibility for providing guidance and support to federal agencies on FOIA issues. OIP first issued guidelines for agency preparation and submission of annual reports in the spring of 1997 and periodically issued additional guidance. OIP also periodically issues guidance on compliance, provides training, and maintains a counselors service to provide expert, one-on-one assistance to agency FOIA staff. Further, it also makes a variety of FOIA and Privacy Act resources available to agencies and the public via the Justice Web site and on-line bulletins.

In addition, the act requires OMB to issue guidelines to "provide for a uniform schedule of fees for all agencies."[7] In charging fees for responding to requests, agencies are required to conform to the OMB guidelines. Further, in 1987, the Department of Justice issued guidelines on waiving fees when requests are determined to be in the public interest. Under the guidelines, requests for waivers or reduction of fees are to be considered on a case-by-case basis, taking into account both the public interest and the requester's commercial interests.

The 1996 FOIA amendments, referred to as e-FOIA, require that agencies submit a report to the Attorney General on or before February 1 of each year that covers the preceding fiscal year and includes information about agencies' FOIA operations.[8] The following are examples of information that is to be included in these reports:

[7] This provision was added by the Freedom of Information Reform Act of 1986 (Pub. L. 99-570). See OMB, *Uniform Freedom of Information Act Fee Schedule and Guidelines*, 52 FR 10011 (Mar. 27, 1987), effective April 27, 1987.

[8] 5 U.S.C. § 552(e).

- number of requests received, processed, and pending;
- median number of days taken by the agency to process different types of requests;
- determinations made by the agency not to disclose information and the reasons for not disclosing the information;
- disposition of administrative appeals by requesters;
- information on the costs associated with handling of FOIA requests; and
- full-time-equivalent staffing information.

In addition to providing their annual reports to the Attorney General, agencies are to make them available to the public in electronic form. The Attorney General is required to make all agency reports available on line at a single electronic access point and report to Congress no later than April 1 of each year that these reports are available in electronic form.

Disposition of Agency Requests

As agencies process FOIA requests, they generally place them in one of four possible disposition categories: grants, partial grants, denials, and "not disclosed for other reasons." These categories are defined as follows:

- *Grants*: agency decisions to disclose all requested records in full.
- *Partial grants*: decisions to withhold some records in whole or in part, because such information was determined to fall within one or more exemptions.
- *Denials*: agency decisions not to release any part of the requested records because all information in the records is determined to be exempt under one or more statutory exemptions.
- *Not disclosed for other reasons*: agency decisions not to release requested information for any of a variety of reasons other than statutory exemptions from disclosing records. The categories and definitions of these "other" reasons for nondisclosure are shown in table 2.

Table 2: "Other" Reasons for Nondisclosure

Category	Definition
No records	The agency searched and found no record responsive to the request.
Referrals	The agency referred records responsive to the request to another agency.
Request withdrawn	The requester withdrew the request.
Fee-related reasons	The requester refused to commit to pay fees (or other reasons related to fees).
Records not reasonably described	The requester did not describe the records sought with sufficient specificity to allow them to be located with a reasonable amount of effort.
Not a proper FOIA request	The request was not a FOIA request for one of several procedural reasons.
Not an agency record	The requested record was not within the agency's control.
Duplicate request	The request was submitted more than once by the same requester.

Source: Department of Justice.

When a FOIA request is denied in full or in part, or the requested records are not disclosed for other reasons, the requester is entitled to be told the reason for the denial, to appeal the denial, and to challenge it in court.

Fee Structure and Fee Waivers

FOIA also authorizes agencies to recoup certain direct costs associated with processing requests, and agencies also have the discretion to reduce or waive fees under various circumstances. Agency determinations about fees and fee waivers are complex decisions that include determining (1) a requester's fee category, (2) whether a fee waiver is to be granted, and (3) the actual fees to be charged.

FOIA stipulates three types of fee categories for requesters: (1) commercial; (2) educational or noncommercial scientific institutions and representatives of the news media; and (3) other. Further, fees can be charged for three types of FOIA-related activities—search, duplication, and review—depending on the requester's fee category. In addition, fees may not be charged to a requester in certain situations, such as when a fee waiver is granted or when the applicable fees are below a certain threshold.

Commercial users can be charged for the broadest range of FOIA-related activities, including document search, review, and duplication. Commercial use is defined in the OMB fee schedule guidelines as "a use or purpose that furthers the commercial, trade

or profit interests of the requester or the person on whose behalf the request is being made." The second category exempts search and review fees for documents sought for noncommercial use by educational or noncommercial scientific institutions, and for documents sought by representatives of the news media. The third category of fees, which applies to all requesters who do not fall within either of the other two categories, allows for "reasonable" charges for document search and duplication. Table 3 shows the FOIA-related activities for which agencies can charge by fee category, as stipulated in the act.

Table 3: FOIA Charges by Category

	Activities for which agencies can charge		
Category of requester	**Search**	**Review**	**Duplication**
Category 1: Commercial requester	Yes	Yes	Yes
Category 2: Educational or noncommercial scientific institutions and representatives of the news media	No	No	Yes (100 pages free)
Category 3: Other	Yes (2 hours free)	No	Yes (100 pages free)

Source: GAO analysis of 5 U.S.C. § 552 (a)(4)(A)(iv).

Although the act generally requires that requesters pay fees to cover the costs of processing their requests, in certain circumstances, fees are not to be charged. For example, as stipulated in the act, fees may not be charged when the government's cost of collecting and processing the fee is likely to equal or exceed the amount of the fee itself.

Further, under certain circumstances, the act requires an agency to furnish documents without charge, or at reduced charges. This is commonly referred to as the FOIA fee-waiver provision. Based on this provision, an agency must provide a fee waiver if two conditions are met:

- disclosure of the requested information is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government, and
- disclosure of the information is not primarily in the commercial interest of the requester.

Under the act and guidance, when these requirements are both satisfied, based upon information supplied by a requester or otherwise made known to the agency, the fee waiver or reduction is to be granted by the FOIA officer. When one or both of these requirements are not satisfied, a fee waiver is not warranted. As these criteria suggest, fee waivers are to be granted on a case-by-case basis. Individuals who receive fee waivers in some cases may not necessarily receive them in other cases.

Relationship of FOIA and the Privacy Act

In addition to FOIA, the Privacy Act of 1974[9] includes provisions granting individuals the right to gain access to and correct information about themselves held by federal agencies. Thus the Privacy Act serves as a second major legal basis, in addition to FOIA, for the public to use in obtaining government information. The Privacy Act also places limitations on agencies' collection, disclosure, and use of personal information.

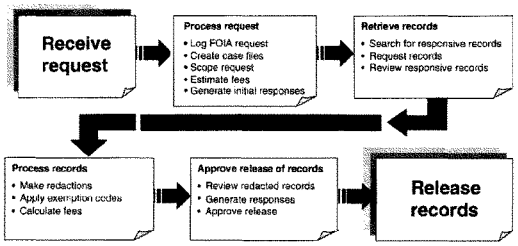
Although the two laws differ in scope, procedures in both FOIA and the Privacy Act permit individuals to seek access to records about themselves—known as "first-party" access. Depending on the individual circumstances, one law may allow broader access or more extensive procedural rights than the other, or access may be denied under one act and allowed under the other. Subsequently, the Department of Justice's Office of Information and Privacy (OIP) issued guidance that it is "good policy for agencies to treat all first-party access requests as FOIA requests (as well as possibly Privacy Act requests), regardless of whether the FOIA is cited in a requester's letter." This guidance was intended to help ensure that requesters receive the fullest possible response to their inquiries, regardless of which law they cite. For more information about FOIA and the Privacy Act, see appendix I.

[9] See 5 U.S.C. § 552a.

The FOIA Process at Federal Agencies

Although the specific details of processes for handling FOIA requests vary among agencies, the major steps in handling a request are similar across the government. Agencies receive requests, usually in writing (although they may accept requests by telephone or electronically), which can come from any organization or member of the public. Once received, the request goes through several phases, which include initial processing, searching for and retrieving responsive records, preparing responsive records for release, approving the release of the records, and releasing the records to the requester. Figure 1 is an overview of the process, from the receipt of a request to the release of records.

Figure 1: Overview of Generic FOIA Process



Source: GAO analysis of agency information.

During the initial processing phase, a request is logged into the agency's FOIA system, and a case file is started. The request is then reviewed to determine its scope, estimate fees, and provide an initial response to the requester. After this point, the FOIA staff begins its search to retrieve responsive records. This step may include searching for records from multiple locations and program offices. After potentially responsive records are located, the documents are reviewed to ensure that they are within the scope of the request.

During the next two phases, the agency ensures that appropriate information is to be released under the provisions of the act. First, the agency reviews the responsive records to make any redactions based on the statutory exemptions. Once the exemption review is complete, the final set of responsive records is turned over to the FOIA office, which calculates appropriate fees, if applicable. Before release, the redacted responsive records are then given a final review, possibly by the agency's general counsel, and then a response letter is generated, summarizing the agency's actions regarding the request. Finally, the responsive records are released to the requester.

Some requests are relatively simple to process, such as requests for specific pieces of information that the requester sends directly to the appropriate office. Other requests may require more extensive processing, depending on their complexity, the volume of information involved, the need for the agency FOIA office to work with offices that have relevant subject-matter expertise to find and obtain information, the need for a FOIA officer to review and redact information in the responsive material, the need to communicate with the requester about the scope of the request, and the need to communicate with the requester about the fees that will be charged for fulfilling the request (or whether fees will be waived).

Specific details of agency processes for handling requests vary, depending on the agency's organizational structure and the complexity of the requests received. While some agencies centralize processing in one main office, other agencies have separate FOIA offices for each agency component and field office. Agencies also vary in how they allow requests to be made. Depending on the agency, requesters can submit requests by telephone, fax, letter, or e-mail or through the Web. In addition, agencies may process requests in two ways, known as "multitrack" and "single track." Multitrack processing involves dividing requests into two groups: (1) simple requests requiring relatively minimal review, which are placed in one processing track, and (2) more voluminous and complex requests, which are placed in another track. In contrast, single-track processing does not distinguish between simple and complex requests. With single-track processing, agencies process all requests on a first-in/first-out basis. Agencies can also process FOIA

requests on an expedited basis when a requester has shown a compelling need or urgency for the information.

FOIA Implementation

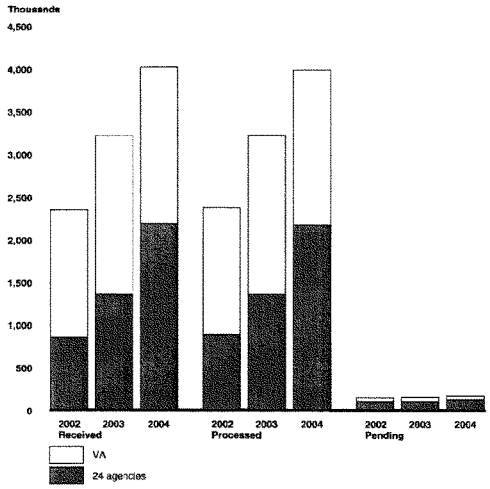
Citizens have been requesting and receiving an ever-increasing amount of information from the federal government, as reflected in the increasing number of FOIA requests that have been received and processed in recent years. In fiscal year 2004, the 25 agencies we reviewed reported receiving and processing about 4 million requests, an increase of 25 percent compared to 2003. From 2002 to 2004, the number of requests received increased by 71 percent, and the number of requests processed increased by 68 percent.

The 25 agencies we reviewed handle over 97 percent of FOIA requests governmentwide. They include the 24 major agencies covered by the Chief Financial Officers Act, as well as the Central Intelligence Agency and, beginning in 2003, the Department of Homeland Security (DHS) in place of the Federal Emergency Management Agency (FEMA). While the creation of DHS in fiscal year 2003 led to a shift in some FOIA requests from agencies affected by the creation of the new department, the same major component entities are reflected in all 3 years that we reviewed. For example, in 2002, before DHS was formed, FEMA independently reported on its FOIA requests, and its annual report is reflected in our analysis. However, beginning in 2003, FEMA became part of DHS, and thus its FOIA requests are reflected in DHS figures for 2003 and 2004.

In recent years, Veterans Affairs (VA) has accounted for a large portion—about half—of governmentwide FOIA requests received and processed. This is because the agency includes in its totals the many first-party medical records requests that it processes. However, VA's numbers have not driven the large increases in FOIA requests. In fact, in 2004, the agency had a decline in the number of requests received, processed, and pending compared to 2003. Thus,

when VA is excluded from governmentwide[10] FOIA request totals, the increase between 2003 and 2004 changes from 25 percent to 61 percent. Figure 2 shows total requests reported governmentwide for fiscal years 2002 through 2004, with VA's share shown separately.

Figure 2: Total FOIA Requests with VA Shown Separately, Fiscal Years 2002–2004



Source: GAO analysis of FOIA annual reports for fiscal years 2000–2004 (self-reported data).

Note: For 2004, data were unavailable for the Agency for International Development and the Environmental Protection Agency.

[10] For 2004, data were unavailable for the Agency for International Development and the Environmental Protection Agency.

In 2004, most dispositions of FOIA requests (92 percent) were reported to have been granted in full, as shown in table 4. Only relatively small numbers were partially granted (3 percent), denied (1 percent), or not disclosed for other reasons (5 percent). When VA is excluded from the totals, the percentages remain roughly comparable.

Table 4: Disposition of Processed Requests for Fiscal Year 2004

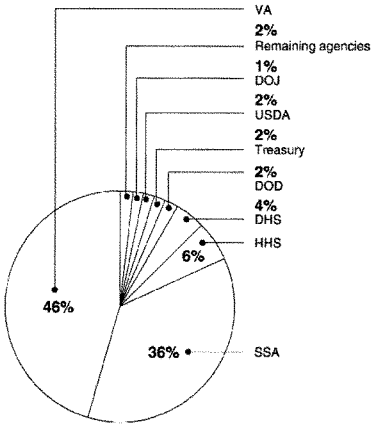
Disposition	Number of requests (all)	Percentage of requests (all)	Number of requests (without VA)	Percentage of requests (without VA)
Grants	3.6 million	92	1.9 million	87
Partial grants	113,000	3	105,000	5
Denial	22,000	1	15,000	1
Not disclosed for other reasons	196,000	5	158,000	7

Source: FOIA annual reports for 2004 (self-reported data).

Note: Totals are rounded. Because of rounding, the total percentage of requests processed exceeds 100 percent.

Agencies other than VA that reported receiving large numbers of requests in fiscal year 2004 included the Social Security Administration (SSA), the Department of Health and Human Services (HHS), and the Department of Homeland Security (DHS), as shown in figure 3. Agencies other than VA, SSA, HHS, and DHS accounted for only 9 percent of all requests.

Figure 3: Number of Requests Received by Agency for 2004



Source: GAO analysis of FOIA annual reports for fiscal year 2004 (self-reported data).

Note: Because of rounding, the total percentage received exceeds 100 percent.

Remaining agencies include the Central Intelligence Agency, Commerce, Energy, Interior, Labor, Transportation, Education, the General Services Administration, Housing and Urban Development, the National Aeronautics and Space Administration, the Nuclear Regulatory Commission, the National Science Foundation, the Office of Personnel Management, the Small Business Administration, and State. Information was not available for the Agency for International Development or the Environmental Protection Agency at the time of our review.

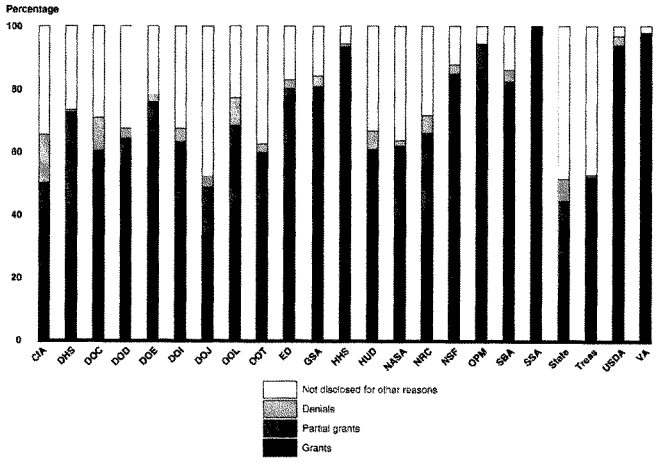
Three of the four agencies that handled the largest numbers of requests—VA, SSA, and HHS—also granted the largest percentages of requests in full. However, as shown in figure 4, the numbers of fully granted requests varied widely among agencies in fiscal year 2004. For example, three agencies—State, the Central Intelligence Agency, and the National Science Foundation —made full grants of requested records in less than 20 percent of the cases they

processed. Eight of the 25 agencies we reviewed made full grants of requested records in over 60 percent of their cases.[11] This variance among agencies in the disposition of requests has been evident in prior years as well.[12]

[11] Information for the Agency for International Development and the Environmental Protection Agency was not available for fiscal year 2004.

[12] See GAO, *Information Management: Progress in Implementing the 1996 Electronic Freedom of Information Act Amendments*, GAO-01-378 (Washington, D.C.: Mar. 16, 2001); and *Information Management: Update on Freedom of Information Act Implementation Status*, GAO-04-257 (Washington, D.C.: Feb. 18, 2004).

Figure 4: Disposition of Processed Requests, by Agency (Fiscal Year 2004)



Source: GAO analysis of annual FOIA reports for fiscal year 2004 (self-reported data).

