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IMPLEMENTING FOIA—DOES THE BUSH ADMINISTRATION'S EXECUTIVE ORDER IMPROVE PROCESSING?

HEARING

BEFORE THE

SUBCOMMITTEE ON GOVERNMENT MANAGEMENT, FINANCE, AND ACCOUNTABILITY

OF THE

COMMITTEE ON GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

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IMPLEMENTING FOIA—DOES THE BUSH ADMINISTRATION'S EXECUTIVE ORDER IMPROVE PROCESSING?

WEDNESDAY, JULY 26, 2006

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

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

Present: Representative Platts, Towns, Waxman, Gutknecht, Maloney, and Duncan.

Also present: Representative Sanders.

Staff present: Mike Hettinger, staff director; Tabetha Mueller, professional staff member; Dave Rebich, detailee; Erin Phillips, clerk; Brad Hoffer, intern; Adam Bordes and Anna Laitin, minority professional staff members; Earley Green, minority chief clerk; Jean Gosa, minority assistant clerk.

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

The Freedom of Information Act [FOIA], was signed into law 40 years ago this month in July 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 disclosures, and Congress has added additional exceptions over time.

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-9/11 information age and face 21st century security, information management, and resource challenges. As we seek to achieve this balance, we must remember the words of Thomas Jefferson who said, "Information is the currency of democracy," for it is an essential tool to ensure that the citizens of this Nation have access to information in the way Jefferson envisioned.

Last May, this subcommittee held the first hearing in the House of Representatives on FOIA implementation in over 5 years. Today serves as an important followup to that hearing. In response to legislative proposals introduced last year in the House and Senate as

well as the oversight conducted by this committee, President issued Executive Order 13392, entitled Improving Agency Disclosure of Information, on December 14, 2005.

This document seeks to improve the overall processing of FOIA requests, creating a more citizen-centered and results-oriented approach to information policy. Specifically, the Executive order requires agencies to develop FOIA improvement plans, designate chief FOIA officers, and establish in-house FOIA requester centers. The results of the initial phase of the order's implementation were reported to the Attorney General and the Office of Management and Budget on June 14, 2006.

This hearing will give the subcommittee members an opportunity to hear from key members who have introduced FOIA-related legislation as well as the Department of Justice on progress made implementing the Executive order and the Government Accountability Office which has reviewed the initial FOIA improvement plans. Finally, the subcommittee will also hear from FOIA requestors on their views of how the Executive order will improve FOIA processing and access to information.

We have three panels of distinguished witnesses. On our first panel, we are especially delighted to have with us three individuals who have really led the charge here when it comes to improving our FOIA process: the Honorable Patrick Leahy, U.S. Senator from Vermont and ranking member of the Senate Judiciary Committee; the Honorable John Cornyn, U.S. Senator from Texas; and the Honorable Brad Sherman, Member of Congress, the 27th District of California.

Our second panel will include Dan Metcalfe, Director of the Department of Justice's Office of Information and Privacy, and Ms. Linda Koontz, Director of Information Management Issues for the Government Accountability Office.

Our last panel will include Ms. Tonda Rush, public policy director at the National Newspaper Association, and Patrice McDermott, director of OpenTheGovernment.Org.

We certainly thank all of our witnesses and again our first panelists for your time in being with us, and we look forward to your testimony.

With that, I will yield to the ranking member from New York, Mr. Towns, for the purpose 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.

Mr. PLATTS. Mr. Waxman is recognized.

Mr. WAXMAN. Well, thank you very much for yielding to me, Mr. Towns, and Mr. Chairman, for holding today's hearing. This is our second hearing on the Freedom of Information Act, and I am pleased that the subcommittee is continuing its oversight of this vital law that ensures public access to Government information.

Open Government is a bedrock of our democracy. 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. Administration officials have 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-classifications are on the rise. These trends are ominous.

In December 2005, President Bush took a promising step by signing an Executive order calling on agencies to improve the operation of the Freedom of Information Act and to develop a citizen-centered approach that will speed up response times and reduce backlogs. This Executive order is certainly a step in the right direction. If implemented properly, it could address some of the problems faced by FOIA requestors, but even if it is fully implemented, the Executive order will not address all of FOIA's problems.

Our first panel today is composed of a bipartisan group of Senators and a Representative who have taken important steps to improve the operations of the Freedom of Information Act. They have introduced legislation that aims to speed up agency responses to FOIA requests and to fix weaknesses in the act, and I hope that we will be able to work as a committee to consider their legislation.

But, the Bush administration's wholesale assault on open Government demands that Congress pass a comprehensive response, and that is why I introduced the Restore Open Government Act. This 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, it eliminates unnecessary pseudo-classifications that restrict public disclosure of Government records.

Government secrecy has a high cost. It breeds arrogance and abuse of power while Sunshine fosters scrutiny and responsible Government. That is why it is so important that this committee act on the Restore Open Government Act.

Chairman Platts, I want to thank you again for holding this hearing and for your continued interest in open Government and the Freedom of Information Act. I yield back my time, and I appreciate Mr. Towns, the ranking member, yielding to me the opportunity to go first.

Mr. PLATTS. Thank you, Mr. Waxman.

I yield back to Mr. Towns.

Mr. TOWNS. Thank you very much, Mr. Chairman, for holding this hearing on legislative proposals to improve our current FOIA laws and increase Government transparency for all citizens. I welcome our witnesses and especially appreciate the efforts of our distinguished colleagues from both chambers, who are joining us today.