Note: Abbreviations are as follows: CIA: Central Intelligence Agency; DHS: Department of Homeland Security; DOC: Department of Commerce; DOD: Department of Defense; DOE: Department of Energy; DOI: Department of Interior; DOJ: Department of Justice; DOL: Department of Labor; DOT: Department of Transportation; ED: Department of Education; GSA: General Services Administration; HHS: Health and Human Services; HUD: Housing and Urban Development; NASA: National Aeronautics and Space Administration; NRC: Nuclear Regulatory Commission; NSF: National Science Foundation; OPM: Office of Personnel Management; SBA: Small Business Administration; SSA: Social Security Administration; State: Department of State; Treas: Department of the Treasury; USDA: Department of Agriculture; VA: Veterans Affairs. Reports were not available for the Agency for International Development (AID) or the Environmental Protection Agency (EPA).

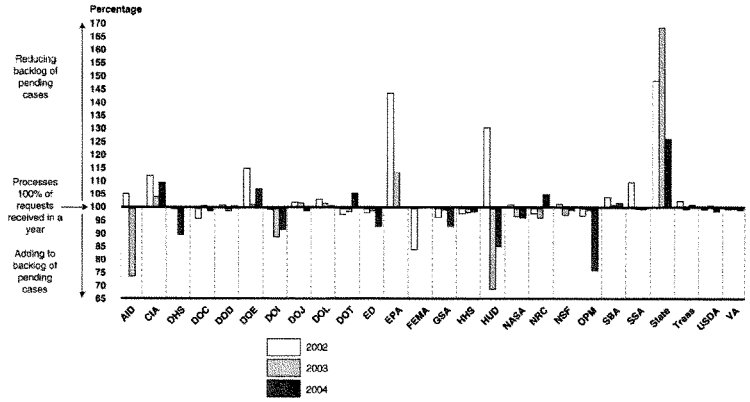
Agency Backlogs Have Increased

In addition to processing greater numbers of requests, many agencies (13 of 25) also reported that their backlogs of pending requests—requests carried over from one year to the next—have increased since 2002. In 2002, pending requests governmentwide

were reported to number about 140,000; whereas in 2004, about 160,000—14 percent more—were reported.

Mixed results were reported in reducing backlogs at the agency level—some backlogs decreased while others increased, as reported from 2002 through 2004. The number of requests that an agency processes relative to the number it receives is an indicator of whether an agency's backlog is increasing or decreasing. Six of the 25 agencies we reviewed reported processing fewer requests than they received each year for fiscal years 2002, 2003, and 2004—therefore increasing their backlogs (see fig. 4). Nine additional agencies also processed less than they received in two of these three years. In contrast, five agencies (CIA, Energy, Labor, SBA, and State) had processing rates above 100 percent in all three years, meaning that each made continued progress in reducing their backlogs of pending cases. Thirteen agencies were able to make at least a small reduction in their backlogs in 1 or more years between fiscal years 2002 and 2004.

Figure 1: Agency Processing Rate for 25 Agencies



Source: GAO analysis of FOIA annual reports for fiscal years 2002–2004 (self-reported data).

Note: Abbreviations are as in figure 3.

The agency processing rate is defined as the number of requests processed in a given year compared with the requests received, expressed as a percentage.

In 2002, FEMA data were used, and for 2003 and 2004 DHS data were used.

For 2004, data were unavailable for the Agency for International Development and the Environmental Protection Agency.

FOIA does not require agencies to make records available within a specific amount of time. As I mentioned earlier, Congress did not establish a statutory deadline for making releasable records available, but instead required agencies to make them available promptly. Agencies, however, are required to inform requesters within 20 days of receipt of a request as to whether the agency will comply with the request.

For 2004, the reported time required to process requests by track varied considerably among agencies (see table 5). Eleven agency

components reported processing simple requests in less than 10 days, as evidenced by the lower value of the reported ranges. These components are part of the Departments of Energy, Education, Homeland Security, Health and Human Services, the Interior, Justice, Labor, Transportation, the Treasury, and Agriculture. On the other hand, some organizations are taking much more time to process simple requests, such as components of Energy, Interior, and Justice. This can be seen in upper end values of the median ranges greater than 100 days. Components of four agencies (Interior, Education, Treasury, and VA) reported processing complex requests quickly—in less than 10 days. In contrast, several other agencies (DHS, Energy, Justice, Transportation, Education, HHS, HUD, State, Treasury, and Agriculture) reported components taking longer to process complex requests, with median days greater than 100. Four agencies (HHS, NSF, OPM, and SBA) reported using single-track processing. The processing times for single track varied from 5 days (at SBA) to 182 days (at an HHS component).

Table 5: Median Days to Process Requests for 2004, by Track

	Type of request processing track			
Agency	Simple	Complex	Single	Expedited
AID	—	—	—	—
CIA	7	63	—	10
DHS	8–84	5–111	—	3–45
DOC	13	41	—	5
DOD	17	59	—	1
DOE	1–158	18–916	—	5–7
DOI	3–834	0–99	—	2–64
DOJ	0–137	6–636	—	1–195
DOL	2–30	18–60	—	2–25
DOT	1–68	23–135	—	5–57
ED	0–30	2–134	—	3–21
EPA	—	—	—	—
GSA	—	14	—	—
HHS	9–25	60–325	5–182	2–66
HUD	21–95	30–161	—	9–42
NASA	18	33	—	26
NRC	11	47	—	60
NSF	—	—	20	—
OPM	—	—	9	—
SBA	—	—	5	—
SSA	19	37	—	—
State	6	209	—	184
Treas	2–10	4–172	—	5–10
USDA	1–77	12–800	—	1–53
VA	—	4–49	—	1–18

Source: FOIA annual reports for fiscal years 2004 (self-reported data).

Note: For agencies that reported processing times by component, the table indicates the range of reported component median times. A dash indicates that the agency did not report any median time for a given track in a given year. For 2004, EPA and AID annual reports were not available.

Based on the data in agency annual reports, it was not feasible to determine trends at the agency level in the amount of time taken to process requests (reported annually as the median number of days to process requests). This is largely because many agencies have reported median processing times at a component level, making it difficult to derive overall agency median processing times. Nearly half (12 of 25) of the agencies reported median times at a component level. Although this practice does not provide agency-level indicators, it provides visibility into differences in processing

times among the various components of agencies, which can sometimes be substantial.

In summary, FOIA continues to be a valuable tool for citizens to obtain information about the operation and decisions of the federal government. Agencies have received steadily increasing numbers of requests and have also continued to increase the number of requests that they process. Despite this increase in processing requests, the backlog of pending cases continues to grow. Given this steadily increasing workload, it will remain critically important that strong oversight of FOIA implementation continue in order to ensure that agencies remain responsive to the needs of citizens.

Mr. Chairman, this completes my prepared statement. I would be happy to respond to any questions you or other Members of the Subcommittee may have at this time.

Contact and Acknowledgements

If you should have questions about this testimony, please contact me at (202) 512-6240 or via e-mail at koontzl@gao.gov. Other major contributors included Barbara Collier, John de Ferrari, and Elizabeth Zhao.

Appendix I: Relationship of FOIA and the Privacy Act of 1974

In addition to rights under the Freedom of Information Act (FOIA), individuals also have rights of access to government information under the Privacy Act of 1974. The Privacy Act restricts the federal government's use of personal information. More precisely, it governs use of information about an individual that is maintained in a "system of records," which is any group of records containing information about an individual from which information is retrieved by individual identifier. With regard to access, the Privacy Act gives individuals the right to have access to information about themselves that is maintained in a system of records so that they can review, challenge, and correct the accuracy of personal information held by the government.

While both laws generally give individuals the right of access to information (subject to exemptions), there are several important differences:

- While FOIA generally gives a right of access to all federal government records, the Privacy Act applies only to records pertaining to an individual that are retrieved by individual identifier.
- While FOIA generally gives "any person" a right of access to records, the Privacy Act gives access to only the subject of a particular record and only if that person is a U.S. citizen or a lawfully admitted permanent resident alien.
- While FOIA exempts categories of records from public release, including where disclosure would constitute an unwarranted invasion of personal privacy,[19] the Privacy Act's exemptions pertain to a variety of the act's requirements, not just access (e.g., that agencies account for all disclosures of personal information, that they maintain only relevant and necessary personal information, and that they notify the public of their sources for obtaining records of personal information).

[19] 5 U.S.C. § 552(b)(6) and (b)(7).

Under current Department of Justice guidance, agencies are to treat an individual's requests for his or her own records as a request under FOIA as well as the Privacy Act. This is intended to ensure that individuals are fully afforded their rights under both laws. As a practical matter, it appears that agencies generally consider requests for access to one's own records as FOIA requests, without any separate accounting as Privacy Act requests. These requests are referred to as "first-party requests" and their addition to agency FOIA statistics can been seen, for example, in the large numbers of FOIA requests reported by agencies such as VA and SSA.

Apart from questions about the role of the Privacy Act in FOIA decisions, privacy questions are often dealt with independently under FOIA. The act's two privacy exemptions [(b)(6) & (7)] protect from public release information about individuals in "personnel and medical files and similar files" and "information compiled for law enforcement purposes," the disclosure of which would constitute an "unwarranted invasion of personal privacy." These statutory provisions have resulted in an analysis that involves a "balancing of the public's right to disclosure against the individual's right to privacy."[14] This approach led, for example, the Supreme Court to decide that there is a significant private interest in the "practical obscurity" of criminal history records even though they are officially public records.[15] The development and refinement of such privacy principles continues as agencies and the courts make new "balancing" decisions in FOIA cases. Accordingly, it is difficult to definitively describe the extent of privacy protection under FOIA, or to characterize federal privacy protection as limited to the terms of the Privacy Act.

[14] Dept. of the Air Force v. Rose, 425 U.S. 352, 372; U.S. Department of Justice v. Reporters Committee for Freedom of the Press, 489 U.S. 749 (1989).

[15] Reporters Committee, at 780.

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Mr. PLATTS. Thank you, Ms. Koontz.

Before we go to questions, I know, Mr. Weinstein, you need to return to the Archives. Again, I appreciate your being here for your opening statement and those of the other witnesses on the panel.

Mr. WEINSTEIN. Thank you, Mr. Chairman. Again, my apologies to the members of the subcommittee. But the NHPRC is a very valued component of NARA and they are having their semi-annual meeting today to decide on grants.

Mr. PLATTS. Well, we will save all the tough questions for Dr. Kurtz in your absence.

Mr. WEINSTEIN. That is a good idea. He can answer them, Mr. Chairman.

Mr. PLATTS. Thank you. We will proceed to questions and we will begin with roughly our 5-minute round for each member. I will begin.

Again, I appreciate all the testimonies and the effort that each of you put in day in and day out trying to promote openness in our Government. One of the issues I guess I would like to start with is the timeliness and the challenge we have and some of the examples of the months, if not years, and some perhaps justified because of the complexity and the volume of information until we go through and really, from a national security perspective.

I would like to start with the first premise of what incentives under current FOIA legislation, what incentives do agencies have to comply with the time requirements in the law as it stands today. I would open that up to all three of you.

Mr. NICHOLS. I'm happy to answer that question. First of all, FOIA is obviously a Federal statute. My view is that agencies have a duty to comply with Federal statutes. That in and of itself is an incentive.

In addition, the Department of Justice, through its Office of Information and Privacy, provides guidance and encouragement to agencies to both comply with FOIA in an appropriate way and also to be timely in the way that they do so.

Finally, I think that it doesn't happen often or not incredibly often, but litigation, if requests are not processed timely, is a threat. Agencies know that if they do not respond in a timely manner they may be sued and will have to defend their position in court.

Mr. KURTZ. I think I would also add, Mr. Chairman, let me emphasize what the Archivist said, that it is our mission to make records available and so the purposes of the Freedom of Information Act are very compatible with NARA's mission. We have a very trained and effective FOIA staff that works on these issues. So, it is very compatible.

We have about a 75 percent response rate within 20 days, but as we talk through the questions this afternoon, I think the serious issues involved with the remainder will come to the fore.

Mr. PLATTS. Ms. Koontz.

Ms. KOONTZ. I would agree with what the other witnesses have said. I would just add that FOIA does require agencies to report publicly on processing times for providing FOIA requests. I think this is an incentive as well to have their times look as favorable as possible.

In addition, just as Mr. Nichols said, they wish to avoid conflicts with requesters and unnecessary appeals.

Mr. PLATTS. Dr. Kurtz.

Mr. KURTZ. I would like to add one other thing. In talking about incentives, part of our implementation of the Government Performance and Results Act is we have set up standards and measurements for responsiveness to FOIA. That is part of our agency measurement system.

Mr. PLATTS. There seems to be lots of information about timeliness and how well an agency or department is doing. I would agree in some instances the threat of a lawsuit, especially if it is a well-resourced applicant for the information, that is an additional legitimate threat.

But I guess my concern is what consequences are there for non-compliance? It is a question I have asked at a lot of hearings this past 2 years as chairman of the subcommittee. In the private sector there are more readily consequences for not doing one's job. Usually you lose your job.

A week ago I sat here and asked what happened when one of our departments spent $170 million on a program that now is found to not be able to do what it is supposed to do and we are starting over. My question was, was anyone let go? Has there been any effort to recoup that money? Unfortunately, the answer as best known was no; thus far none of that has occurred.

I guess that goes to my question here. We look at the timeliness, but are there any consequences? Are any of you aware of anyone being demoted who is responsible for FOIA in any agency or any department for non-timely compliance with FOIA requests?

Mr. NICHOLS. Not sitting here, I am not aware, but I would be happy to look into that.

Mr. PLATTS. Actually, if you would identify and if there is any information that relates to staff where in instances they have been demoted because of failure to comply, we would like that information provided to the subcommittee.

Ms. Koontz or Dr. Kurtz, are you aware of any instances of there being actually consequences for non-compliance other than through the legal system?

Ms. KOONTZ. I am not aware of any situations like that, but I have to say we haven't been asked to study that particular issue either.

Mr. KURTZ. I am not aware of any.

Mr. PLATTS. I certainly have more questions, but I am about to run out of time. Maybe one last question on that same topic and then I am going to yield to Mr. Waxman. We are going in the proper order now. Is relating to just that responsibility for oversight, Mr. Nichols, is that most directly with you in your understanding the law with Justice for overseeing within the executive branch, timeliness and general compliance, fulfilling the requirements of the law of all the various departments and agencies?

Mr. NICHOLS. Within the executive branch the Department of Justice has primary responsibility for overseeing agency compliance with FOIA. OMB does have a piece of that oversight, but Department of Justice does have the primary responsibility, yes.

Mr. PLATTS. With that responsibility, are you aware of any instances where in identifying failures to comply that there were recommended actions submitted by DOJ to a specific agency or department recommending that the secretary or director of a certain department or agency take remedial actions or administrative actions regarding the personnel involved for failure to comply?

Mr. NICHOLS. I am not aware of any such steps. I don't know that doesn't mean it hasn't happened. I am just not aware.

Mr. PLATTS. If you do become aware of information again, if you could submit it to the committee after the fact, we will keep this record open for several weeks after the hearing.

I am going to yield to the ranking member of the full committee, Mr. Waxman of California.

Mr. WAXMAN. Thank you, Mr. Chairman.

Mr. Nichols, I would like to ask you about the proliferation of new categories of restricted information and the use of information designation such as for official use only to prevent public access to non-classified documents. In your written testimony you noted that labels such as for official use only should not be confused with withholding information that is exempt from disclosure under the Freedom of Information Act.

You have conceded however, that nevertheless they often are. I am concerned that these labels are not clearly defined. They are applied inconsistently across agencies and even within agencies and they don't have statutory authority in many cases.

Some administration officials have acknowledged this obvious point. For example, I have a May 9th letter from the head of Intelligence and Security at the Department of Transportation on this issue. This official, Christopher McMann, acknowledged that his department "did not keep records of restricted information designations other than national security classifications." He also stated "There is no regulatory or other national policy governing the use of the for official use only designation."

Do you agree with his characterization that there is currently no regulatory or national policy governing the for official use only designation?

Mr. NICHOLS. I am not sure about the answer to that. What I do know is that answer does not determine whether, when a request is made under FOIA, that information will be withheld or not because when you have a FOIA request you have to do the typical exemption analysis, and that may or may not mean that the information will be withheld in a particular circumstance.

Mr. WAXMAN. That has more to do with the information itself and not the designation for official use only, doesn't it?

Mr. NICHOLS. I am not exactly sure I understand your question.

Mr. WAXMAN. Well, if somebody puts on there "for official use only," does that bestow FOIA exemption?

Mr. NICHOLS. May I confer with my colleagues for a second?

Mr. WAXMAN. Please.

Mr. NICHOLS. Absolutely not. That does not bestow a FOIA exemption.

Mr. WAXMAN. Do you also agree that in many instances there is no statutory basis for using the "for official use only" designation? Is there a statutory basis for using that designation?

Mr. NICHOLS. With respect to FOIA or generally speaking?

Mr. WAXMAN. Certainly with respect to FOIA and then——

Mr. NICHOLS. Well, as I said before, that designation, to the extent it occurs, is not FOIA-determinative with respect to a request.

Mr. WAXMAN. OK. Now, my staff has been collecting examples of bizarre uses of the "for official use only." For example, according to the publication Government Executive the Department of Defense phonebook is now labeled "for official use only." In another example, last December the Department of Health and Human Services issued a new information security program policy. It was labeled "for official use only." Directly below this stamp, on the cover page however, the report said the following disclosure is not expected to cause serious harm to HHS.

Let me ask you, if HHS actually made a determination and stated on the cover of its document that disclosure would not cause harm, why would they then restrict it by labeling it for official use only?

Mr. NICHOLS. I am not sure why HHS made that determination. But again, with respect to FOIA and whether this information, so designated, would be producible to someone who made a FOIA request, I stand on my previous answer that "for official use only" will not be determinative of the outcome of such a FOIA request.

Mr. WAXMAN. Would you support efforts by Congress to help agencies come to a more sensible and consistent application of these labels?

Mr. NICHOLS. The labels for official use only?

Mr. WAXMAN. That or any other label that they want to make up that there is no statutory basis for in law.

Mr. NICHOLS. I hate to sit here and speculate, Mr. Waxman. But I think as a general proposition it is best to have a relatively consistent application of terms across the Government.

Mr. WAXMAN. Thank you very much. I yield back my time, Mr. Chairman.

Mr. PLATTS. I now yield to Mr. Towns.

Mr. TOWNS. Thank you very much, Mr. Chairman.

Ms. Koontz, how successful have agencies been in utilizing information technology for more efficient dissemination of Government records and files to the general public? Are requests being completed more efficiently?

Ms. KOONTZ. That is an area that we haven't studied specifically, but we have had a lot of conversations with agency officials over the years. I think one of the biggest challenges that they have consistently cited, along with the notion of having not enough staff to do some of these responsibilities, it is also the lack of information and technology support that they think could help them process FOIA requests more efficiently.

We have also heard from other agencies who have implemented electronic records management systems and they report to us that these have helped them make gains in the area. This is not something we have been able to verify, but I think there is some indication that some places have had some success with this.

Mr. TOWNS. But most of the time it is a lack of staff, you say?

Ms. KOONTZ. That is often what they have told us, it is often a lack of resources such as staff and such as information technology.

I mean there are other factors, too, that play into their ability to process in a timely manner which would include variations in terms of the type of complexity of requests that they receive, whether it is sensitive information that requires line by line review and redaction. There are a number of variables here that affect efficiency.

Mr. KURTZ. One thing I would note, Mr. Towns, we have developed two automated systems for redaction and tracking that have really greatly assisted us in performing our FOIA reviews at the National Archives. So, we went from a purely manual system to an automated system. It has been extremely helpful.

Mr. TOWNS. When did this take place?

Mr. KURTZ. I think we developed this about 2 years ago. We gave a demonstration of it to the subcommittee staff in the last week or so. We would be glad to make information about it available to any interested agency.

Mr. TOWNS. Ms. Koontz, are the wholesale or incremental changes that could be implemented to reduce the number of backlogs of FOIA cases throughout the agency community are they wholesale or incremental? What would you say? How would you describe it?

Ms. KOONTZ. To reduce the backlog specifically?

Mr. TOWNS. The backlog.

Ms. KOONTZ. I think as with most things it is a combination of probably some wholesale sort of changes as well as some incremental changes that need to be done to reduce to perhaps increase staffing, if that is something if we can allocate more staff to FOIA. But also to increase information technology, more of a wholesale change, I would say.

Mr. TOWNS. Thank you.

Mr. Nichols, there are concerns that agencies are not being compliant with the provisions of FOIA relating to response time and fulfilling requests from many news organizations. Can you offer us some specific examples of what the Department of Justice has done to enforce agency compliance with FOIA?

Has the DOJ FOIA office been active in forcing agencies to be in compliance with their FOIA activities?

Mr. NICHOLS. I want to make clear that our oversight responsibility as we discussed earlier and I think is in my testimony is that we are responsible for encouraging agencies to comply with FOIA in a timely and consistent manner.

Mr. TOWNS. How do you do that?

Mr. NICHOLS. We post guidances. We have a full-time staff that consults regularly with FOIA. Several members of that staff are here today, the Office of Information and Privacy [OIP]. They have a very robust Web page that gives agencies guidance on both substantive and procedural aspects of the act to encourage their compliance with the act.

Mr. TOWNS. But there's nothing you can do, though, if they do not comply?

Mr. NICHOLS. I'm not sure what you mean by nothing we can do.

Mr. TOWNS. What can you do then? Maybe that is a better way to put it.

Mr. NICHOLS. Well, I think, like I said, we encourage their compliance.

Mr. TOWNS. Encourage? What do you mean when you say encourage? Could you be a little more specific? Sometimes I encourage the chairman on some things.

Mr. NICHOLS. I think, a, we make sure they understand their obligations under the Act; b, we talk to them about their obligations under the act; and c, we publish this guide that tells them what they are supposed to do.

This is not a small book, obviously. This lays out their various obligations. We try to make sure they understand as best they can what they are supposed to do. I think those are important substantial efforts that we undertake and we devote a substantial number of people, time and effort to attempting or pushing agencies to comply with their obligations.

Mr. TOWNS. Thank you, Mr. Chairman. My time has expired.

Mr. PLATTS. Thank you, Mr. Towns. Mrs. Maloney.

Mrs. MALONEY. Thank you.

Mr. Nichols, you testified earlier that if someone did not respond or if the agency did not respond, then they could go into court. I would like to ask my questions and my questions come from constituents, individuals, not big news organizations and so forth or research organizations, but individuals who may have a conflict with Government. There's a fine that came in from Government. They are questioning where it came from. The EPA is trying to take their land from them. They have condemned or called it wetlands or different interactions with the Government.

One of them was a whistle blower that was fired and then tried to look back at why this firing took place. In many of these cases they tell me that the Government never responds. I'm not talking about areas that are sensitive such as maybe Department of Justice or CIA or Homeland Security. I am talking about general agencies that are there to serve the public without any form—or should not, in my opinion—have any form of confidential information or whatever. It is not Homeland Security or has national interests involved. Yet they say they can't get a response.

I think to give the answer that people can go into court is not an appropriate answer. Most people can't afford to go into court. But they are certainly entitled to have the laws of this country upheld.

I would appeal to my colleagues that I think this law has to be changed. To say that you have to reply within 10 days—and I hear from some constituents it is 1, 2, 3, 4 or never years. Then we have to come up with a reasonable timeframe, maybe a year, maybe 6 months. But then fine the agency or do something to make the agency respond. I think the answer, oh, go into court and sue the Government, is just not an appropriate response for responsibility of Government.

I would like to get back to the use of terms. As Mr. Waxman was pointing out, when they say official use or they just redact reams of paper, say a decision from the EPA or the Commerce Department where they will redact in a individual dispute with a constituent three-fourths of the paper. So all you are looking at is black. I can't imagine that the exemptions would apply to that.

Now, if my constituent comes to me and says I don't think this should have been redacted, what course of action do they have or can I take on their behalf? Do I appeal back to the agency and say, please reconsider the redactions? Do I go to the Department of Justice? Is there someone looking to see if there is really a legitimate reason for the redaction or maybe just a Government official doesn't want anybody to look at the mistakes they made or stupid things that they did. I mean we all make mistakes.

But I think one of the strengths of our Government is that we look at our mistakes, come up with better answers and go forward. That is very troubling for me. It has come to me from about seven different constituents that when they even got their FOIA request, which is usually 1, 2, 3, 4 years later, that three-fourths of it is redacted. Who do you appeal to question why it was redacted?

Mr. NICHOLS. Well, if I can answer in two ways, first, with respect to any particular redaction it is almost impossible for me sitting here to know whether it was appropriate. In a whistle blower example, there may have been law enforcement interests.

Mrs. MALONEY. Let's stay away from the whistle blower. Let's stay with an individual dispute with an individual and the Department of Commerce or EPA.

Mr. NICHOLS. Sure, but it depends on what the dispute is about. It may implicate law enforcement concerns. It could implicate Privacy Act concerns with respect to other individuals.

Mrs. MALONEY. But my question is, who do I appeal to for my constituents. Who does my constituent appeal to when they believe the redaction is unfair?

Mr. NICHOLS. There is a mechanism for appealing within FOIA.

Mrs. MALONEY. What is it? What is the mechanism? I want to go back and tell my constituents how they can appeal the FOIA. What do I tell them? What is the mechanism?

Mr. NICHOLS. I am sorry. I just wanted to confirm that my understanding is absolutely correct. Your constituent could take an administrative appeal within the agency to challenge the determination either with respect to a denial of the request or withholding information or——

Mrs. MALONEY. They can do an administrative appeal to the agency that redacted it?

Mr. NICHOLS. Yes.

Mrs. MALONEY. Saying, explain to me why was it redacted.

Mr. NICHOLS. Yes.

Mrs. MALONEY. And they can do an administrative appeal now if, say, it has taken 2, 3 or 4 years? Please explain to me why it has taken so long.

Mr. NICHOLS. I am sure there are time limits, though I don't know them right now.

Mrs. MALONEY. They are 10 days. The law says 10 days.

Mr. NICHOLS. No. What I mean is once they have received the information and they think that it is improperly redacted, to challenge that redaction.

Mrs. MALONEY. OK. So they have to challenge it within 60 days, I think it is. Then, once they challenge it, what is the timeframe to get back to them?

Mr. NICHOLS. They have to respond to appeals within 20 working days.

Mrs. MALONEY. But you see, what has happened with this law—and I know my time has expired—the law is not being enforced in any way, shape or form. We heard from the numbers from the chairman, I believe, that showed that the 10-day waiting period, and even in your own testimony, is practically never met. The 20-day response to the retractions is practically never met.

Right now we don't have any enforcement tool back on the agencies. They can basically just ignore and go forward. As Mr. Nichols said, the recourse that a constituent has is to go into court. I feel that should be a last course of action. I don't think the law is working right if the average citizen in our country can't get their answer and the answer is they have to go to court to get their response.

Mr. NICHOLS. Could I respond to that?

Mrs. MALONEY. Yes, please do.

Mr. NICHOLS. I just simply don't think it is true that the average citizen can't get a response. We have 4 million requests a year, 4 million requests. That is a substantial increase even over last year. It is almost 30 percent, as the GAO testimony indicates.

At the same time, the backlog, which is requests pending for over a year or across years, is only 160,000 requests, which is a 14 or 15 percent increase over last year. So, we have actually had a substantial increase in requests and not nearly the same increase in backlog. The number of 140,000 or 160,000 requests that are backlogged as a percentage of the total number of requests is substantially less than 5 percent.

Mrs. MALONEY. As one of my constituents said to me, administrative appeal never works. You are going against the Government. The Government always wins. So, I would like to know how often are administrative appeals successful and how often do the redactions change in favor of the citizen? Do you have any data on that?

Mr. NICHOLS. No data. I think it varies by agency.

Mrs. MALONEY. And what if the citizen disagrees with the administrative appeal decision? What recourse is there?

Mr. NICHOLS. Well, they can, of course, always go to court.

Mrs. MALONEY. It is going to court. OK, maybe that is something we could as a committee request, a GAO report on how often are the administrative appeals successful and how often do the redactions change in favor of the citizen. I think that is a legitimate question to ask and I think it is one that we should do in a bipartisan way.

Also, the timeframe, maybe I am unusual, but I hear reports from my constituents that they wait 1, 2, 3, 4 years to ever get a response.

Mr. PLATTS. Mrs. Maloney, we are going to come back around for another round and maybe several rounds as the time allows. But I think it is a legitimate question. I would like, Mr. Nichols, if the Department of Justice could submit to the committee any data that you do have, maybe not with you today, but that the department has that relates to either specifically to Department of Justice or

other agencies on administrative appeals, how many were made in the last, say, 2 years and how many were successful in any form?

If you have it for other departments or agencies, we would like you to submit that as well, but if you have, even just for the Department of Justice, that would be very helpful and give us an example.

Mrs. MALONEY. I think maybe a GAO report would be in order.

Mr. PLATTS. Well, that is something we can look at.

Mrs. MALONEY. We could look at it. I will tell you, I think this is one of the most important bills that ever passed Congress. It is one of the things that makes our democracy great. I come from a city that gets criticized all the way, all the time, by the whole Nation. I sometimes think it makes us stronger when we look at what we have done wrong and we get stronger from it.

But I am getting a lot of complaints from my constituents and maybe I am just overreacting, but when people yell at me, then I get a little testy. They are saying no one listens to them and the administrative appeals are cooked. So, I don't know.

Mr. PLATTS. Mrs. Maloney, that is the reason we are here today, is to explore the good and bad of FOIA and what the weaknesses are, what the strengths are and that is the reason for this panel and our second panel of requesters, is to explore what improvements over the last 39 years have been identified and even the last 9 years since the 1996 act, which I know you played a critical role in and I commend you on that effort. But that is the purpose of this hearing, is to explore that.

If you could provide that information and my guess is you will have it perhaps just for your department, which we will welcome and then we will look at the possibility with the ranking member of a GAO request to go beyond that.

Mrs. MALONEY. Thank you. Thank you, Mr. Chairman.

Mr. PLATTS. I would like to continue on one of the challenges. Mr. Nichols, I appreciate, one, you pointed out that we want to keep it in perspective that we certainly have room for improvement. But when we look at numbers and we look at that 71 percent increase from 2002 to 2004 of requests for information and then we talk about 140,000, up to 160,000 now in 2004 of carryover, unfulfilled.

Your point about percentages, if we extrapolated from where we were in 2002, a 71 percent increase in requests to the 140,000 in carried-over cases in 2002, we would have had about 100,000 more cases carried over, not just 20,000. So in those numbers there is actually some good news in the sense that a smaller percentage of that huge increase is now carried over and that is good news.

Ideally, we get to where an even smaller percentage is carried over. There are certainly going to be some of these very complex cases of national security that we know will carry on longer than we would otherwise hope.

But let me get to one of the things you talked about in your testimony, which is staffing. The demands that we are placing and using Justice and FBI in the post-September 11th environment, we know there is a tremendous redirection and a needed redirection of resources. Does that account for it? My understanding is that prior to 2001 FBI had 600 roughly personnel doing FOIA in the De-

partment of Justice and we are down then to 400. We actually reduced it by about a third.

Is that, first, accurate? Are you aware if those numbers are roughly accurate in the numbers at Justice?

Mr. NICHOLS. If I could check and see if we know.

Mr. PLATTS. Sure.

Mr. NICHOLS. That is roughly correct.

Mr. PLATTS. As we are seeing an increase we actually see a reduction in staff internally and now I am going to assume that is because of enhanced demands on the department. But in getting to the issue of staffing, are you aware of any requests by Justice submitted to OMB when the annual budgets are put in place for returning to that 600 level?

In other words, in 2004 where we have just had the 2006 budget submitted a few months back and the 2005 budget and the 2004 budget, have there been requests for additional FOIA staff to deal with this huge volume?

Four million requests a year, 71 percent increase Government-wide is huge and a lot of that being Justice—prisoners, I know in particular, are you requesting more staff to try to keep up?

Mr. NICHOLS. Again, if I may consult.

Mr. PLATTS. Sure.

Mr. NICHOLS. Two answers. One, I am not aware, we don't know. I would have a hard time talking about internal deliberative processes anyway. But again, I am not aware.

Mr. PLATTS. But I would like if you could followup again for the record. If the public information as far as what was submitted to OMB, the budget request, and I was going to make a joke. I hope I don't have to make a FOIA request for that information.

Mr. NICHOLS. We would process it timely. We will make the 20-day deadline.

Mr. PLATTS. I think that is a legitimate question. We have seen your demand go up tremendously. It is a legitimate statement to say from a staffing standpoint we are swamped and rightfully you have huge priorities.

But I do agree that one of the foundations of our democracy is openness. One of the ways we defeat the terrorists is by remaining an open Government and not allow them to achieve what they are after, which is to change our way of doing business, as a Government and as a Nation. So, you are checking. Maybe we can look at the 2004, 2005 and 2006 budgets, what specific requests for additional FOIA staff have been submitted to OMB and perhaps ultimately by OMB to Congress. I am not aware of any, but I appreciate that.

On the issue of staffing, and this really goes to Dr. Kurtz, you and Mr. Nichols, how do you ensure on the staff you have a consistent uniform application of discretion, when deciding what should be released and is appropriate and what is not? What goes into that training and that process?

Mr. KURTZ. We have a special designated staff that works with FOIA both here and the National Archives in Washington and in the Presidential libraries that fall under FOIA and the Presidential Records Act.

So, there is intensive training, both in the area of FOIA exemptions and also areas of declassification, other statutes that apply such as atomic energy statutes. So there is continual and constant training and the staff works on all of these sensitive areas including FOIA.

Mr. PLATTS. But that training is internal, correct?

Mr. KURTZ. Partially.

Mr. PLATTS. Is some of it with Justice?

Mr. KURTZ. Some of it is provided by the Justice Department. A lot of it is provided by other agencies. For instance, the Department of Energy has a very extensive program for reviewers.

Mr. PLATTS. And that really goes to—I guess I am looking for uniformity not just within your own agency, but across the Federal Government. How do we ensure that there is equal or uniform discretion?

Mr. KURTZ. It would seem to me that agencies that have a lead, for instance that is why I mentioned the Department of Energy for atomic energy information, they are the experts and so they provide training Government-wide. Perhaps that is a model that could be considered for other areas in competence.

Mr. PLATTS. Mr. Nichols.

Mr. NICHOLS. I agree with that. I also add what I have said about our Office of Information and Privacy which provides substantial guidance, both substantive and procedural to all agencies. It has a great Web site and publishes this book, which does a lot of things to ensure consistent application of FOIA.