The cornerstone to a free and democratic society is reliant upon the principle of public access to governmental activities. As I have said many times, open access to Government information and records serve as a counterweight to ill timed or uninformed Government decisions and ensures that decisionmakers are held accountable for their actions.

As FOIA celebrates its 40th birthday—so let me say to FOIA, happy birthday—new challenges concerning the protection of National Security information, limited agency resources, and volumes

of FOIA requests are increasing the amount of time taken by agencies to comply. These factors contributed to a new 25 percent increase in the number of backlogged FOIA requests Government-wide in 2005 when compared to the previous year. Although the administration issued Executive Order 13392 in order to improve upon current results, it remains unclear if it will strengthen agency compliance or reduce the number of requests resulting in litigation or administrative challenges. This outcome, I believe, is symptomatic of the overzealous safeguarding of information that has no implication on our Government's National Security or law enforcement activities.

In short, extensive backlogs and protracted litigation is not a model for open or transparent Government and remedies must be put in place to reverse these trends. It is my hope, Mr. Chairman, that our witnesses today can bring clarity to these issues and offer us an efficient blueprint to improve the FOIA process.

So, on that note, Mr. Chairman, I conclude my statement and say that I really appreciate the commitment and dedication that you have shown to this issue because, as you know, the American people are concerned.

On that note, I yield back.

Mr. PLATTS. Thank you, Mr. Towns.

I yield to the gentleman from Minnesota for an opening statement.

Mr. GUTKNECHT. Mr. Chairman, I will be very brief, but I would concur with my colleague that I am delighted we are having these hearings because I think this is something that is fundamental to our American democracy. It is one thing to have a Freedom of Information Act; it is another thing to make sure it is implemented in the way that Congress intended.

I want to share one real quick example from my District, and this has been a frustration for over a year now, where you have one particular U.S. Marshal's Office who will not allow a photograph of someone who has been convicted, not someone who has been charged but convicted. So we have different interpretations of what the rights and responsibilities are between various jurisdictions.

This is a multidimensional kind of issue, and I really do applaud you for having these hearings. I think it is clearly a congressional responsibility to do what we can, to see that not only do we have freedom of information but more importantly, that information ultimately is shared with the public in a very reasonable and responsible way.

Thank you.

Mr. PLATTS. Thank you, Mr. Gutknecht.

We are pleased to be joined by a member of the full committee, the gentleman from Vermont, Mr. Sanders.

Mr. SANDERS. Thank you very much, Mr. Chairman, and thank you for allowing me to sit in on this hearing today.

I am especially pleased to be here today to welcome my colleague from the State of Vermont, Senator Leahy. I think, in Vermont, we understand that Senator Leahy has been one of the leading congressional champions of open Government and the right of the people to know, which in fact is the cornerstone of what American de-

mocracy is about, and we very much applaud his efforts. We are delighted to see Senator Cornyn here as well.

I think there is a bipartisan concern in this country, right here in Congress and on this committee, that while we hear a whole lot of talk in Congress and in the White House about freedom, freedom, freedom, you can't have a free society unless the people know what is going on. It is a very serious problem when people of this country try to secure information about the goings-on of their own Government and cannot get that information. That is not what freedom is about, and that is not what democracy is about, and that is an issue we have to address as we celebrate the 40th Anniversary of FOIA.

Thank you again, Mr. Chairman. I am delighted to welcome our guests.

Mr. PLATTS. Thank you, Mr. Sanders.

We appreciate our colleagues' patience while we had our statements. We are again very pleased to have our three distinguished colleagues with us and again thank each of you for your leadership on this issue in advancing the cause of freedom of information and ensuring that our citizens know what their Government is up to.

Senator Leahy, we will begin with you.

STATEMENTS OF HON. PATRICK LEAHY, A U.S. SENATOR FROM THE STATE OF VERMONT; HON. JOHN CORNYN, A U.S. SENATOR FROM THE STATE OF TEXAS; AND HON. BRAD SHERMAN, A REPRESENTATIVE IN CONGRESS FROM THE STATE OF CALIFORNIA

STATEMENT OF HON. PATRICK LEAHY

Senator LEAHY. Thank you, Mr. Chairman. First off, let me thank you for doing this. We mentioned and you and I chatted briefly, privately, about schedules. We know what everybody's schedules are like, and to take time for this, I think it is very important.

My neighbor from New York, Mr. Towns, I appreciate very much your very strong statement, and that meant a lot. Of course, I have my whole House delegation here from Vermont with Congressman Sanders. [Laughter.]

We appreciate his efforts. I would note that when he was mayor of our largest city, he didn't need a FOIA law. He ran the most open administration that the city had ever seen. So he is committed.

Mr. Gutknecht, thank you very much for what you said.

The Freedom of Information Act is something I have talked about, I think, ever since I came to the Senate. I am pleased to be here with, of course, Representative Sherman and my distinguished friend, Senator John Cornyn from Texas.

Now I always worry when I say nice things about John Cornyn on these, that the State Republican Party is going to have a recall petition on him, and that is not my intention for saying it. He has been a great partner and ally in our efforts to strengthen and improve our open Government laws.

In open Government laws, it doesn't make any difference whether you have a Republican or Democratic administration, you want

open Government. The two of us have tried to demonstrate to our other colleagues that this is not a partisan issue. It is a bipartisan partnership. We have co-sponsored three FOIA bills. One has passed the Senate; another has been reported out of the Judiciary Committee. So we are going to keep working on this.