Mr. PLATTS. I am not aware currently of this being the case. Is there any discussion at Justice or in the various agencies—you identified some instances of spikes in FOIA requests and that small agencies can get inundated, a large agency could get inundated because of an issue popping up—of having a Government-wide FOIA team that is easily moved? Does that happen today? Are there FOIA staff that, Justice gets hard hit and you borrow from the Archives or is there any sharing of FOIA staff currently and is there any discussion of more of a Government-wide team being put in place?

Mr. NICHOLS. I think it happens on a fairly small scale, a case-by-case basis. There is not, as I understand it, a dedicated task force that might move agency to agency or case to case. It is more ad hoc.

Mr. PLATTS. Because they relate to me, they say if we want uniform application of FOIA so we try to have uniform training, that there would be an opportunity for that so that as there are spikes from agency to agency we would not have to add permanent staff, but maybe shift people.

My only hesitancy, and I am interested in the opinions of all three of you if this is something you think would be a concern, that while you can get uniform training, having insights into specific knowledge of your agency's information is a critical aspect of the decision that you make. Is that perhaps a big hurdle from that kind of team that would move from agency to agency?

Ms. KOONTZ. I think that is a fair characterization that in some cases that certain agencies may require staff who have expert knowledge of those particular operations and of that particular in-

formation in order to make the right kind of decisions about disclosure. But that would not be uniform across the Government. It would be in particular cases, so I think it is an idea that might otherwise have some merit for particular situations.

Mr. PLATTS. More likely where there is intelligence sensitivities?

Ms. KOONTZ. Yes.

Mr. PLATTS. Some of the agencies on a more regular basis are going to have those type of sensitive decisions?

Ms. KOONTZ. And often an agency like CIA might cite that one of the difficulties they have is being able to hire trained staff who can go through this very sensitive information and review and redact it. It is not something that anybody can do and that is why they often call on retired personnel and get them back to do that sort of thing.

But we are not dealing with a monolith here. There are many different kinds of requests and we have to take them into consideration.

Mr. KURTZ. Just to followup on Ms. Koontz' comment, the State Department, for instance, has a very active program of bringing back retired Foreign Service officers to work in declassification and access issues because of their expertise and their knowledge.

Mr. PLATTS. OK. I am going to yield to Mr. Towns.

Mr. TOWNS. Thank you very much, Mr. Chairman.

Ms. Koontz, I know you have had a lot of work in this area and you have been able to talk to a lot of people. I ask this question because something strikes me real funny here. I think that as Members of the Congress, I think this is going to be something that we will probably want to ask more questions about.

The fact that nobody has ever been fired for not—that, to me, strikes me as very funny. What is the general consensus in terms of talking to staff out there? Do they feel that complying is important or do they just feel that if I comply, fine; if I don't, so what?

Ms. KOONTZ. We certainly have not talked to everybody, but I have to say that the FOIA staff that we have talked to over the years are very dedicated. They are very, very interested in trying to meet the needs of requesters. I haven't seen any kind of attitude that would indicate to me that people don't care about what they are trying to do here.

But sometimes they do suffer from maybe a lack of attention within the agency, a lack of resources. In some cases, too, again, some of these requests are very difficult. They are very broad and often searching agency records, searching records across an agency is a very difficult task.

Mr. TOWNS. Let me ask this question then. While a person is waiting for information, do they generally acknowledge the fact that a request has been made?

Ms. KOONTZ. I believe there is an acknowledgment and also we have been talking a lot about that 20-day requirement. The 20-day requirement is actually not a requirement to supply the records, as I understand it. It is really a requirement to get back to the requester and say are we going to comply with your request or not.

So, that is a form also of getting back to the requester and letting them know that yes, you are going to provide responsive records or no, you don't have responsive records.

Mr. TOWNS. What would your reaction be if we decided to say that a response must be answered within a year, one way or the other? What would your reaction to that be?

Ms. KOONTZ. My reaction to it would be that I think it is useful to have guidelines or requirements for when agencies are supposed to provide things. However, I am a little concerned that if you make it a year, while I am not sure that is any more realistic than making it 20 days. It doesn't recognize the variations.

I think that whatever timeframe we come up with has to recognize the reality that there are huge variations in the type, number and FOIA request that agencies get.

Mr. TOWNS. Mr. Nichols.

Mr. NICHOLS. First, the administration, I don't know what its official policy would be with respect to that if it were proposed in the bill. But I think part of the consideration would have to be, well what is the penalty for failure to comply? I don't know what you are suggesting would be the consequence of that. That would obviously be relevant to the consideration of whether and to what extent that would be a good idea.

Mr. TOWNS. Excellent question. Maybe we would have to reduce your budget.

Mr. KURTZ. You could send it to the Archives.

Mr. TOWNS. Mr. Kurtz.

Mr. KURTZ. We have been discussing this very issue amongst ourselves at NARA about what might be various strategies to pursue. Picking up also on what Ms. Koontz said, our difficulty really is coping with very complex cases. We get almost all of the so-called simple ones out within the 20 days.

So we do a couple of things. One, we do communicate with each researcher if it is going to take more than 20 days. But more than that, we try to engage them in a communication and dialog with us so we can try to focus the request, get some idea of their priorities so that we can move through it in a certain way.

I know there are several bills that have been proposed and one that proposes to establish a commission to look at the issues of why FOIA is so difficult to implement. One of the areas that a commission could look at is various categories of problems and are there different timeframes and so forth for different kinds of requests involving different kinds of records.

There are law enforcement issues. There are national security issues. Each of those have their own complexities. Perhaps a commission could consider, instead of one sweeping sort of deadline, try to have some sense of categorization and stratification.

Mr. TOWNS. The reason I raised this issue is because as Members of Congress, and I think Congresswoman Maloney addressed it, how we bump into constituents who say, well, I have made a request and I haven't heard a word. So, I am wondering in terms of if there was a sort of time limit on it that it would sort of be helpful.

But anyway the 20 days, I think that helps some if it is actually being complied with. Ms. Koontz, did you see that it was actually being complied with?

Ms. KOONTZ. That is an interesting question because although there is a 20-day requirement, we looked at the annual reports that

agencies give to the Attorney General. That particular metric is not reported on. So, it is not possible for us to say from the data that are in the annual reports to what extent they are being complied with.

Mr. TOWNS. My time has expired, but I actually have one more question.

Mr. PLATTS. Sure, Mr. Towns.

Mr. TOWNS. OK, fine. This is to you, Dr. Kurtz. According to a recent notice from the National Archives and Records Administration in the Federal Register, your agency would be discarding approximately 9.100 backup tapes of classified records from the Clinton administration.

Some historians have expressed concern about this, saying some data or information may be lost in the process. Can you assure us that your efforts will not result in the loss of any information or data?

Mr. KURTZ. Yes, I can. Those backup tapes are duplicates and all of the information from the various systems have been backed up. They have been preserved. There will be no loss of information. That is what we intended to try to convey in our Federal Register notice. As we get responses from the public and concerns from historians, we will be talking with them and explaining actually what we have done from a preservation point of view and to try to clarify any confusion.

Mr. TOWNS. Thank you very much.

Mr. PLATTS. Thank you, Mr. Towns. I understand that you are saying they are duplicate backups.

Mr. KURTZ. Right.

Mr. PLATTS. We want to followup, Ms. Koontz. You said in the annual report you review that metric is not there. That is a decision of Justice and what you require in the reports? You set the parameters or where are those parameters? Is that in the statute, what they have to give you?

Mr. NICHOLS. Yes. What we ask for is what Congress has provided for by statute and that is generally what the agencies give us.

Mr. PLATTS. But you could request additional information as the one responsible for oversight. There is nothing prohibiting you from saying we want this specific metric in your annual report so that we get to that issue of 20-day compliance.

Mr. NICHOLS. I think that is probably right. The reason I say technically yes, it is always possible, but you would have issues of comparing the specific framework that Congress set up and the extent to which imposing additional requirements would be consistent with that framework would have to be considered closely.

That is why I say technically yes, I guess anything is possible. But you would have to look at it closely.

Mr. PLATTS. I would encourage the Department to consider and if legislation is to move forward here in the House and Senate, that is something we would look at. On an administrative standpoint, given that your responsibility is oversight as an agency, one of the things you are looking at is timeliness in that 20-day requirement metric is certainly one that goes to the crux of timeliness, to identify, where there may be a red flag going up that you more quickly

hone in on a possibly problem. So, I would encourage the department to give weight to that or thought to that.

I want to turn to the issue of expedited review. Ms. Koontz, what trends have you seen regarding the use of the expedited review process in recent years?

Ms. KOONTZ. What we have seen since between 2002 and 2004 is that the number of expedited requests have dropped fairly dramatically by about 75 percent. But this is mostly due to a similar, very big drop at Veterans Administration in expedited requests.

I can't explain further than that because all I have is the data. I even talked to VA about what the reasons for that change were.

Mr. PLATTS. That is what I was going to ask you as far as the reasoning behind that we are not aware of.

Ms. KOONTZ. I am not aware of it, no.

Mr. PLATTS. OK. Thank you. One quick question yet and then I want to get to Mr. Duncan. I apologize. I didn't see you come in there on my left.

Mr. DUNCAN. That is all right.

Mr. PLATTS. On the expedited review, Mr. Nichols, have you looked at compliance at all on that specific issue, where agencies and departments, how they are responding to expedited review requests in particular?

Mr. NICHOLS. I know that there are data on expedited review processing. Beyond that, if I may check again, like the other data that we have about the timeliness of responding to simple and complex requests, we now as of 2 years ago include expedited data with that other data. So, one can look at the extent to which those requests are being complied with in the timeliness sense in the same way as you can look at the other information.

Mr. PLATTS. Is there any specific agency or department that raises concerns about their compliance rate regarding expedited requests?

Mr. NICHOLS. None has been brought to my attention for sure and none that I am aware of with respect to expedited.

Mr. PLATTS. Thank you.

I now yield to Mr. Duncan from Tennessee for the purpose of questions.

Mr. DUNCAN. Well, thank you, Mr. Chairman, and thank you for calling a hearing on a very important subject. I am sorry that I had meetings that prevented me from being here earlier. I have two groups of constituents waiting for me in my office right now.

But let me just make a couple of comments. I remember several years ago Governor Rendell of Pennsylvania who, before he was Governor, was Democratic National Chairman, he said at a hearing several years ago, he said the problem with the Federal Government is that there is no incentive for people to work hard, so many do not. There is no incentive for people to save money, so much of it is squandered.

That is so true. I thought of that when I heard Mr. Towns express some amazement that nobody has been fired who had not been doing a job on these things. One of the other problems with the Federal Government is that too many employees know that they would have to commit some horrendous criminal offense to lose their jobs.

But I noticed in these statistics that 46 percent of these requests are to the VA and I also notice that the VA has the quickest average on handling these requests.

Then 36 percent of the requests are to the Social Security Administration. What it looks like is that the departments that are the slowest in handling these things are also the departments that are getting the fewest requests.

Now, it is the easiest thing in the world to make a simple thing complicated and that is what we do too often in the Government. I think that based on what Mr. Rendell said, that somebody should consider offering some of these departments that are doing such slow jobs, offering some incentive to employees who get these requests processed quicker.

They should also, in conjunction with that, penalize employees in their salaries. You said something about cutting the budget. Gee, we haven't cut a budget since I have been here and I have been here 17 years. So, we are not going to do that. But we should consider some types of incentives or something if you really want to do something about this problem.

That is about all I have to say. I will have to leave, but thank you, Mr. Chairman, for holding this hearing and for calling on me.

Mr. PLATTS. You are welcome, Mr. Duncan. We appreciate your being here. As we have discussed in previous hearings, the consequence issue is something that we are going to stay after, whether it be here with staffing.

Mr. DUNCAN. Well, I appreciate the work you are doing. You are turning this into one of the more active subcommittees in the Congress. We don't always have many people here, I recognize that. But I do always try and show up, for a while anyway.

Mr. PLATTS. We know the challenge of being in four places at once is something that is always with us. Thank you.

We are going to run short on time. We may have some written questions that we will submit to you and keep the record open for those 2 weeks, depending on what we have covered here today. I want to get just a couple more on the cost issue.

Mr. Nichols, you shared that roughly $300 million cost Government-wide on a annual basis, which is significant. One of the costs that I wanted to ask about that I wasn't sure, with the Department of Justice is your litigation costs in the civil side related to FOIA.

My understanding is from 2003 to 2004 it went from 30,000—I guess several years in a row it was at 30,000 and then jumped to 6.7 million in 2004. Is that just a real way of accounting for your litigation costs or was there actually a new expenditure of more than $6 million?

Mr. NICHOLS. No. I think my understanding is that we started capturing the costs correctly or differently and so it is not as if the litigation expenses increased 50-fold.

Mr. PLATTS. So, it might have been kind of apportioned to something else as opposed specifically to FOIA-related litigation?

Mr. NICHOLS. That is right.

Mr. PLATTS. OK. On the issue of costs, Mr. Nichols, you and Dr. Kurtz, with your agencies, if you could wave a magic wand what would be your first request or wish to help reduce the costs you have related to FOIA and your ability to manage the cost?

Mr. KURTZ. Well, I would put it this way: This might not sound initially like reducing costs, but we need more staff to train and to work and focus on the FOIA requests. I think over time if we were able to do that we could tackle the more complex issues that we have with other agencies related to processing these requests and it would end up, I think, ultimately driving down the costs of delay and it would also provide a much enhanced public service.

Mr. PLATTS. Are you referencing specifically where you have something that you have to go to another agency for their approval because if it is a classified document only they can declassify it?

Mr. KURTZ. Right. It takes a lot of time when you have very large requests for thousands and thousands of pages of records to review them, make the referrals to other agencies and that sort of issue. So, the more qualified, trained staff that are working on that the faster at least that part of the process can go.

Mr. PLATTS. Mr. Nichols.

Mr. NICHOLS. It seems to me that a lot of the costs are driven and in some respects are out of our hands. It depends on what requests we get. If we get requests for extremely sensitive information, classified information, law enforcement related information, privacy protected information, that makes our responses take longer, require more manpower to be devoted to them.

So, some of it is out of our hands. I would echo what Dr. Kurtz said generally. I think at the margins one can always attempt to cut costs. Certainly if we got fewer requests costs would go down.

Mr. PLATTS. It is not likely.

Mr. NICHOLS. Correct. We are always considering ways to make ourselves more efficient. But from what I know I think a lot of it is driven, as Dr. Kurtz said, by the nature, extent and type of request that we get.

Mr. PLATTS. My hope and belief is that information technology can go a long way to ultimately drive down costs. Dr. Kurtz, I thought that is maybe what you were going to say, more money and information technology. I know your agency has made some great inroads as you referenced, that information technology will allow us, as we digitize information, we up front do a better job of classifying it, this is releasable right away instead of an additional review.

My one caution as I say that is that we don't get to where we see technology as this grand solution and start throwing money at it because as I referenced earlier a week ago we had a hearing that related to $170 million that was thrown at technology all for naught because we are starting over.

Mr. KURTZ. I would say on information technology it certainly has revolutionized the way we work internally. But the issues of trying to work across agency lines on these issues and trying to use information technology in sharing information back and forth, particularly if you are talking about classified information, is very complicated.

We are finding that out as we are developing our electronic records archives which will have a classified component to it.

Mr. PLATTS. And security concerns related there to?

Mr. KURTZ. Yes.

Mr. PLATTS. For time, we are going to need to wrap up this panel. I want to thank each of you and your staffs who are here today, not just for your testimony, but for your service to your fellow citizens day in and day out. We appreciate your work and we look forward to continuing to work with you and your agencies and staffs as we go forward in promoting as open a Federal Government as possible.

We are going to take a 2-minute recess while we get the second panel and we will reconvene shortly.

[Recess.]

Mr. PLATTS. The subcommittee will come to order.

Mr. Towns may get back with us. Mrs. Maloney, I understand, as is typical on session days, has lots of conflicting schedules.

We are delighted to have our second panel with us. Again, we appreciate your written testimonies you have submitted and the oral testimonies. What I would like to do, if I could ask you to stand and be sworn in, as is the practice of the subcommittee to have everyone sworn in, and take the oath and then we will move right to your testimony.

I think we have you in the order we are going to go in.

[Witnesses sworn.]

Mr. PLATTS. Thank you. You may be seated. The clerk will note that the witnesses affirmed the oath.

Again, if you could stick roughly to the 5-minute timeframe, we are not going to be sticklers. Our hope is we will have a good amount of time and get through your statements and some good Q and A before any votes happen. The last thing I want to have you do is sit even longer while we go over for votes. Our belief is that we will be able to complete the hearing before that happens.

Mr. Smith, we are going to start with you. I need to start with, as a fellow newspaper person myself, of course I wasn't writing or editing, I was delivering. It was not my first job, but one of my early jobs was as a Sunday news carrier in York. I never have been a real early morning person. I think I lasted about 4½ years doing that paper route.

We appreciate your being with us. As one who delivered papers for some of your colleagues in the industry, we are delighted to have you here to start off this panel.

STATEMENTS OF JAY SMITH, CHAIRMAN, NEWSPAPER ASSOCIATION OF AMERICA AND PRESIDENT, COX NEWSPAPERS, INC.; ARI SCHWARTZ, ASSOCIATE DIRECTOR, CENTER FOR DEMOCRACY AND TECHNOLOGY; AND MARK TAPSCOTT, DIRECTOR, CENTER FOR MEDIA AND PUBLIC POLICY, THE HERITAGE FOUNDATION

STATEMENT OF JAY SMITH

Mr. SMITH. Thank you, sir. I would not be here if not for people like you.

Chairman Platts, I am honored to appear before you today. I testify as a citizen and as someone who has worked in the newspaper business since he was 17 years old, and that is a long time ago.

I also testify as president of Cox Newspapers, which is the publisher of 17 daily and 25 non-daily newspapers. They are part of

Cox Enterprises, a company with cable, radio and television properties and more than 77,000 employees. As its chairman, I am also testifying on behalf of the Newspaper Association of America, a trade association representing more than 2,000 newspapers. NAA is also part of the Sunshine in Government Initiative, which is a coalition of media groups committed to open, accessible and accountable Government.

Please note that I listed citizen first. Citizens, not journalists, submit most of the requests for information. Businesses also make extensive use of the Freedom of Information Act.

FOIA has provided a model for the rest of the world. Many countries have followed our lead as they embrace democracy and open their societies.

Created in 1966, the act has fostered public knowledge, participation and a way of life that we hold dear and that is a life of openness and honesty. Permit me please a couple of real life examples on the significance of the act. The Associated Press found researchers at the National Institutes of Health were collecting royalties on drugs and devices tested on patients who did not know about the agency's financial interest in the products. That breached an NIH promise to Congress. The practice ended under a reaffirmed policy announced when the story hit the wire.

The Dayton Daily News, a Cox newspaper, reported on the surprisingly large percentage of deaths of Peace Corps volunteers overseas. Thanks to FOIA, several families learned crucial details about the deaths of their loved ones. That conflicted with what they had been told by Peace Corps officials. The stories led to congressional hearings and prompted the Peace Corps to improve policies on safety and security for volunteers.

At its best FOIA builds credibility. Honest people get honest answers from honest public servants. It is that pure, that simple. But the system has flaws. Agencies do not have strong incentives to act on requests in timely fashion or to avoid costly litigation. Lack of accountability leads to lost requests or an inability to track progress and unwarranted denials of requests prevent important information from reaching the public.

Consider this request now in litigation by our Cox Newspapers Washington bureau. Federal law requires illegal aliens convicted in our country of such crimes as rape, murder and child molestation to be deported once they have served their prison terms. Thousands of these aliens remain in the United States because Federal immigration officials failed to show up when the criminals were released from prison.

Despite numerous requests, the Justice Department will not release information that could help journalists and the public to know if aliens who should have been deported were instead released back into their communities.

The subcommittee has asked for recommendations on how Congress can improve FOIA. I would like to focus on three.

First, create a FOIA ombudsman to review compliance and to identify public agencies plagued by excessive delays. The ombudsman would also assist in resolving disputes as an alternative to litigation.

Second, clarify that reasonable attorney fees can be recovered by the requester when the pursuit of a claim was the catalyst for agencies to release information. Too often the Government refuses to provide documents, knowing full well that the law is not on its side. Then, just prior to a court decision, the agency produces the documents, effectively mooting the case. There is no recourse for the requester, no disincentive for the Government to avoid litigation.

Third, ensure compliance of Federal agencies with the Electronic Freedom of Information Act of 1996 to increase Government information provided on line, ever improving technology maybe more to cut the knot that entangles public information than any other tool at our disposal.

The benefits of these proposed remedies are not limited to the media and to Government. They are about a common audience the media and Government serve and serve well when they perform at their best. And that, of course, is the American people.

Thank you for this opportunity. I look forward to your questions.

[The prepared statement of Mr. Smith follows:]

Written Statement

of

Jay Smith

President, Cox Newspapers, Inc.

on the

Implementation of the Freedom of Information Act

Before the

United States House of Representatives

Committee on Government Reform

Subcommittee on Government Management, Finance and Accountability

May 11, 2005

As a young reporter I learned the value of documents, especially those that were public. Unlike some people, they didn't shade the truth. While a balky photocopier could turn them gray, they were almost always black and white. They were there to see when the reporting was done. Others could determine if the work was solid and would stand the test of time. Nothing inspired greater journalistic confidence than the words, "according to public records," when attached to an important story.

And I am hard-pressed to think of anything that has advanced the accessibility and usability of public records the way the Freedom of Information Act has.

Chairman Platts, Ranking Member Towns and Members of the Subcommittee on Government Management, Finance and Accountability, I am honored to appear before you today as you review the Freedom of Information Act, a vital tool for the informed citizenry so essential to a vibrant democracy.

I testify as a citizen and as someone who has worked at newspapers since he was 17-years-old. That was 38 years ago.

I also testify as president of Cox Newspapers, Inc., publisher of 17 daily and 25 non-daily newspapers. They are part of Cox Enterprises, Inc., an Atlanta, Ga., company with cable, radio and television properties and more than 77,000 employees. I am chair of the Newspaper Association of America (NAA), a national trade association representing over 2,000 newspapers in the U.S. and Canada, including 90 percent of the daily circulation in this country and I am also representing them today, as well as the Sunshine in Government

Initiative, a coalition of eight media and journalistic organizations formed to promote policies to insure government is accessible, accountable and open to the public.

Please note that I listed "citizen" first. While newspapers and other media have championed the cause of FOIA, it is the every day citizen, not the journalist, who submits the most requests for information. According to a new review of FOIA requests by The Associated Press, military veterans and citizens interested in genealogical information, by far, make the greatest number of requests. For example, the Department of Veterans Affairs received 1.8 million requests, more than any other department or agency last year. Most of these requests involved military personnel and medical records. Moreover, the number of requests at the Social Security Administration doubled from 2003 to 2004 and, according to Social Security officials, people seeking genealogical information made most of these requests.

Businesses also make extensive use of FOIA. A 2003 Heritage Foundation survey of four agencies – General Services Administration, Environmental Protection Agency, Department of Education and the Department of Transportation – found that 40 percent of FOIA requests to those agencies made over a six month period came from corporations. Lawyers ranked second with 25 percent, individuals third with 16 percent and non-profits fourth with 8 percent. The media filed 5 percent of the requests.

Our Freedom of Information Act has provided a model for the rest of the world, and it is heartening to see so many countries following our lead as they embrace democracy and open their societies. It is also important to note that FOIA has served as a framework upon which so many states have built their public records laws. Created in the 1966, this law has

touched and changed lives at home and abroad. It has fostered public knowledge, public participation and a very way of life we hold so dear --- a life of openness and honesty.

Permit me to provide a few real-life examples on the significance of FOIA from stories in newspapers or news organizations with which I am involved and familiar.

The Associated Press, on whose board I serve, found that researchers at the National Institutes of Health (NIH) 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.

Relying heavily on FOIA-obtained material, The Dayton Daily News, a Cox newspaper, reported on the surprisingly large number of deaths of Peace Corps volunteers overseas. Several families learned crucial details about the deaths of their loved ones. Some of the information conflicted with what they had been told by Peace Corps officials. A newspaper series led to congressional hearings and also prompted the Peace Corps to revise its procedures in educating volunteers on safety and security issues.

My colleagues at other distinguished newspapers have also shown the spotlight on government waste and abuse with articles made possible through FOIA.

As result of a Knight Ridder investigation published in March 2005, the Department of Veterans Affairs (VA) is now examining whether veterans groups are providing their claims helpers, known as veterans service officers, with adequate training and oversight to competently help veterans apply for VA benefits. This Knight Ridder investigation revealed

that the VA basically "rubberstamped" names of claims officers submitted by veterans groups without any evidence of training or testing, and the documents obtained by Knight Ridder through a FOIA lawsuit against the VA showed that the agency revoked the accreditation of only two claims officers since 1999.

The South Florida Sentinel filed a federal lawsuit to force the release of government records on the distribution of millions in disaster aid following last year's four hurricanes. The suit charges that the Federal Emergency Management Agency (FEMA) has failed to produce records requested through FOIA. FEMA has been under fire since the newspaper reported in October that the government had approved thousands of Hurricane Frances claims in Miami Dade, a county barely touched by the storm. Fourteen Miami-Dade residents were indicted on federal fraud charges.

While the Freedom of Information Act has allowed the public to better understand the operations of its government, it is in need of important revisions to make sure the Act is implemented more effectively. That it needs bolstering nearly 40 years into its life is worrisome, but not surprising, given the increased size and complexity of our society and our government. Along the way, there has been shift away from a presumption of openness which has been at the core of FOIA. In addition, there is a fixed culture within government that the information belongs to the agencies, not American citizens. Some resist transparency at all costs, even though transparency in government will help it become more efficient and more accountable.

Too often, FOIA doesn't work properly, and delays are a common problem. Some requesters have waited more than a decade for inquiries to be processed. According to a 2003 audit of 35 agencies conducted by the National Security Archives at George Washington University, some backlogs went back 16 years. According to this audit, the average response time of the Commerce Department is 55 days and it had pending requests as old as 2,400 days. FOIA processing times at the Department of Agriculture are as high as 905 business days and processing times at the Environmental Protection Agency are as high as 1,113 business days.

Then there are the FOIA roadblocks – unwarranted denials of FOIA requests – that prevent important information from reaching the public.

Consider this request, now in litigation, by our Cox Newspapers Washington bureau. Federal law requires illegal aliens convicted in our country of such crimes as rape, murder and child molestation to be deported once they have served their prison terms. Thousands of these aliens remain in the U.S. because federal immigration officials failed to show up when the criminals were released from prison. Despite numerous requests, the Justice Department will not release the government database that could help journalists and the public to know if aliens, who should have been deported, were released into their community.

Whining is not the purpose of this testimony. I'd prefer to conclude by answering two questions posed in your invitation. What are the strengths and weakness of FOIA, and what opportunities does Congress have to better serve an informed citizenry?

At its best, FOIA builds credibility in government. Honest people get honest answers from honest public servants. It is that pure, that simple.

But the system has flaws. Agencies do not have strong incentives to act on requests in timely fashion or to avoid unnecessary and costly litigation with requesters. Lack of accountability leads to lost requests or an inability to track their progress. In too many instances, officials lack the tools or the resources to respond.

Here are five ways Congress could improve FOIA:

1.) Create an FOIA ombudsman to review compliance, identify public agencies plagued by excessive delays, and assist the public in resolving disputes with agencies as an alternative to litigation;

2.) Clarify that reasonable recovery of attorney fees is authorized when the pursuit of a claim was the catalyst for agencies to release information;

3.) Examine and ensure compliance of federal agencies with the Electronic Freedom of Information Act of 1996 to increase the amount of government information provided online. Ever-improving technology may do more to cut the knot that entangles public information than any other tool at our disposal. We need to ensure agencies are proactive in complying with EFOIA;

4.) Help FOIA requesters get timely responses by restoring meaningful deadlines for agency action; and

5.) Establish hotline and/or electronic tracking services to enable the public to follow the status of requests.

Again, please note that the benefit of these proposed remedies are not limited to the media and government. Rather, they are about a common audience the media and the government serve, and serve well, when they perform at their best --- the American public.

Mr. PLATTS. Thank you, Mr. Smith.
Mr. Schwartz.

STATEMENT OF ARI SCHWARTZ

Mr. SCHWARTZ. Chairman Platts, thank you for holding this important hearing on the oversight of the Freedom of Information Act and for giving the Center for Democracy and Technology the chance to testify today.

CDT hopes that this hearing marks the beginning of the subcommittee's interest in the important issues of public access to Government information and the related issue of Government information management.

As others here have eloquently said, the Freedom of Information Act remains the most important tool for public insights into the workings of Government, necessary to ensure accountability.

While FOIA is the best tool and a model for openness around the world, Congress has wisely decided to continuously monitor the law's effectiveness and improve it over time to make sure that it is still working as intended.

When it has been clear that the law is not working well, Congress has amended FOIA directly or passed laws that work in concert with FOIA to improve Government accountability and access to Government information. Efforts to include provisions that increase oversight and ensure that requests are answered in a timely fashion are important. Yet, it is our contention that the most important changes to FOIA are those that obviate the need for FOIA requests at all.

Over the past decade Congress has made changes along these lines. In 1996 the E-FOIA passed. Among other improvements it required the availability of frequently requested information and a list of information systems directly online.

In 2002 Congress passed the E-Government Act that requires the creation of a Government-wide taxonomy for the first time. If widely implemented, this will make searching for information much more effective for both the agencies and Internet users.

Despite these improvements there have still been several setbacks in the efforts to improve access to Government information. Too often issues of cost, privacy and security are unnecessarily seen as competing with openness. Most of the discussion around these issues assumes that there must be a tradeoff.

However, according to polling the public does not see it this way, nor does CDT. In fact, CDT regularly hears stories from agencies about the internal mismanagement of information that implicates all of these areas. While cases such as the FBI virtual case files have been highlighted in the press, similar inefficiencies and failures exist throughout Government.

For example, one agency came to CDT to discuss changes in its Privacy Act practices. These officials were cataloging the Privacy Act systems of records at the agency to examine those that could be combined or eliminated.

They found about half of these important data systems were just missing. In this case, as in so many others, poor information management doesn't serve any interests. However, while bad informa-

tion practices harm all of these areas, good information management practices can protect them.

Information managers have long suggested solving data access and control programs by tagging information within the actual coding of the document. These tags describe the document in part or in whole and would streamline searching the catalog for information. It would also allow the creators of public documents to tag privacy-sensitive information or classified information, making decisions about releasing the document at the time it is created other than other agency staff to review the document when it is requested.

Documents suitable for release could then be posted as a matter of course without the need for a FOIA request. Such approaches also offer opportunities for cost savings. It takes less time to digitize and make available all agency documents with appropriate redactions and withholdings than it does to file away the documents until FOIA request is received, search for requested documents and then print and review and send the documents it found.

Perhaps the best example of the power of posting information comes not under FOIA but from a congressional agency, the Government Accountability Office. GAO began publicly posting all its reports on its own Web site in 1996. By 1998, the total number of copies that GAO was printing had decreased by one-third.

Meanwhile the average report was accessed more than 100,000 times online. Given the number of reports that GAO issues, this means that in only 2 years tens of millions of more GAO reports were being accessed without a significant rise in GAO's budget.

We believe that while the subcommittee looks to improve FOIA implementation that it encourage models that stress good information management. CDT is committed to working with the committee as your efforts continue and we look forward to your questions.

[The prepared statement of Mr. Schwartz follows:]

Statement of Ari Schwartz
Associate Director
Center for Democracy & Technology
before the
House Government Reform Subcommittee on
Government Management, Finance, and Accountability
on the
Freedom of Information Act

May 11, 2005

Chairman Platts, Ranking Member Towns, and members of the Subcommittee, thank you for holding this hearing on the Freedom of Information Act. I am Ari Schwartz, Associate Director for the Center for Democracy & Technology (CDT).

CDT is a non-profit public interest organization founded in 1994 to promote democratic values and individual liberties for the digital age. CDT works for practical, real-world solutions that enhance free expression, privacy, universal access and democratic participation. We are guided by our vision of the Internet as a uniquely open, global, decentralized and user-controlled medium. We believe the Internet has unprecedented potential to promote democracy, by placing powerful information and communications technology in the hands of individuals and communities.

Summary

Citizen access to government information is essential to a functioning democracy. **The Freedom of Information Act (FOIA) remains an essential tool to provide citizens the insight into the workings of government that is necessary to ensure accountability**.

FOIA is by no means perfect and CDT is supportive of the current efforts by Senators John Cornyn (R-TX) and Patrick Leahy (D-VT) and Representative Lamar Smith (R-TX) and Brad Sherman (D-CA) to improve the law.

However, we also think that there is a more fundamental opportunity to improve citizen access to information that should be central to the heart of this Subcommittee's agenda. **Information management within agencies should be improved to provide more of the information created with taxpayer dollars back to the public directly via the Internet without the need for a FOIA request.** Better design of information management infrastructures would force agencies to make disclosure decisions at the time of document creation. Systems built with the proactive goal of dissemination would not only enhance the public's access to information, but would also help agencies fulfill their missions and cut down on many inefficiencies. The E-FOIA amendments of 1996, the E-Government Act of 2002 and OMB Circular A-130 have started us down the path to this goal, but there is still much work to be done.

Background

The importance of an informed citizenry to a functioning democracy has long been understood. James Madison once said, "A popular government without popular information, or the means of acquiring it, is but a prologue to a farce or tragedy or perhaps both." Franklin Delano Roosevelt understood that "The only sure bulwark of continuing liberty is a government strong enough to

protect the interests of the people, and a people strong enough and well enough informed to maintain its sovereign control over the government." It is important to keep in mind that public oversight of government is a check not just on abuse but also on the accuracy of the data on the basis of which governmental decisions are made. Without access to government information, effective citizen oversight is impossible.

FOIA

Although the importance of "the people's right to know" has long been understood, it was not statutorily enforced until 1966 with the passage of the Freedom of Information Act (FOIA). Through this Act, every citizen of the United States gained the right to access information held by the government. It was enacted to ensure an informed citizenry, vital to the functioning of a democratic society, as a check against corruption and to hold the governors accountable to the governed. FOIA affirmed the public's right-to-know as a central principle of our democratic government.

FOIA is viewed by journalists, public interest organizations, and citizens as an important tool in opening federal agency policies and practices to public scrutiny. The congressional findings accompanying the 1996 amendments to the Act state that FOIA has led to the disclosure of waste, fraud, abuse and wrongdoing in the Federal Government, and has led to the identification of unsafe consumer products, harmful drugs, and serious health hazards.