Fulfillment of the public's right to know ebbs and flows. As you mentioned with the happy birthday, it is the 40th Anniversary, and right now, FOIA is under heavy assault. An overly broad FOIA waiver in the charter for the Department of Homeland Security, that is the single largest rollback of FOIA in history. We have seen the muzzling of Government scientists on issues from climate change to drug approvals, shifting the burden of proof in the FOIA process from Federal agencies to the public, expanding use of Government secrecy stamps, threats of criminal prosecutions of journalists, and undermining whistleblowers even though we have laws for them.

Those are troublesome when you want to have open Government, but I think chief among the problems is the major delay encountered by FOIA requestors. According to a recent report on FOIA by the National Security Archive, the oldest outstanding FOIA request dates back to 1989. To put that in perspective, we had a Soviet Union then. That was before its collapse. In fact, according to the report, the oldest of these outstanding FOIA requests was submitted to the Defense Department in March 1989, by a graduate student. The graduate student is now a tenured law professors.

Now these are most extreme cases, of course, but we have Federal agencies operating under a 2001 directive from former Attorney General Ashcroft that gives them the upper hand in FOIA requests, reversing the presumption of compliance directive issued earlier by Attorney General Reno. Then you have exceptions. Under Section (b)(3) of FOIA, Congress can exempt additional records from FOIA by statute. But often, the language when we exempt this is buried so in legislation that nobody in the public, including some Members of both bodies that vote on it, ever see it until after the fact.

We have seen the placements of fees or limits on the fee waivers afforded to journalists. The National Security Archive, an independent non-governmental research group and a valued information clearinghouse for the press, now we have the CIA rescinding the search fee waivers for them.

President Bush issued Executive Order 13392 in December of last year. I see it as a constructive first step, but it is not the comprehensive reform we have.

FOIA is 40 years young, but the law's values of openness and transparency in Government are timeless in their importance of Government of, by, and for the people. No generation, no generation can take this for granted. I think we have responsibility to leave to each generation a stronger FOIA. Incidentally, most of what I have said today about the need for a stronger FOIA is exactly what I said when it was a Democratic administration. An open Government is a better government.

Thank you.

I want to ask permission for my whole statement to be part of the record.

[The prepared statement of Senator Patrick Leahy follows:]

Statement Of Senator Patrick Leahy
Subcommittee On Government Management,
Finance, and Accountability,
Committee On Government Reform,
U.S. House Of Representatives
Hearing On "Implementing FOIA:
Does the Bush Administration's Executive Order Improve Processing"
July 26, 2006

Good afternoon Chairman Platts, Vice Chairwoman Foxx, Ranking Member Towns, and members of the Committee. Thank you for inviting me to appear before this Committee to discuss the importance of transparency in government and the Freedom of Information Act (FOIA), an issue that I have advocated for since my early days in the Senate. I am pleased to join Representative Sherman and my friend, the distinguished Senator from Texas, Senator Cornyn, here today.

Senator Cornyn has been a great partner and ally in our efforts to strengthen and improve our open government laws. Together we have forged an effective bipartisan partnership, having now together cosponsored three FOIA bills, one of which has passed the Senate and another that has been reported out of the Judiciary Committee. You can be sure that we will keep working on this important issue.

The public's need to know is a constant in our democracy. But fulfillment of the public's right to know ebbs and flows. This month as we mark the 40th anniversary of the Freedom of Information Act, the current ebb tide of public access to government information has been especially severe. After four decades, FOIA – a bulwark of open government – is under a targeted assault.

The setbacks to FOIA and to open government include the overly broad FOIA waiver in the charter for the Department of Homeland Security – the biggest single rollback of FOIA in its history. These setbacks also include muzzling government scientists on issues from climate change to drug approvals; shifting the burden of proof in the FOIA process from federal agencies to the public; the expanding use of government secrecy stamps; threats of criminal prosecutions of journalists; and undermining whistleblowers and the laws that protect them. These setbacks are all especially troubling to those who value transparency in government. But, more importantly, these setbacks are evidence of deeper problems with the implementation of FOIA that have plagued this law for some time.

Chief among the problems with FOIA's implementation is the major delay encountered by FOIA requestors when they seek information from the government. According to a recent report on FOIA by the National Security Archive, the oldest outstanding FOIA requests date back to 1989 – before the collapse of the Soviet Union. In fact, according to this report, the oldest of these outstanding FOIA requests was submitted to the Defense Department in March 1989 by a graduate student who is now a tenured law professor. Of course, this is an example of a more extreme case, but even extreme cases are reflective of the very real problem that delays in FOIA matters are all too commonplace in our government.

Another key concern is the growing use of the exemptions under FOIA to withhold information from the public. Today, federal agencies operate under a 2001 directive from former Attorney General John Ashcroft that gives them the upper hand in FOIA requests, reversing the presumption-of-compliance directive issued earlier by former Attorney General Janet Reno. Also, there is a growing – and troubling -- practice of hiding new exemptions in the laws passed by Congress. Under Section (b)(3) of FOIA, Congress can exempt additional records from FOIA by statute. But, often the language creating

these exemptions is buried deep in legislation, circumventing public scrutiny until after the bill becomes law.

Another recent FOIA-unfriendly move is the placement of limits on the fee waivers afforded to journalists who seek information under FOIA. FOIA provides a search fee waiver for journalists because the news media publishes information to keep the public informed. However, more and more members of the news media are being denied the benefit of this waiver because they are not affiliated with a recognized news organization. For example, earlier this month we learned that the CIA has threatened to rescind the search fee waivers long granted to the National Security Archive, an independent non-government research group that has been a valued information clearinghouse for the press and the public for many years. This change could cost the National Security Archive hundreds of thousands of dollars.

When President Bush issued Executive Order 13392 in December 2005, I said at the time that it was a constructive first step, but not the comprehensive reforms that are needed to properly enforce our federal FOIA law. It is helpful to look inward and examine how federal agencies view their own performance in responding to FOIA requests, but a truly

meaningful review of FOIA must also look outward and get input from FOIA requestors in order to effectively address the shortcomings that I have briefly outlined today.

That is the approach that Senator Cornyn and I took with legislation that we have proposed to strengthen and improve FOIA. Last year Senator Cornyn and I introduced S.394, the OPEN Government Act of 2005. This bill is a collection of commonsense modifications designed to update FOIA and to improve the timely processing of FOIA requests by federal agencies. A provision contained in Section 8 of that bill – which requires that the statutory exemptions under FOIA from now on would cite specifically to the FOIA law – passed in the Senate last year.

Senator Cornyn and I also introduced a second bill last year, S.589, the Faster FOIA Act, which would create a commission to study agency delay. That bill was favorably reported out of the Judiciary Committee last year and we hope the Senate will act on this legislation before the current congressional session ends.

As I mentioned earlier, we saw the single greatest rollback of FOIA in history tucked into the charter for the Department of Homeland Security. This provision created an opportunity for big polluters or other offenders to hide mistakes from public view just by stamping 'critical infrastructure information' at the top of the page when they submit information to the Department. I am fighting to repeal this law and to replace it with a reasonable compromise called the Restore FOIA Act, which would protect both sensitive information and the public's right to know.

FOIA is 40 years young, but the law's values of openness and transparency in government are timeless in their importance to a government of, by and for the people. No generation can afford to take these protections for granted and it should be the goal of each generation of Americans to hand over to the next the legacy of a stronger and more vibrant FOIA than the one we inherited. I thank the Committee for inviting me to appear at this important hearing and I would be happy to answer any questions.

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Mr. PLATTS. Senator Leahy, if you would like to complete it, that shouldn't have been read.

Senator LEAHY. I will just put it in the record.

Mr. PLATTS. OK, without objection.

Senator LEAHY. I know Senator Cornyn has a tough schedule this afternoon too, and I don't want hold him up any longer.

Mr. PLATTS. I just want to comment that one of the parts of your statement is a presumption of the burden of proof. Clearly, the intent is supposed to be on the Government in withholding, not on the public trying to prove the case, and I think your statement is right on point.

Senator LEAHY. Thank you very much.

Mr. PLATTS. Thank you, Senator Leahy.

Senator Cornyn.

STATEMENT OF HON. JOHN CORNYN

Senator CORNYN. Chairman Platts and Ranking Member Towns and to the entire committee, thank you for allowing me to come join you today in this oversight hearing. This is an important subject, and I appreciate the opportunity you have given me to testify.

When I came to Washington about 3½ years ago, coming as a former Attorney General of my State and someone responsible for enforcing the open Government laws and a firm believer in the benefits of transparent Government and Sunshine, I looked for an ally in the Senate and was pleased to see on the Judiciary Committee, the Ranking Member Senator Leahy who, as was pointed out, has a long and distinguished record when it comes to enforcement of our open Government laws.

To me, it represented a great opportunity for us to work in a bipartisan way on a principle that we feel very seriously about. I want to congratulate him publicly on his leadership in this area, and I am pleased to be able to work with him now to see if we can continue to advance this cause through the Judiciary Committee and the U.S. Senate.

Freedom of information and openness in Government are among the most fundamental principles of our Government. The Declaration of Independence makes clear that our inalienable right to life, liberty, and the pursuit of happiness may only be secured when "Governments are instituted among men, deriving their just powers from the consent of the governed." It is clear that consent, which is the fundamental foundation for legitimacy of our Government and our laws should be informed consent.

I associate myself with the comments made by members of the committee and Senator Leahy, and I am sure Congressman Sherman will make, that this is really fundamental to who we are and to give the American people the opportunity to have a voice. After all, we work for them, and there is no way for them to know the kind of job we are doing unless they get access to information to make an informed judgment.

Because of the belief in these shared values, Senator Leahy and I introduced the Open Government Act which is designed to ensure that our open Government laws remain robust. It contains more than a dozen substantive provisions that are intended to achieve four important objectives: No. 1, to strengthen the Freedom of In-

formation Act and to close loopholes; second, to help requestors obtain timely responses to their requests, hopefully more than a 1989 request still pending; we need to do better; third, ensure that agencies have strong incentives to act on FOIA requests in a timely manner; and fourth, to provide FOIA officials with the tools they need to ensure that our Government remains open and accessible.

Now while I have found that these goals in our legislation are certainly something we would all agree are very positive, some of the folks back home in Texas when I told them what we are trying to do up here in Washington, they say, what is the big deal? We assume that the law would be the same in the Nation's Capital and across this country as it is in our States. So they view many of these provisions, which are even controversial here in Washington, as things that should be in the fundamental law of the land.

This legislation reinforces our belief that FOIA establishes the presumption of openness that was mentioned a moment ago and that our Government is based not on the need to know but on the fundamental right to know, and I believe it is important to pass the legislation.

There has been some discussion about the President's Executive order, and I am pleased that the President has seen fit to elevate this issue by the Executive order, but I don't believe that is a substitute for the kind of legislation that Senator Leahy and I have introduced and that this committee will consider as well.