Under FOIA, federal entities are required to disclose records upon the written request of a citizen, unless the records fall within one of the nine exemptions to the Act. Records may be withheld from the public if they are:

- Specifically authorized under criteria established by an Executive Order to be kept secret in the interest of national defense or foreign policy, and are classified as such;
- Related solely to the internal personnel rules and practices of any agency;
- Specifically exempted from disclosure by statute;
- Trade secrets and commercial or financial information obtained from a person and privileged or confidential;
- Inter-agency or intra-agency memoranda or letters which would not be available by law to a party other than a party in litigation with the agency;
- Personnel or medical files;
- Records or information compiled for law enforcement purposes;
- Records contained in or related to examination, operating or condition reports prepared by, on behalf of, or for the use of any agency responsible for the regulation or supervision of financial institutions; or
- Geological and geophysical information and data.

E-FOIA Amendments

In the years following FOIA's initial passage, some weaknesses in the law became evident. Among the problems encountered were long wait times, uneven implementation, and the inability to receive electronic documents. Another concern was the "requester's paradox" — "how can I know to request a specific document, when I don't even know that the document exists?"

In 1996, the "Electronic Freedom of Information Act" (E-FOIA) amended FOIA to address these problems.

The amendments lengthened allowable agency response times (previously almost universally ignored), but limited the types of circumstances in which extensions could be granted. This cut down on the use of boilerplate language to extend almost every FOIA request.

E-FOIA required agencies to provide records "in any form or format requested by the person if the record is readily reproducible by the agency in that form or format" in order to allow requesters to request information in a usable electronic format.

To address the "requester's paradox," Congress pushed agencies to make more information directly available to the public. E-FOIA required agencies to index and post online documents that are likely to be the subject of frequent requests,[1] including copies of administration opinions, policy statements, and staff manuals. These indexes are now often referred to as "Electronic Reading Rooms" and appear on agency Web sites. The amendments also required agencies to create indexes and description of all major information systems. This inventory allows requesters to see the types of information that may be available for request.

OMB Circular A-130

In 1980, OMB developed basic principles and guidelines for dissemination of information by federal agencies. Entitled Circular A-130, this document has been updated four times to become the seminal policy statement for the delivery of government information for every President since Ronald Reagan. It establishes the active dissemination of information as a critical goal for agencies. We have included the document's "Basic Considerations and Assumptions" as an appendix to this testimony because they should continue to provide the underpinnings of any decisions made on government information policy.

To accomplish the goals set forth in A-130, OMB specifically advises agencies that tagging information in advance and creating "an information dissemination management system which can ensure the routine performance of certain functions" are essential.

E-Government Act

As the World Wide Web developed, citizens wanted more government information to be made available online.[2] In passing the E-Government Act of 2002, Congress actively promoted improved use of the Internet. Congress understood that, at the local level, many direct governmental *services* (such as registering a car and renewing a driver's license) were available online, whereas at he federal level citizens were specifically interested in finding *information*. Therefore, the E-Government Act wisely focused more on government-wide information policy instead of than on specific government services.

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[1] In its 2004 Freedom of Information Act Guide, the Department of Justice advises agencies that they are "required to determine whether [records] have been the subject of multiple FOIA requests (i.e., two or more additional ones) or, in the agency's best judgment based upon the nature of the records and the types of requests regularly received, are likely to be the subject of multiple requests in the future" (p.25 & 26).

[2] The Pew Internet & American Life Project has been documenting the public's use of government Web sites for years and continues to indicate that government information is a frequent draw for Web users. A 2004 report found that 77% of Internet users (97 million Americans) have at some point gone online to search for information from or to communicate with government agencies (http://www.pewinternet.org/pdfs/PIP_E-Gov_Report_0504.pdf).

The E-Government Act also required a committee of relevant government agencies to develop recommendations for open standards to enable the organization and categorization of government information. This will be the first time that the government develops a cross-agency taxonomy of information so that different terms that are used to mean the same thing can be mapped within and across agencies, allowing for better searching and retrieval of information. These recommendations are due from OMB in December 2005.

This taxonomy will help take advantage of the Web's unique decentralized structure that allows information to be sorted in ways beyond traditional hierarchical stovepipes. Some of these changes are already in place, in part thanks to other changes in the E-Government Act encouraging cross-agency partnerships. For example, the US Park Service (part of the Department of Interior) and the US Forest Service (part of the US Department of Agriculture) both administer public lands on which camping is permitted. In the past, to find information about campgrounds in a National Park or National Forest, an individual needed to know which agency administered the land. Today, an individual can use recreation.gov to quickly plan a trip across the country, stopping at parks and forests without needing to know the agency involved.

Recent Negative Changes to FOIA and FOIA policy

Not all of the changes to FOIA over the past several years have been positive. On October 12, 2001, then Attorney General John Ashcroft distributed a memorandum to all federal agencies altering the government's policy on FOIA by suggesting that agencies should not release information if there is uncertainty about whether the information falls under one of the main FOIA exemptions. This memo reversed a policy that had been in place for eight years encouraging agencies to share information if there was uncertainty about whether it should be withheld. The change was a step backwards.

Also of concern is the recent increase in so called "(b)(3) exemptions." This section allows Congress to designate any category of records as exempt from FOIA for any reason. Recently, there have been several such blanket exemptions adopted and others introduced. In most cases, the information seems to be covered by existing exemptions for national security, law enforcement and/or confidential business information, but Congressional exemption under (b)(3) essentially insulates agency decisions from judicial review. We urge Congress to refrain from adopting (b)(3) exemptions except in truly extraordinary cases.

Current Legislation to Improve FOIA

In March of this year, Senators John Cornyn (R-TX) and Patrick Leahy (D-VT) and Representatives Lamar Smith (R-TX) and Brad Sherman (D-CA) introduced the OPEN Government Act of 2005 and the Faster FOIA Act of 2005, legislation that would close many loopholes left open by FOIA.

The OPEN Government Act (HR 867) is an important bill in several respects. CDT is especially encouraged that it would take advantage of the Internet to more efficiently disseminate public information. The Internet is an ideal medium for increasing and streamlining public access to government information. For example, through blogs and audio and video webcasts, the Internet has facilitated the rise of independent media outlets. By requiring Internet publications to be considered when making a determination of a requester's news media status, the OPEN Government Act recognizes the legitimacy of these online outlets and in doing so, removes a financial hurdle for many smaller media entities to use FOIA. In addition, by creating a system

that allows FOIA requesters to track requests, the Act takes advantage of the efficiency of the Internet in providing a layer of accountability to the FOIA request process. Finally, requiring the Comptroller General to report on the implementation of the Critical Infrastructure Information Act of 2002 will bring oversight to the effectiveness of the (b)(3) exemption for information on the nation's critical infrastructure. CDT strongly supports the bill.

The Faster FOIA Act (HR 1620) would create a 16 member Commission on Freedom of Information Act Processing. With at least four members required to have experience submitting FOIA requests on behalf of nonprofit research, educational, or news media organizations, such a Commission could develop innovative solutions to the continuing problems of FOIA delays, balancing the needs of both agencies and requesters. CDT supports the Faster FOIA Act.

Creating Better Information Structures

Access to information inevitably implicates other interests — in particular cost, privacy and security. Too often, these important issues are unnecessarily seen as competing with openness. Most of the discussion around these issues assumes that there must be a trade-off. However, the public does not see it this way, nor does CDT.

In April 2003, a poll conducted by the Council for Excellence in Government showed that access, privacy and security were all equally important values and suggested that citizens expect all to be protected in federal e-government projects.[3] These findings should not come as a surprise since, in most cases, getting the right information to the right person at the right time ensures privacy, security and access, and can be more cost effective if done properly. Yet, to get to this point, information must be managed properly.

CDT regularly hears stories from agencies about the internal mismanagement of information. While cases such as the FBI's Virtual Case File have been highlighted in the press, similar inefficiencies and failures exist thoughout government. For example, one agency came to CDT to discuss changes in its Privacy Act practices.[4] These officials had begun their task by cataloging the current Privacy Act Systems of Records at the agency to examine those that could be combined or eliminated. They found about half of these important data systems were missing. Over time the agency had simply lost track of them. Poor information management does not serve the interests of access, privacy, security or cost efficiency.

Yet, as bad information harms all of these areas, good information management can protect them. Information managers have long suggested solving data access and control problems by tagging information within the actual coding of the document. These tags describe the document in part and in whole. This so-called *metadata* would streamline the searching and cataloging of information. It would also allow the creators of public documents to tag privacy sensitive information or classified information, making decisions about release at the time document is created rather than requiring other agency staff to review the document when it is requested. Documents suitable for release could then be posted as a matter of course, without the need for a FOIA request, essentially ending the "requester's paradox."

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[3] http://www.excelgov.org/displayContent.asp?Keyword=ppp041403

[4] This anecdote is more relevant than it may seem. Agencies treat individual requests for information under the Privacy Act as FOIA requests, because FOIA offers more rights to the individual. This is also the reason that many FOIA officers are also Privacy Act officers and why some Chief Privacy Officers at agencies have requested responsibility for FOIA.

Such approaches also offer opportunities for cost savings. Put simply, it takes less time to digitize and make available all agency documents (with appropriate redactions or withholdings) than it does to file away the documents until a FOIA request is received, then search for the requested documents, and print, review and send the document if found. Past examples show that making electronic records available to the public before a member of the public makes a request saves an agency time and money.

Perhaps the best example of the power of posting information comes not under FOIA, but from a Congressional agency, the Government Accountability Office. GAO began publicly posting all of its reports in October 1994 through GPO Access and in 1996 began providing the reports on its own Web site. By1998 the total number of copies that GAO was printing had gone down from 1.2 million a year to 800,000 a year. Meanwhile an average of 150,000 to 200,000 copies of each GAO report were being downloaded online. Given the number of reports that GAO issues, this means that tens of millions more GAO reports are being accessed without a significant rise in GAO's budget. While there may have been some initial start-up costs to put the data on a GAO Web site, there is no question that GAO has saved taxpayers money over the long term by putting all reports online.

Conclusion

Congress should be encouraging agencies to think creatively about building better information systems with dissemination as a key goal. Addressing dissemination, privacy and security at the time of the creation of information management systems ensures that all of these interests are protected.

Appendix I

OMB Circular A-130 -- http://www.whitehouse.gov/omb/circulars/a130/a130trans4.html
Basic Considerations and Assumptions:

a The Federal Government is the largest single producer, collector, consumer, and disseminator of information in the United States. Because of the extent of the government's information activities, and the dependence of those activities upon public cooperation, the management of Federal information resources is an issue of continuing importance to all Federal agencies, State and local governments, and the public.

b Government information is a valuable national resource. It provides the public with knowledge of the government, society, and economy -- past, present, and future. It is a means to ensure the accountability of government, to manage the government's operations, to maintain the healthy performance of the economy, and is itself a commodity in the marketplace.

c The free flow of information between the government and the public is essential to a democratic society. It is also essential that the government minimize the Federal paperwork burden on the public, minimize the cost of its information activities, and maximize the usefulness of government information.

d In order to minimize the cost and maximize the usefulness of government information, the expected public and private benefits derived from government information should exceed the public and private costs of the information, recognizing that the benefits to be derived from government information may not always be quantifiable.

e The nation can benefit from government information disseminated both by Federal agencies and by diverse nonfederal parties, including State and local government agencies, educational and other not-for-profit institutions, and for-profit organizations.

f Because the public disclosure of government information is essential to the operation of a democracy, the management of Federal information resources should protect the public's right of access to government information.

g The individual's right to privacy must be protected in Federal Government information activities involving personal information.

h Systematic attention to the management of government records is an essential component of sound public resources management which ensures public accountability. Together with records preservation, it protects the government's historical record and guards the legal and financial rights of the government and the public.

i Strategic planning improves the operation of government programs. The agency strategic plan will shape the redesign of work processes and guide the development and maintenance of an Enterprise Architecture and a capital planning and investment control process. This management approach promotes the appropriate application of Federal information resources.

j Because State and local governments are important producers of government information for many areas such as health, social welfare, labor, transportation, and education, the Federal Government must cooperate with these governments in the management of information

resources.

k The open and efficient exchange of scientific and technical government information, subject to applicable national security controls and the proprietary rights of others, fosters excellence in scientific research and effective use of Federal research and development funds.

l Information technology is not an end in itself. It is one set of resources that can improve the effectiveness and efficiency of Federal program delivery.

m Federal Government information resources management policies and activities can affect, and be affected by, the information policies and activities of other nations.

n Users of Federal information resources must have skills, knowledge, and training to manage information resources, enabling the Federal government to effectively serve the public through automated means.

o The application of up-to-date information technology presents opportunities to promote fundamental changes in agency structures, work processes, and ways of interacting with the public that improve the effectiveness and efficiency of Federal agencies.

p The availability of government information in diverse media, including electronic formats, permits agencies and the public greater flexibility in using the information.

q Federal managers with program delivery responsibilities should recognize the importance of information resources management to mission performance.

r The Chief Information Officers Council and the Information Technology Resources Board will help in the development and operation of interagency and interoperable shared information resources to support the performance of government missions.

Mr. PLATTS. Thank you, Mr. Schwartz.

Mr. Tapscott.

STATEMENT OF MARK TAPSCOTT

Mr. TAPSCOTT. Mr. Chairman, I commend you as well for holding this hearing. I don't believe the Freedom of Information Act gets nearly the public attention that it deserves. I think that what you are doing here is one of the most important things that this Congress will be doing this year.

Mr. PLATTS. Thank you.

Mr. TAPSCOTT. As I am sure you know, Secretary of Defense Donald Rumsfeld is one of the original co-sponsors of the 1966 FOIA. He made an observation during the floor debate at that time that I think has a direct relevance to what you are discussing here today and the issues presented by how do we make the FOIA work better.

Secretary Rumsfeld said "There 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."

I think what he described as having happened in the years leading up to passage in 1966 of the original FOIA is very much what has happened in the years since it was passed. What we have seen is, over time, Government employees, the vast majority of whom who handle FOIA requests being career employees, for whatever reason have learned the many ins and outs and vague phrases within the law and the case law on the administrative side to interpret the FOIA frankly for the Government's advantage too often and too often to the disadvantage of the requesters, particularly in my case the news media.

I say this and I want to point out that when I cite career Federal employees, I am a former Government employee myself, in fact I was the fourth generation of my family to be in the Government and I understand that career employees should have a certain degree of insulation from political employees and their pressures. That is a good thing to a certain extent.

One of the byproducts of that insulation is that it encourages this very process that I am talking about of being insulated from accountability for doing things like not properly administering the FOIA.

I was frankly amused to hear Mr. Nichols from the Justice Department during the previous panel citing as one of the so-called incentives to Government employees to do the FOIA administration properly being the threat of a lawsuit.

Speaking as a journalist who has often had opportunities to consider is this important enough for us to file a lawsuit, 99.99 percent of the time the answer is it probably is, but we can't afford it.

I think that this process should surprise no one because we see the results in the increased delays, the increased backlog and so forth. The National Security Archive did a survey in 2003 that I

think indicates very accurately the problem and the present condition. Their conclusion was simply that the system is in extreme disarray. I believe that is a very accurate characterization.

I was especially pleased, Mr. Chairman, when you focused in on the absence of real penalties for not properly administering. The fact is there are no penalties. There is, to my knowledge, no Federal employee who has ever been disciplined and certainly none that has ever been dismissed for failing to properly administer the FOIA.

There are consequences, but usually it is because they presented too much information, not enough.

I am also encouraged that you have cited that as one of the main problems that needs to be addressed because I think that is one of the big things that the Cornyn-Leahy bill addresses, one of the most important things that it addresses and that is providing genuine consequences, both to the individual employee and to the agency.

I want to cite for you an example that I recently learned about that I think illustrates these problems. Mr. Frank Flimko is the editor of a small newsletter that covers the Government's funding stream for youth programs. Last year he asked for HHS information on Federal salaries of Head Start directors. He was denied that because allegedly providing that information would be a violation of personal violation.

Frankly, whoever wrote that denial didn't know the law because that kind of information has been routinely provided. But Mr. Flimko doesn't have a lawyer. He doesn't have the kind of resources that are needed to challenge that kind of a holding. That is the reality of what most newsmen and most requesters face. Whatever the Government tells them is the last word. That needs to be changed.

Thank you, sir.

[The prepared statement of Mr. Tapscott follows:]

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CONGRESSIONAL TESTIMONY

The Open Government Act of 2005

Testimony before
Government Reform Committee
Subcommittee on Government Management,
Finance and Accountability
United States House of Representatives

May 11, 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 HAPPENNED 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 OVER THE YEARS WITH THE SOMETIMES VAGUE PHRASES AND LOOPHOLES OF THE FOIA ACT AND ITS IMPLEMING REGULATIONS AND CASE LAW.

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 CAN ALSO MAKE 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?

I RECENTLY LEARNED OF THE EXPERIENCE OF FRANK FLIMKO, PUBLISHER OF THE CD PUBLICATIONS NEWSLETTERS, THAT REFLECTS VIRTUALLY ALL OF THE MAJOR PROBLEMS OF THE FOIA SYSTEM TODAY. THE SPECIFIC NEWSLETTER IN THIS INSTANCE IS THE "CHILDREN AND YOUTH FUNDING REPORT."

LAST MAY KLIMKO REQUESTED FROM THE U.S. DEPARTMENT OF HEATH AND HUMAN SERVICES A COPY OF A REPORT PRODUCED BY THE DEPARTMENT ON THE USE OF FEDERAL TAX DOLLARS IN THE COMPENSATION OF THE 25 TOP HEAD START PROGRAM EXECUTIVES AND INFORMATION ON THE GRANTS RECEIVED BY THE TOP 25 HEAD START OFFICES.