In conclusion, Mr. Chairman, I am under no illusions about the real and legitimate obstacles that some in the Government face when implementing FOIA policy, and I doubt anyone has it harder than the FOIA officer quoted in the Department of Defense report who, when asked to indicate obstacles that impede processing, wrote, "Unique location in Baghdad, Iraq. Mail processing slow, slow IT connections, lack of fax capability and ground transportation is dangerous."

So not all resistance to open Government and freedom of information requests are borne out of malice. Sometimes conditions on the ground make it difficult to comply, but it is our job to make sure not only that the laws are sufficient to provide that openness but also to make sure that our Government officials responsible for responding can, to the maximum extent which conditions permit, respond in a timely and complete manner.

I remain committed to working with those in the trenches, both literally and figuratively, who labor to respond to these requests. Whether it is enhancing the FOIA laws as reflected by the Open Government Act or providing resources targeted to specific backlogs or legislative changes in the way the administration allocates FOIA personnel, I stand ready to work with this committee as I do with Senator Leahy to advance these ideas.

Finally, let me just say, lest there be any doubt about it and there is not, this is not a partisan issue. As Senator Leahy has observed many times, Democrats and Republicans alike like to trumpet their successes and hide their failures, and it is just human nature. We have an obligation to the American people, and we have an obligation to our form of Government to make sure that it works, to make sure that people have the information they need in order to judge what we are doing, in order to grant that informed

consent which is the foundation of the legitimacy of our Government.

So thank you very much for the opportunity to be here and testify, and we look forward to working shoulder to shoulder with you in the fights that loom ahead.

[The prepared statement of Senator John C. Cornyn follows:]

Statement of Senator John C. Cornyn
Before the House Government Management,
Finance and Accountability Subcommittee
"Implementing FOIA – Does the Bush Administration's
Executive Order Improve Processing?"

Chairman Platts, Ranking Member Towns, thank you for convening this oversight hearing. This is an important subject, and I appreciate that you have invited me here today to testify.

Despite the sometimes partisan and divisive issues that plague the FOIA debate, I am grateful for the opportunity I've had to work across party lines with Senator Leahy, who has demonstrated strong leadership on this important topic.

Freedom of information and openness in government are among the most fundamental principles of our government. The Declaration of Independence makes clear that our inalienable rights to life, liberty and the pursuit of happiness may be secured only where "Governments are instituted among Men, deriving their just powers from the consent of the governed." And James Madison, the father of our Constitution, famously wrote that consent of the governed means *informed* consent – that "a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."

Open government is one of the most basic requirements of any healthy democracy. It allows taxpayers to see where their money is going, it permits the honest exchange of information that ensures government accountability, and it upholds the ideal that government never rules without the consent of the governed. Without access to government information, effective citizen oversight is impossible.

Because of these values, Senator Leahy and I introduced the Open Government Act, which is designed to ensure that our open-government laws

remain robust. The Act contains over a dozen substantive provisions that are intended 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.

This legislation reinforces 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. I believe it is important to pass this legislation.

Late last year the President signed an Executive Order (E/O) directing federal agencies to strengthen compliance with the open-government laws and reinforce a national commitment to FOIA. I was pleased with this action.

The executive order considerably raised the profile of the importance of FOIA issues throughout the

government. This is an important achievement because, as one of the FOIA improvement reports notes, quote: "FOIA doesn't receive the support it should from immediate supervisors and top management." I hope that with the President's directive this will change.

The E/O directs Administration officials to create a process for everyday citizens to track the status of their request and formulate a protocol for requestors to resolve FOIA disputes without resorting to litigation. Additionally, the E/O requires each government

agency to create a FOIA Requester Service Center, in addition to FOIA Public Liaisons. All of these requirements are designed to facilitate FOIA requesters' access to information in a timely, cost-efficient manner, which is the goal of FOIA.

Finally, the E/O requires each Chief FOIA officer to review its agency's practices, including the use of technology, to set concrete milestones and specific timetables to implement its plan to reduce backlogs and efficiently administer its FOIA responsibilities. I

have reviewed some, but not all of the reports, and I hope to see measured progress in the weeks ahead.

In conclusion, Mr. Chairman, I am under no illusions about the real and legitimate obstacles some people in the government face when implementing FOIA policy. And, I doubt anyone has it harder than the FOIA officer quoted in the Department of Defense report who, when asked to indicate obstacles that impede processing, wrote – and I quote:

"Unique location in Baghdad, Iraq. Mail processing slow, slow IT [information technology] connections, lack of fax capability and ground transportation is dangerous."

But I remain committed to working with those "in the trenches" – both literally and figuratively, who labor to respond to FOIA requests. Whether it is enhancing the FOIA laws as reflected by the Open Government Act, providing resources targeted to specific backlogs, or legislating changes in the way the Administration

allocates FOIA personnel, I stand ready to advance these ideals.

Open government should not be a partisan issue, because it is fundamentally an American issue – it is necessary to preserve our way of life as a self-governing people. Ensuring the accessibility, accountability, and openness of the federal government is a cause worthy of preservation, and the President's Executive Order is a meaningful step toward that goal. Passing the Open Government Act

will substantially advance FOIA's policy goals, and I would urge you to support this valuable legislation.

Thank you for the opportunity to appear before you today.

Mr. PLATTS. Thank you, Senator Cornyn, and I certainly share the belief of the importance of this. It is not a partisan issue but a good Government, bicameral issue, and we look forward to working with you. I think your point about the States that really have show and taken a lead and give us great examples to follow, that was again the intent of the Founding Fathers, that they are kind of the laboratories of democracy, and we can learn from them as opposed to thinking we always have the answers here in Washington.

Congressman Sherman.

STATEMENT OF HON. BRAD SHERMAN

Mr. SHERMAN. Well, thank you, Chairman Platts and Ranking Member Towns for inviting me to testify on this important Executive order and on the broader issues of open Government and ensuring the press and the public with access to Government information. Of course, I am delighted to be appearing here with Senator Cornyn and Senator Leahy, two Senators who have put so much effort into this and who share my belief that we must improve the accountability, accessibility, and openness of the Federal Government by improving FOIA.

Executive Order 13392 was issued on December 14, 2005. Mr. Chairman, I believe you were there, and I believe that Senators were as well. It requires agencies to review their FOIA operations, develop an agency-specific plan, and to report to the Attorney General and the OMB Director on their review, development, and implementation of an agency plan by June 14, 2006. So the 25 major agencies were required to do this. All but three have, and I know we all look forward to the State Department, Homeland Security Department, and USAID submitting their reports.

While the Executive order was helpful, it failed to deal with a number of problems including the fact that under FOIA, the exemptions are too broad; the delays are too numerous; there is complete lack of meaningful penalties for either individuals or agencies that violate FOIA; as the Senators each pointed out, the shift in the burden of proof to the person requesting the information; and finally, the difficulty of recovering of recovering attorneys' fees when litigation is successful.

On July 4th, earlier this month, a private group, the OpenTheGovernment.Org, issued a report on well the Executive order was working. The report found that the agency-specific plans for 17 agencies did not address the various points that were required by the Executive order. At least 43 percent of those points were not even covered. The Open The Government group rated 12 percent of the agency plans as poor and 36 percent as merely adequate.

Now Senators Cornyn and Leahy have offered two bills dealing with FOIA, the Open Government Act of 2005 and the Faster FOIA Act. Congressman Lamar Smith and I have sponsored identical bills in the House. As much fun as we are having here at this hearing, think of how much fun we would have if we were watching a markup of those two bills here at the subcommittee.

The Open Government Act was described in part by the Senator from Texas. It would provide meaningful deadlines for agency ac-

tion 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. The bill would establish the Office of Government Information Services to review the FOIA process, implement a better tracking system of FOIA claims, and set a 20 day time limit for agencies to decide whether to comply with claims, and allow easier recovery of legal fees for claimants who successfully litigate to gain information.

Specifically as to legal fees, the bill would make agencies, in more instances, pay those costs when efforts to pry open records through the courts are required in order to get information. The current law makes agencies pay attorneys' fees when the news media or the others requesting the information substantially prevailed. Under the Open Government Act, the requestor could recoup fees and legal costs if that requestor obtained a substantial part of the requested relief or caused the agency to change its position on the disclosure of records. Those who partially prevail in litigation should get their attorneys' fees. That is one way to inspire agencies to avoid this whole litigation process and instead provide the requestor with the information.

Similarly, the Faster FOIA Act would establish an advisory commission of experts and Government officials to study what changes in Federal law and policy are needed to ensure most effective and timely compliance with FOIA. It would direct the commission to report to Congress and the President as to how to deal with these lengthy delays, and of course in this case, information delayed is information denied. We have to be as attuned to the timeliness of response as to its quality.

So I urge the subcommittee and ultimately the full committee to mark up H.R. 867, the Open Government Act, and H.R. 1620, the Faster FOIA Act.

Once again, thank you for inviting me to appear.

[The prepared statement of Hon. Brad Sherman follows:]

Statement of

Congressman Brad Sherman

for the Oversight Hearing on

Implementing FOIA – Does the Bush Administration's Executive Order Improve Processing?
House Government Reform Subcommittee on
Government Management, Finance, and Accountability
July 26, 2006
2:00 PM
2247 RHOB

Thank you, Chairman Platts and Ranking Member Towns for inviting me to testify and for scheduling this important hearing on Bush Administration Executive Order 13392 and its impact on the processing of Freedom of Information Act requests, and on the broader issues of open government and ensuring press and public access to government information. I am delighted to be appearing with Senator Cornyn and Senator Leahy, two Senators with longstanding interests and commitments to the cause of open and responsive government, who share my belief that we must improve the accountability, accessibility, and openness of the federal government by improving FOIA.

Executive Order 13392, Improving Agency Disclosure of Information, issued on December 14, 2005, requires agencies to review their FOIA operations, develop an agency specific plan, and report to the Attorney General and the OMB Director on their review, development and implementation of the agency plan by June 14, 2006. Three of the twenty five major agencies referenced in the May 11, 2005 GAO Report on Implementation of the Freedom of Information Act have not provided the report summarizing the review of their FOIA operations and agency-specific implementation plans as required by the Executive Order. I hope that the Department of Homeland Security, U.S. AID, and the State Department will report soon. Agencies are also required to report on progress in implementing the Executive Order in their annual reports for FY 2006 and 2007. While helpful, the Executive Order fails to get at the root of key problems with FOIA, namely, (i) exemptions that are too broad, (ii) the complete lack of any meaningful penalties, for either individuals or agencies that violate FOIA, and (iii) the difficulty of recovery of attorneys fees when litigation is successful.

While I believe that the Bush Administration's Executive Order 13392 represents a positive first step, it is clear that a tremendous amount remains to be done to improve the timeliness, the completeness, and the accuracy of governmental responses to FOIA requests. Both individual citizens and news organizations still face far too many bureaucratic backlogs and administrative hurdles in obtaining access to information.