THIS KIND OF INFORMATION REGARDING THE USE OF FEDERAL TAX DOLLARS IN A WELL-KNOWN FEDERAL PROGRAM OUGHT TO BE EASILY ACCESSIBLE TO ANY MEMBER OF THE PUBLIC. YET ALMOST A YEAR TO THE DAY LATER, KLIMKO IS STILL BEING TOLD BY HHS THAT HE CANNOT HAVE THAT INFORMATION BECAUSE RELEASING IT COULD VIOLATE AN INDIVIDUAL'S PRIVACY UNDER EXEMPTION 6 OF THE FOIA. THIS DESPITE THE FACT THAT FEDERAL AGENCIES ROUTINELY MAKE PUBLIC SUCH GRANT INFORMATION AND THE U.S. OFFICE OF PERSONNEL MANAGEMENT HAS LONG MADE SALARY INFORMATION ABOUT PUBLIC EMPLOYEES AVAILABLE.

KLIMKO IS AT THE MERCY OF THE HHS OFFICIALS BECAUSE HE HEADS A SMALL COMPANY THAT CANNOT AFFORD TO TAKE THE GOVERNMENT TO COURT.

KLIMKO'S SITUATION HIGHLIGHTS 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.

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.**

IN CLOSING, IT SHOULD ALSO BE NOTED THAT THE PUBLIC DEMAND FOR TRANSPARENCY IN GOVERNMENT IS LIKELY TO INCREASE IN THE FUTURE AS THE INTERNET BECOMES THE DOMINANT FORM OF COMMUNICATIONS TECHNOLOGY. MILLIONS OF GOVERNMENT DOCUMENTS HAVE BEEN MADE PUBLIC VIA THE INTERNET IN RECENT YEARS AND THE NUMBER OF PEOPLE ASKING FOR ACCESS TO GOVERNMENT DOCUMENTS IS LIKELY TO INCREASE, THANKS TO THE GROWTH OF INTERNET-BASED NEWS SITES, INCLUDING ESPECIALLY BLOGGERS CONCERNED WITH PUBLIC POLICY ISSUES.

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.

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Mr. PLATTS. Thank you, Mr. Tapscott. I share the sentiment, that the threat of litigation being the most overriding incentive to comply is not a very valid one because, as you reference, even newspapers are always hesitant because of the cost involved, to go that route.

I think for that individual citizen it is not an option and we need to find a way to better fulfill the intent of Congress, which is to have an open, accessible Government. When that is not working, there should be consequences.

That is one of the frustrations in 2-plus years in this chairmanship is that consequences is not something that is very common in the Federal Government, for mis-expenditure of funds, for non-compliance with FOIA, whatever it may be. I want to touch on a number of issues.

My understanding is that our next series of votes is going to begin between 4:15 and 4:30, which, assuming that is the earliest, that means we have to be on the floor about 4:35 to get in under the bell for that first vote. From what they are telling us, it may be as many as six votes with a 10-minute debate on recommittal in the middle, which means we do not want to keep you waiting because you will be here a long, long time, probably at least an hour and 15 minutes more.

So we are going to try to push through in the next 25 to 30 minutes and try to touch on various issues with Mrs. Maloney and myself.

First, Mr. Smith, your emphasis, and I did take note of your identifying yourself first as a citizen, which I think is important for all of us to do. Some of us are in office, some are in the private sector. Whatever our positions are, first we are American citizens all seeking that same good outcomes for our Nation and for all of our citizens. I think that is an important perspective for us all to remind ourselves about as we go forward on important issues like this.

I wanted to ask, on a specific issue and I did not get to it with Justice while they were still here. The example of the case with the immigration issue and the aliens being released, that is an ongoing litigation case?

Mr. SMITH. That is correct.

Mr. PLATTS. Because that is one that we may actually incorporate into our followup questions to Justice, that specific issue. My guess is because it is an active litigation case they are going to respond that since it is in litigation they can't respond. But it is one that just goes to the crux of homeland security.

Here we have individuals of not the character we want out on the street and we have them in our possession and we are releasing them and apparently putting our citizens at risk and yet we can't get the data to verify the accuracy of that. We probably will make a followup on that and see what response we get even though litigation is involved.

I do want to get into a couple of your specific recommendations and the idea of an ombudsman. I think Mrs. Maloney referenced earlier in her statements and others have too of trying to have that type of one-stop shop where you can go to as opposed to a litigation. So maybe you do the administrative appeal and the same

agency that denied you the first time denies you again. Before going to litigation there could be that ombudsman.

Do you have any structure and vision and how that would be structured? The head of the agency, and I am going to reference GAO as an example where there is a fixed term of 15 years for the Comptroller General to try to de-politicize the position. Do you have anything in mind along those lines or is it more just the concept that we need to focus on, trying to establish that concept?

Mr. SMITH. In terms of structure, no. I like your use of the word de-politicize. I think it is important that this be a fair-minded representative of the requester as well as of the agency. As I thought about this, you can almost draw a parallel to the thing that so many of us know as telephone hell when you get into the voice mail system and you are transferred from this to that to another and how wonderful it is when there is a living, human being who picks up the phone and says, may I help you?

It doesn't happen too much any more. I think about that concept brought to Government and applied in this way and assuming that person, A, is knowledgeable, B, has the interests of the citizen at heart and C, also understands that there may be legitimate concerns of the agency. That is what I am talking about.

Mr. PLATTS. Yes. I think we have a litigious enough society that where we can try to have an effort that avoids the need for litigation, I think it is something that is worthy of exploration on how to structure it, how to have it facilitate that cooperation in a way that is truly de-politicized and fair to all sides. That is the challenge probably. But it is something I want us to look at and see if there's a way to try to incorporate it in some of the legislation that has been proposed, some of the aspects that they have included.

One of the other things you highlighted was the attorneys fees. Where you use the legal system inappropriately there are in the Federal rules avenues to go after attorneys fees for misuse, but that is a rarity. We should not allow Federal officials to use the legal system for the purpose, in other words, just to stall and delay.

That is something that as we look at legislation—let me get to a couple of questions, because of the time limitations, that maybe are broad. I am sure each of you could cite examples that you are personally familiar with. In fact you have in some of your testimony, examples of delay that were unreasonable and inappropriate.

Where those delays happen, though, one of the questions, I am not sure, is how informed the requester is kept of the delay and the reasons for the delay. I would be interested if all three of you would want to expand on your personal familiarity that this agency is really good at saying, well, it is going to be 6 weeks or 10 weeks and this is why. They keep you informed and others that basically tell you nothing and you are just in limbo unless you are after, and it is kind of a best case/worst case scenario that you are familiar with would be helpful?

Mr. Smith, would you like to begin?

Mr. SMITH. I can recall one very specific example that occurred in Dayton, OH, when a reporter there filed, I believe, over a 3-year period nine separate requests with the Department of Health and

Human Services. After one of those requests had aged about a year he called and was told by the agency representative "Are you really sure you want to keep this thing alive?"

The reporter said, "Yes, absolutely, of course. Why wouldn't I?" And the agency representative said, "Because most people don't; they give up." That is, in my estimation lousy service and a horrible way to respond.

Mr. PLATTS. Instead of facilitating a completion, you are trying to discourage it from going forward at all.

Mr. SMITH. Yes, sir.

Mr. SCHWARTZ. I will actually followup on that. We don't make too many requests at CDT. We hear about other requests. In some examples, in cases where we have made requests, you have to keep checking. You have two or three requests in at the same time to different agencies, and you have to keep checking what they told you and different time lines that they are coming back, etc., making it extremely complex for someone that wants to put in a request on one subject that goes to different agencies.

That is one of the reasons we think that the online tracking tools and some of the tracking pieces from the Open Government Act make sense. It gets at the point that Representative Maloney made earlier of where does this thing stand 2 or 3 years down the line?

You can go back and take a look at it. That would have been very helpful in the cases that we had. We were waiting for substantial periods of time.

Mr. PLATTS. Mr. Tapscott.

Mr. TAPSCOTT. Several years ago at the Heritage Foundation we were asked by Scripps-Howard News Service to do a statistical analysis of the effectiveness of the COPS Program, which we did and published. Very soon after we published the results of that study the Justice Department retained a couple of academics to do a similar study. As soon as their names were announced they asked us for our data which, within about 30 seconds of receiving their request we provided that data.

When we asked those two academics who were studying the question on behalf of the Justice Department for their data, they refused to provide it. This didn't prevent the Justice Department from issuing a news release touting the results of their study, but nobody could check the data upon which that study was based.

We continued to ask for that data. We did finally receive it, but only after one of your colleagues on another committee put in a call to the Attorney General. Not everybody has access to the Attorney General.

Mr. PLATTS. Right. Is there an agency that you would identify as the best case that handles FOIAs in the most efficient way, again based on your own experiences with this process? If we have one we should look to try to model as doing maybe not perfect, but better than others?

Do none jump out?

Mr. TAPSCOTT. Not as models to emulate, no.

Mr. PLATTS. Maybe models not to emulate.

Mrs. Maloney, I don't know if you have questions.

Mrs. MALONEY. I do. Thank you, Chairman Platts and Ranking Member Towns for your interest. I think we really need to update

this law. The fact that it says you should get a response in 10 days and absolutely no one is adhering to that, and maybe they can't with the backlog that is there.

What is really startling to me is news agencies that are in the position with staff and support and in the job of doing a story are having trouble getting information. You can imagine what Joe Blow or Jane Blow, how hard it is for them to get any inquiry answered.

I thought it was interesting where the news organizations said they can't afford to go into court. Well, how can a citizen afford to go into court? There is really no punishment now for an agency not responding. Very startling, I thought, was Mr. Smith's statement that one reporter kept calling and calling and they said, well, we just thought we would never have to respond because we usually wait a year or two before we respond and usually most people give up.

So, it shows we have to put some type of enforcement behind it that is reasonable. Obviously, with limited resources and so forth that has to be taken into consideration, but a law that has no teeth and no enforcement is not really a law; it is a joke. I think we really have to update it. It is an important law. It is one we need to work on.

I thought Mr. Tapscott's statement that one agency, when inquired about salary levels, said this was personal information of what an administrator is paid is absolutely ridiculous. I think we are all public employees. The public pays us and is entitled to know what our salaries are. But I think it underscores the cavalier response that some agencies have to not hand out any information.

If a news agency can't even get what the pay scale is in an agency, what does that tell you? That is redacted. What I am hearing from so many of my constituents is that everything is redacted.

I think we need something more than an ombudsman, I think we need a review of the redactions to see whether they are active or not. That is basically what it is. To say that you can go to an administrative review within the agency that is telling you you can't see that information, I would suggest that when we get this report back from whomever it will be that in the administrative review Joe Blow and Jane Blow and possibly the new agencies never win.

I would like to ask the panel, have you ever been involved in an administrative review of redactions or really turning down your request and what was your experience in the administrative reviews?

I must say we are not getting the story out. I try to know what is going on. I was not aware that you had the administrative review. Have you used the administrative review or have your reporters or other news agencies, when denied information or when redactions appear to be excessive, have you gone to the administrative review process which was mentioned?

Mr. SMITH. Ma'am, if we have I am not familiar with it, but we sure have spent a lot of money on attorneys.

Mrs. MALONEY. If you could look into how newspapers have used the administrative review process and see whether or not that has been successful for them or not, I think that would be information that the chair would like to see and I would like to see it, too.

What is your experience with the administrative review process?

Mr. SCHWARTZ. Representative Maloney, we have had a review, an administrative review on cost issues in terms of we are a public interest organization, we are saying that we are going to post this information that we are receiving on the Internet for the public. We were going to make it publicly available.

This agency wanted us to pay. We made a case. There was a review. They told us that we still have to pay.

We decided that the $150 that it was costing us was less than we would spend bringing it to court. I think this is the case in a lot of cases. We just paid the money and got the documents, even though we felt that it was the wrong decision.

Mr. TAPSCOTT. Congresswoman, I have been involved in several administrative appeals as a reporter, specifically covering the General Services Administration some years ago. GSA frequently used the redaction process to avoid providing the kinds of information that it seemed to us at the time should have been provided.

I have occasion to ask reporters frequently now, when they tell me they have been denied, are you going to do an administrative appeal? More often than not they look at me either like I am nuts or they laugh at me.

Mrs. MALONEY. When you did an administrative review, did you win?

Mr. TAPSCOTT. No, never.

Mrs. MALONEY. You did not?

Mr. TAPSCOTT. No.

Mrs. MALONEY. So, see, I think most people will think, hey, I'm going to go back to the same person who told me I can't see it for an administrative review. I am not going to win in that process. I don't think people trust it.

What I find problematic, and I might sound a little like a Republican now because a lot of my Republican colleagues——

Mr. PLATTS. We don't mind.

Mrs. MALONEY [continuing]. Want to cut back Government, I think, too much. I'm a Democrat. I think Government does a lot of great things to help people and Government does a great job and we need to have more people working in the FOIA office and so forth. Gosh, what was the point I wanted to make?

Anyway, I am just really concerned that the public is not getting this information, that it is not accessible and it is really problematic. I am very sensitive to homeland security and national security issues, particularly today when we had quite a scare in the House of Representatives. We evacuated, I think, in about 3 minutes. It reminded me of the day of September 11th.

But outside of national security, have members of your organization, I would like each of you to mention this, have you identified specific areas where there are increasing conflicts with agencies in gaining access to Government records and proceedings outside of national security? Is there any particular area where you are having more trouble than others?

Mr. SMITH. I don't know that I can cite any one particular area, but over time we have seen an increase in the number of turndowns that we have received.

Mrs. MALONEY. Yes. Well, I have had some constituents say they finally get the paper 2 years later and the whole page is redacted.

I mean not the whole page; the whole page could not be sensitive or personal or national security.

Mr. SCHWARTZ. We are in a privacy organization and we have been seeing an increase in misuse of the Exemption 6 of the Privacy Exemption in the way that you said where salaries are requested.

Mrs. MALONEY. Can you give us some examples?

Mr. SCHWARTZ. There have been several cases, particularly from the Department of Justice where employees that worked on a particular issue that signed a memo, etc., where their names are blacked out.

Now, doing their job is not private. It is part of what they are doing. The fact that their name is on the document is not private information. If it had personal information about their personal lives, that would be different. But the fact that they are involved in a particular case and that their name is on a memo does not make it personal information.

Mrs. MALONEY. If you have ideas of how you think this law should be changed, in addition to the sort of broad sweeps that you put in your testimony, such as that specific.

Now, personally I am offended that information that should be out there for the general public, that they are putting up barriers so you can't give that information out on a Web site. I don't understand that.

Issues are complicated. I see my time is up. I thank the chairman for his attention to this subject.

Mr. PLATTS. Thank you, Mrs. Maloney.

I will try to squeeze a few more issues in here. One of the avenues in trying to look at how we proceed to try to strengthen FOIA in the independence issue and the ombudsman issue, do the three of you have an opinion on the possibility if these ladies and gentlemen were in this room they would cringe at being assigned more work, but our Inspectors General throughout every department and agency, I spoke to their annual conference yesterday in Philadelphia.

They are an important independent aspect. In fact, we are looking at trying to strengthen their independence. There is legislation that Congressman Cooper has introduced. We have looked at it and we are trying to see how we can move forward to strengthen their independence. Are they an avenue, if given the resources to expand their responsibilities to include within their respective departments and agencies the ability to review FOIA compliance?

Mr. Tapscott, it sounds like you don't think that would work.

Mr. TAPSCOTT. I would be very hesitant about doing that because in my own experience with a number of the IGs over the years, and more important the IG staffs, it is not unusual for an IG staff to be part of the problem rather than part of the solution. They have an interest, for whatever reason, in protecting rather than exposing problems within an agency.

I think the problem is not so much the FOI officers themselves within the agency. More often than not the problem is the deputy program manager or the deputy assistant secretary or the GS–13 administrator who simply will not provide the documents that the FOIA officer is trying to get.

Mr. SCHWARTZ. I somewhat agree with that. I think that some IGs are very good and very independent. Some have more questionable histories. So the question is, really, can you set up an independent ombudsman or an independent body that can do the reviews, that can report on FOIA compliance over time.

In some cases I would say that the IG is the best place to put it, but I do see what Mr. Tapscott is saying in other cases. We have run into IGs that are part of the problem as well. That could be the case for any independent body that you set up.

Mr. PLATTS. My thought is if you are going to look at IGs it would be after strengthening their independence with fixed terms and allowing them especially in some of the smaller departments and agencies where the IG is appointed by the agency head, that just tells us how much independence there is to begin with when you are appointed by the person you are actually charged with kind of overseeing. So, I agree that we would have to be strengthening that independence before looking to expand them as an independent entity in looking at FOIA compliance.

Mrs. Maloney may have touched on this a little bit. Mr. Smith, this relates probably most directly to you or maybe Mr. Tapscott in your prior service in the media. The expedited review process which is newer, how familiar are you with requests made under expedited review and your belief on how compliance with expedited review is better than typical FOIA requests or is it the same, no real difference?

Mr. TAPSCOTT. Expedited review means they tell you no sooner.

Mr. PLATTS. They tell you another story?

Mr. TAPSCOTT. They tell you no. I am not exaggerating when I say that. I am not aware and I am not presuming to have a comprehensive knowledge of all the expedited requests, but I have not heard reporters coming and saying, hey, this expedited review process is a great thing.

Mr. PLATTS. It doesn't seem to have made any difference?