Departmental and agency compliance with the Executive Order's FOIA agency specific plan requirements remains spotty, and the Executive Order does little to address the critical issue of the timeliness of governmental responses to FOIA requests. All of us know that, in many instances, an untimely response from the government to a FOIA request is no better than no response at all. We must recognize and acknowledge the sad reality that some of the agencies sometimes still stonewall FOIA requestors. In other cases, untimely responses are the result of poor planning and procedures or a resource shortfall.

Whether delayed responses to FOIA requests are intentional or inadvertent, the impact on the requestor is the same. We must ensure that proper procedures are in place and adequate resources deployed to provide for timely responses to FOIA requests; audit periodically to ensure that the proper FOIA request handling procedures are actually employed by the agencies and departments; and provide remedies with teeth for requestors whose FOIA requests are not handled properly. We also need to standardize agency reporting of FOIA response times, create core responsibilities and guidelines for Chief FOIA Officers and FOIA Public Liaisons, and make better use of technology to reduce response times.

The July 4th 2006 Report on FOIA and Executive Order 13392 prepared by Open The Government.Org paints a bleak and very different picture of agency compliance with the Executive Order. The report found that the agency specific plans for the 17 agencies in the study did not address 43 percent of the 27 areas for improvement published by DOJ. The Open The Government group rated 12 percent of the plans as "Poor" and 36% of the plans as merely "Adequate" when measuring each of the 17 agency plans against the 27 areas of improvement identified by DOJ. Only 3 percent of the plans were rated as "Good" by Open The Government.Org.

Senators Cornyn and Leahy have offered two bills dealing with FOIA, the *Open Government Act of 2005* and the *Faster FOIA Act.* Congressman Lamar Smith and I have sponsored identical bills in the House. As you know, I am a cosponsor of H.R. 867, *the Open Government Act*, a bill that Senator Leahy and Senator Cornyn offered in the Senate and Congressman Smith offered in the House, and the sponsor of H.R. 1620, the *Faster FOIA Act*, a bill that Senators Cornyn and Leahy offered in the Senate, and that Congressman Smith cosponsored in the House. While the Executive Order incorporated certain proposals that were included in the *Open Government Act*, the two bills each address a number of issues not covered by the Executive Order.

The *Open Government Act* would provide 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. The bill would establish the Office of Government Information Services to review the FOIA process; implement a better tracking system for FOIA claims; set a 20 day time limit for agencies to decide whether to comply with claims; and allow easier recovery of legal fees for claimants who successfully litigate to gain information.

Specifically as to legal fees, the bill would make agencies in more instances pay legal costs related to efforts to pry open records, such as when courts overturn agency decisions to turn down information requests. The current law makes agencies pay attorneys' fees when the news

media or others who sought government records "substantially prevailed." Under the *Open Government Act*, a requestor could recoup legal costs if he obtained a "substantial part of requested relief," or caused an agency to change its position on the disclosure of records.

Similarly, the *Faster FOIA Act* would 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 Faster FOIA Act would direct the commission to report to Congress and the President on how to reduce the lengthy delays in the federal government's handling of FOIA inquiries. The committee study would specifically attempt to identify methods of reducing delay in FOIA processing, create an efficient and equitable processing system, and examine whether the charging of fees and granting of waivers needs to be reformed. It would be required to issue a report within one year of the enactment of this authorizing legislation.

I urge the Committee to schedule a markup for H.R. 867, the *Open Government Act*, and H.R.1620, the *Faster FOIA Act*. Thank you again for allowing me to appear before the Subcommittee this afternoon.

# # #

Mr. PLATTS. Thank you, Congressman Sherman.

In looking at the original debate and taking 11 years to pass FOIA 40 years ago, the last major revisions, I believe, were 10 years ago. We are approaching that 11 year mark again. So maybe we will have success in legislative reforms going forward, and we certainly look forward to working with you.

Congressman Smith was invited as well but had a conflict and was not able to be with us.

I know you three need to run. We appreciate, again, your testimony. If I could ask one quick question, and I apologize in not getting you out of here.

If there was one issue that the three of you saw as the most important when we look at the two different approaches in the legislation—the timely response and the lengthy delays and the most egregious example back to 1989, closing the loopholes and there being too many exceptions, a growing number of exceptions, or the mediation issue and having a better ability to dispute where there is a denial. Would you prioritize any one of those above the others or do you think they all go hand in hand?

Senator LEAHY. I think they are all important, but I think the recent trend of creating exceptions is a mistake, especially they are buried in legislation that we are to apt to see. That worries me. We should be doing just the opposite, and it should be an extraordinary thing if an exception is going to be made. That is something on which Republicans and Democrats should come together and say this is extraordinary.

Senator CORNYN. I would agree with what Senator Leahy said, but to me, the most important thing we could do is to create real and meaningful consequences for failure to meet deadlines and to comply. Right now, there is no real incentive to do that other than the Government employee being a good, diligent employee. In fact, the incentives are all in favor of those who would receive a request and sit on it and basically wait out the requestor until they just went away. So I think real and meaningful consequences to a failure to respond on a timely basis is the most important thing to me.

Mr. PLATTS. Congressman Sherman.

Mr. SHERMAN. I think the Senators have hit it on the head. The exemptions are too numerous and too broad, and there are simply no penalties either on the agency or on the individual employee who simply refuses to comply with FOIA.

Mr. PLATTS. Thank you, Congressman Sherman.

I, again, appreciate your testimonies.