Mr. SMITH. I concur. I don't think we would be sitting here today making these recommendations if this were at the top of the solution file.

Mr. PLATTS. The change in policy in the fall of 2001 with the Attorney General, I think I probably know what your answers are, but your belief is that lessened access because of changing the presumption or has not really had an impact, and that the compliance with FOIA today is pretty much the same as before; it is not an executive action, it is a statutory problem that we have.

Mr. SMITH. Inferentially, I think it has had a very big effect. It is leadership of a kind. I think Mark made the point a moment ago when you were asking about the Inspectors General. Ultimately it comes down to leadership. Is there a bias in favor of openness or is there a bias to be closed? It is a heck of a lot easier to say no than it is to say yes.

I think that memorandum made it much, much easier for folks to say no.

Mr. SCHWARTZ. I have had conversations with FOIA officers where I have asked them that question, have you been holding back documents that you would have released in the past and their

answer was yes, that they have specifically denied requests that they would have accepted in the past.

Mr. TAPSCOTT. I think the National Security Archive, one of the questions that they asked back in 2003 was specifically, has that memo made any difference? If I recall correctly, and I could be corrected, I believe only 5 of the 35 agencies indicated that it had made any difference at all.

Frankly, that did not surprise me because again it is not the senior level folks in agencies that made the day-to-day decisions about FOIA, it is the career people. Frankly, they don't feel too much concern about ignoring directives from John Ashcroft or his predecessor.

Mr. PLATTS. And that goes to the issue of consequences?

Mr. TAPSCOTT. Absolutely.

Mr. PLATTS. It is just human nature if you know that failure to do something—I have a 6-year old and an 8-year old. If I tell them do it and they don't, well, it is maybe bedtime but nothing is going to happen if I don't get in bed and lay down. It is probably one of the hardest parts of being a parent, making sure there are consequences so they learn that lesson. But in the Federal Government it seems like we just shy away from consequences of any kind.

Mr. TAPSCOTT. Mr. Chairman, if you ask the Justice Department, Mr. Nichols how many times the Justice Department OIP office has directed an agency to change a FOIA decision, both before 2001 and after, I am almost certain you will see that there is no difference.

Mr. PLATTS. Yes, and actually I think in his answer when I asked his familiarity with any instances when Justice has directed somebody to do something because of non-compliance, he wasn't aware of any that he could cite. I don't think anyone behind him that was assisting him had any additional information to add to that.

Mrs. Maloney, do you have additional questions?

Mrs. MALONEY. Yes, I do. I would like to ask Mr. Schwartz, you mentioned in your testimony your concern with the congressional designation of so-called B–3 exemptions, the categories of records exempt from FOIA and public disclosure. Would you elaborate on what the B–3 exemptions are? Anybody can answer this, but if you would start, and could you give us one example of a category that was given a B–3 designation and explain how this category could have been better handled for public disclosure purposes?

I would like to followup and ask all of the panelists if they would like to discuss it, if you would like to discuss the exemptions. Do you think they are too broad, that they should be more narrow? How would you change the exemptions? Do you think they are abused? I specifically want Mr. Schwartz to respond to the point that he made in his testimony.

Mr. SCHWARTZ. A B–3 exemption is an exemption where Congress specifically exempts one category of information from the Freedom of Information Act. So, when Congress says this is exempt from the Freedom of Information Act, this type of information, it becomes a B–3 exemption.

Mrs. MALONEY. How many? There are six of them now, right? How many B–3 exemptions are there now?

Mr. SCHWARTZ. I don't have the list. I don't know if either of my colleagues have it.

Mrs. MALONEY. In other words, how could we control this without going to a review process by writing the law possibly more explicitly so that the salary ranges of employees of the Federal Government are subject to a FOIA request?

Mr. SCHWARTZ. Well, in that case it is the agency saying that this falls under B–6 or the privacy exemption, and in that case someone could bring the issue to the courts and fight it out in the courts. I mean we know that people don't do that.

Mrs. MALONEY. We already know no one is going to the courts.

Mr. SCHWARTZ. Right, but in a B–3 case, though, the presumption is with the Government. That is really where the concern is. We are pushing more information so that even in the court the one remedy that we do have out there in the courts is that it is harder to bring those kind of cases.

Mrs. MALONEY. Because the Government makes the decision of what a B–3 exemption is? Is that what you are saying?

Mr. SCHWARTZ. Congress has made that decision and the Government is interpreting it, saying that this is what Congress specifically wanted. For example, as part of the Homeland Security Act, voluntarily submitted information from industry about potential concerns in their critical infrastructure is now exempt from the Freedom of Information Act under a B–3.

Now, it is our contention that this would already be exempt under B–1, which is a national security concern, or B–4 which is confidential business information, or an existing law enforcement, B–7. So there are three possible places that this stuff could already be exempt. Then there would at least be the presumption that you could have this discussion in front of a judge to say——

Mrs. MALONEY. Oh, I see. So when the B–3 is used, the Government makes the decision and they interpret it so they are in a stronger position.

Mr. SCHWARTZ. Correct.

Mrs. MALONEY. So how do you suggest we change that?

Mr. SCHWARTZ. The best way to go about it is to stop using the B–3 for every piece of information that comes around. We are starting to see a lot more bills. Every Congress we see more and more bills that say, well this needs to be exempted with a B–3 exemption, when it falls under the other exemptions. That is why those exemptions are there. By putting everything under a B–3 we are starting to cloak a lot more information that wasn't originally meant to be cloaked.

Mrs. MALONEY. That is very discouraging and problematic. Thank you.

Mr. PLATTS. Thank you, Mrs. Maloney. It might be perfect timing there. My understanding Mrs. Maloney, is that in the B–3 exemption there are 140-ish different——

Mr. SCHWARTZ. That sounds right. That is correct.

Mr. PLATTS. There are 140-ish spots in the code where we have exempted, Congress in recent years or over several years. So it is a pretty regular practice of late.

On the salary, I meant to mention earlier that request for salary, public information, as a regular visitor to third and fourth grade classes to talk about my job, one of the guaranteed questions is how much I make. If I said I'm not telling you, I'd better run for the door because those third and fourth graders are going to get it out of me one way or another.

I want to thank each of you for the valuable time you shared with us in your preparation of your testimonies and your time here today in your oral testimonies. Open government is something that is so important to the way we operate as a Nation.

Your insights into how we can strengthen the FOIA legislation as we go forward is so important because you have been out there and in various ways experienced it as requesters and your input is very helpful to us as we go forward.

We will look to work with Senator Cornyn and Lamar Smith and Congressman Sherman and others who have put forth legislation on how we can try to advance this cause in a positive way and strengthen what we are all after, which is a successful open government that is doing good work for all of our fellow citizens.

So thanks for being with us. We are going to keep the record open for 2 weeks. If you have anything additional you would like to submit, please feel free to do so.

This hearing stands adjourned.

[Whereupon, at 4:28 p.m., the subcommittee was adjourned.]

[Additional information submitted for the hearing record follow:]

United States Senate

WASHINGTON, DC 20510

May 19, 2005

Honorable Todd R. Platts, Chairman
House Government Reform Subcommittee on Government Management, Finance and Accountability
1032 Longworth House Office Building
Washington, D.C. 20515

Honorable Edolphus Towns, Ranking Member
House Government Reform Subcommittee on Government Management, Finance and Accountability
2232 Rayburn House Office Building
Washington, D.C. 20515

Dear Chairman Platts and Representative Towns,

We would like to congratulate you both for your May 11 hearing examining the issue of openness in government and freedom of information. We also want to thank the chairman in particular for expressing interest in working with us on the legislation that we have introduced. It is clear that you both are committed to open government as a founding principle of our democracy, and we very much look forward to working with you to strengthen and enhance our federal freedom of information laws and to strike a positive and workable balance between our national security and our national interest in open government. Your continued leadership in this effort will be critical.

We are especially pleased that your hearing reinforced a common theme expressed by proponents of FOIA reform: the need to establish meaningful incentives for agencies to comply with federal law. Under current law, practically speaking, there are no such incentives. And we are gratified that, at your hearing, the Justice Department representative appeared to acknowledge that the effectiveness of any statutory deadline for complying with FOIA will obviously depend upon "the penalty for failure to comply."

We also appreciate the fact that two bills received positive mention during the course of your hearing – namely, the OPEN Government Act and the Faster FOIA Act. Both bills are supported by a bipartisan, bicameral coalition of members. Moreover, the hearing raised a number of critical issues that the OPEN Government would address.

For example, members on both sides of the aisle engaged in effective lines of questioning concerning the lack of incentives for agencies to comply with FOIA deadlines. It was specifically noted that the threat of litigation alone is not a sufficient incentive due to the heavy cost that it imposes upon FOIA requestors. As you know, the OPEN Government Act would establish such incentives – borrowing from Texas state law provisions that Senator Cornyn helped to administer and enforce when he served as the Attorney General of Texas. Both of you also specifically asked whether any government personnel have ever faced negative employment consequences for failing to reasonably comply with FOIA. Our research indicates that there are provisions in current law that authorize such discipline of personnel, but that, surprisingly, these provisions apparently have never been used. The OPEN Government Act would encourage the use of these provisions in appropriate cases. Members also raised questions about the need for better agency reporting of data on FOIA compliance. The

OPEN Government Act would strengthen current statutory reporting requirements for agencies to provide data concerning their FOIA compliance. Finally, the chairman specifically mentioned the important issue of attorneys' fees. The written testimony submitted to your subcommittee by Senator Cornyn addressed the need to strengthen the ability of FOIA plaintiffs to recover their reasonable attorneys' fees in the event that litigation is the only way to compel an agency to disclose documents proven or admitted to be subject to FOIA. Senator Cornyn's statement responded directly to the written testimony of the Justice Department. The OPEN Government Act would change the law to guarantee reasonable recovery of attorneys' fees. Naturally, we warmly welcome any suggestions that you may have for improving the OPEN Government Act and for facilitating enactment of this important legislation.

Thank you again for holding this hearing on openness in government and freedom of information. We ask that you include a copy of this letter in the record of your subcommittee hearing. We applaud your leadership and look forward to working closely with you.

Sincerely,

JOHN CORNYN
United States Senator

PATRICK LEAHY
United States Senator

cc: Hon. Tom Davis, Chairman, House Committee on Government Reform
Hon. Henry Waxman, Ranking Member, House Committee on Government Reform

Written Statement of Gaddi H. Vasquez
Director
The Peace Corps

Response

Committee on Government Reform
Subcommittee on Government Management, Finance and Accountability

Hearing on "Information Policy in the 21st Century: A Review of the Freedom of Information Act"

May 11, 2005

The Peace Corps supports the effective management of information policy in government and the principles surrounding the implementation of the Freedom of Information Act (FOIA). When FOIA was established in 1966, it created a statutory right of public access to executive branch information. Maintaining these rights is important as well as finding the appropriate balance between the need for government openness and an individual's personal privacy. Over the past fiscal year, the Peace Corps has responded to 6,002 FOIA requests, granted in 99 percent of these requests the requestors' desired information in full, and processed the requests on average within 6 days. The agency is no stranger to the FOIA process.

However, as Director of the agency, I wish to respectfully submit the following response to the Statement of Jay Smith, President of Cox Newspapers, Inc. regarding the "Information Policy in the 21st Century: A Review of the Freedom of Information Act" hearing held on May 11, 2005 before the House Committee on Government Reform, Subcommittee on Government Management, Finance and Accountability. The assertions made in Mr. Cox' Statement about the Peace Corps are inaccurate.

While it is true that the Dayton Daily News submitted numerous FOIA requests to the Peace Corps and published a series of articles on deaths of Peace Corps Volunteers, the Peace Corps is not aware of any crucial information or details about the deaths of Volunteers that families learned based upon information provided to them by the *Dayton Daily News.* In addition, the Peace Corps is not aware of any information provided to families of Peace Corps Volunteers by the *Dayton Daily News* that conflicted with information provided to these same families by Peace Corps officials.

Furthermore, Mr. Smith's assertion that the *Dayton Daily News*' newspaper series led the Peace Corps to revise its safety and security procedures is also factually incorrect. While the Peace Corps did undertake numerous measures to enhance the safety and security of its Volunteers, these measures took place well before the *Dayton Daily News* stories were published. In 2002, the Peace Corps established a separate Office of Safety and Security and appointed an Associate Director for Safety and Security with the mission of this office to foster improved communication, coordination, oversight and accountability for the Peace Corps' safety and security efforts. The Peace Corps also increased by 80 the number of safety and security staff throughout the agency, and reorganized that staff to better communicate, supervise, monitor, and help set safety and security policy. The Peace Corps further expanded staff training relating to safety and security and intensified safety and security training for Volunteers on their roles and responsibilities. All of these actions took place well before the *Dayton Daily News*' series that ran from October 26, 2003 through November 1, 2003.

On behalf of the Peace Corps, I appreciate the opportunity to submit our agency's views for the record.

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Jay Smith
President
E-mail: jay.smith@cox.com

June 3, 2005

The Honorable Carolyn B. Maloney
United States House of Representatives
2331 Rayburn House Office Building
Washington, DC 20515-3214

Re: Administrative Appeals under the Freedom of Information Act

Dear Representative Maloney:

Following up on the questions you raised during the hearing on May 11 about administrative appeals under the Freedom of Information Act, I asked Cox Newspapers' most active users of the Freedom of Information Act, our Washington, DC, bureau and *The Atlanta Journal-Constitution*, about their experiences with the administrative appeal process. They have been frustrating and unproductive.

1. *The Atlanta Journal-Constitution*

Although *The Atlanta Journal-Constitution* does not track occasions when it has appealed the denial of a FOIA request, the newspaper's experience is that filing an administrative appeal rarely leads to a different result than was achieved at the initial agency level. To the contrary, the newspaper's view is that it is frequently necessary to make concrete threats that a lawsuit will be filed on a specific date in order to trigger any meaningful consideration at the administrative appeal level.

Two anecdotal examples illustrate the frustration often encountered by reporters:

* In 2000, a reporter asked for copies of two reports from the Department of State that tracked the Department's programs to resettle refugees in U.S. communities. The reporter received no response to her request. When she appealed the Department's failure to respond, all she received in response was a form letter "thank[ing]" her for "the recent inquiry concerning the status" of her FOIA request. The letter provided no indication when the request would be answered or when the reports would be provided. At significant cost and expense, *The Atlanta Journal-Constitution* was forced to file a lawsuit in federal court in Washington, D.C. Almost immediately, the State Department turned over the reports, which demonstrated the Department's systematic failure to assist refugees.

* In 2004, a reporter requested a copy of a closed investigation by the U.S. Department of Justice that had led to the resignation of the U.S. Attorney for the Southern District of Georgia. Although a Department of Justice letter rebuked the prosecutor for "abusing his authority and violating the public trust," the Department declined to provide the file unless the former U.S. Attorney approved its release. Not surprisingly, he did not. If the prosecutor's permission was a requirement of disclosure, the reporter felt that an appeal was simply a waste of time.

2. The Cox Newspapers Washington Bureau

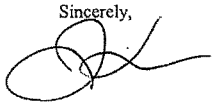
Like *The Atlanta Journal-Constitution*, the Cox Newspapers Washington Bureau does not systematically track the outcomes of administrative appeals under FOIA. However, legal counsel, who has represented the Washington Bureau on FOIA matters for more than 18 years, could not recall any instance in which an administrative appeal resulted in release of documents that the agency had previously refused to release. On the other hand, both legal counsel and journalists with the bureau recalled instances in which the filing of a complaint in federal court resulted in the release of records, without judicial intervention, once the basis of the agency's denial, or outright failure to respond, was scrutinized by Justice Department counsel.

The administrative appeal process can be frustrating in the extreme. Although FOIA requires agencies to respond to requests within 20 days, it is the rare request that is processed within the statutory time-frame. As I explained at the hearing, the Cox Newspapers Washington Bureau is currently litigating a FOIA case against the Department of Justice in which the bureau is seeking records relating the State Criminal Alien Assistance Program, a federal program designed to reimburse state and local governments for some of the cost of incarcerating alien criminals.

The original request out of which that litigation arises was filed with the Office of Justice Programs, a unit of the Department of Justice, on November 1, 2002. No acknowledgement was received. A follow-up letter was sent on December 23, 2002. No acknowledgment was received. The Cox Newspapers Washington Bureau filed an administrative appeal with the Office of Information and Privacy on March 21, 2003. On April 21, 2003, the Office of Information and Privacy acknowledged receipt of the appeal, acknowledged that Office of Justice Program's failure to respond to the initial request within 20 days entitled the requester to appeal, but *declined to act on the appeal until the Office of Justice Programs made an initial determination on the request*. In other words, because the agency had failed to act on the request, the appellate unit refused to address the merits of the request, leaving costly litigation, or additional delay, as the only options.

I am encouraged by your interest in fixing FOIA so that it can provide citizens access to the information they need to play their Constitutional role of overseeing the operation of their government. I remain eager to help in any way I can.

Sincerely,



Jay Smith
President, Cox Newspapers, Inc.

cc: The Honorable Todd Russell Platts
The Honorable Edolphus Towns

Written Testimony submitted to the House Government Reform Subcommittee on Government Management, Finance, and Accountability
Freedom of Information Act (FOIA) hearing
May 11, 2005
Lisa Lechowicz
Chief Executive Officer
Health Data Management, Inc.

Mr. Chairman (Mr. Platts), 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.

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. I hope a similar bill could be introduced in the House. Specifically, I would like to state my strong support for the following sections of this Senate 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 House Government Reform 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.

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