I know the ranking member wanted to comment as well.

Mr. TOWNS. No more than just to thank the Senators for coming and to thank our colleague on this side of the aisle as well for the work that they have done in this area, and we look forward to working with you because I must admit the areas that you are concerned with, I am also concerned with as well.

Thank you very much, Mr. Chairman.

Mr. PLATTS. Thank you, Mr. Towns. This hearing hopefully will lay the groundwork for that markup that we are all looking for.

The committee will stand in recess for about 2 minutes while we seat the second panel.

[Recess.]

Mr. PLATTS. This hearing will reconvene.

I would like to also note we have been joined by the gentleman from Tennessee, Mr. Duncan. Thank you for being with us. Mrs. Maloney from New York was here with us briefly.

We are moved to our second panel now. The practice of the subcommittee and the full committee is to swear in our witnesses. Now that you are seated, if I could ask you to stand and raise your right hands.

[Witnesses sworn.]

Mr. PLATTS. Thank you. The clerk will note that both witnesses affirmed the oath. We appreciate your written testimonies, and we look forward to your oral testimony. We will keep the record open for 2 weeks after the hearing for any additional information you may provide.

We will now proceed, Mr. Metcalfe, with you. Again, thank you for being with us.

STATEMENTS OF DAN METCALFE, DIRECTOR, OFFICE OF INFORMATION AND PRIVACY, U.S. DEPARTMENT OF JUSTICE; AND LINDA KOONTZ, DIRECTOR, INFORMATION MANAGEMENT ISSUES, GOVERNMENT ACCOUNTABILITY OFFICE

STATEMENT OF DAN METCALFE

Mr. METCALFE. Thank you, Mr. Chairman, and good afternoon, Mr. Chairman and members of the subcommittee.

As the Director of the Department of Justice's Office of Information and Privacy, I am very pleased to be here this afternoon to address the subject of Freedom of Information Act and the status of the implementation of Executive Order 13392.

The Department of Justice is the lead Federal agency for the implementation of the FOIA, and it works to encourage uniform and proper compliance with the act by all agencies through its Office of Information and Privacy which is known by its initials OIT. The 91 Federal agencies that are subject to the FOIA handle many millions of FOIA requests per year at a cost now approaching $400 million annually, and they work hard to do so with the limited resources that are available to them. This does not mean, of course, that there is not room for improvement.

On December 14, 2005, the President issued Executive Order 13392 entitled Improving Agency Disclosure of Information. In this Executive order, he directed that the executive branch's FOIA activities should be "citizen-centered and results-oriented," and he instructed each agency to take a number of specific concrete actions in order to implement this policy. These actions have been taken within individual Federal agencies, of course, but they have been coordinated by the Justice Department and the Office of Management and Budget on a Government-wide basis. I appreciate having this opportunity to describe to the subcommittee these particular areas of FOIA activity.

Soon after the Executive order's issuance, the Justice Department and OMB disseminated it throughout the executive branch to the heads of all agencies as well as to all key FOIA personnel directly and provided preliminary guidance to agencies regarding it. OMB's guidance, issued on December 30, 2005, by its Deputy Di-

rector, highlighted the Executive order's requirements, drawing immediate attention to its most immediate one, that is, its mandate for the appointment of a chief FOIA officer at each agency by January 13th. The Justice Department's counterpart guidance memorandum comprehensively discussed the Executive order's provisions as well, and shortly after January 13th, the Justice Department posted a comprehensive list of all agency chief FOIA officers.

The President next required that agencies establish FOIA Requestor Service Centers and FOIA Public Liaisons in order to provide information about the status of their FOIA requests which they immediately began to do.

He further directed each agency, by June 14th, to "conduct a review of the agency's FOIA operations" and develop "an agency-specific plan to ensure that the agency's administration of the FOIA is in accordance with applicable law" and the Executive order's policies.

He required that each agency's plans "include specific activities the agency will implement to eliminate or reduce the agency's FOIA backlog," as well as "concrete milestones with specific timetables and outcomes to be achieved" by June 14th.

To best facilitate these critical agency reviews and the consequent development of individual agency improvement plans, the Executive order convened a major conference for all of these newly designated chief FOIA officers and accompanying key FOIA personnel on March 8th. This conference was keynoted by the Associate Attorney General and OMB's Deputy Director for Management. Their remarks were followed by detailed discussions of the Executive order's provisions and implementation in order to ensure that chief FOIA officers would understand fully and be able to discharge comprehensively their responsibilities. A wide range of potential improvement areas was presented for all agencies' consideration in addition to those identified by the agencies themselves as particularly well suited to their own individual circumstances.

The following month on April 13th, OMB's Director issued a memorandum that emphasized the importance of "ensuring the success of this important Presidential initiative."

Then as agencies advanced further in their ongoing reviews and planning, the Department of Justice conducted three followup programs for all agencies, one each month until the deadline. The Department made available to all agencies specific formatting guidance ultimately reflected in its own FOIA improvement plan as a model.

The Department also provided extensive written guidance to all agencies. This guidance which was issued on April 26th, in coordination with OMB, was distributed to all agencies at the first of these followup sessions at OIP and also was made available through the Department's FOIA Web site. It contained discussions of more than two dozen potential improvement areas identified for possible inclusion in agency plans, and it established a template for the uniform development and presentation of all plans. Further, it included supplemental guidelines on the use of agency annual FOIA reports for reporting the results of the Executive order's implementation, and it additionally addressed a breadth of questions and guidance points in aid of all such implementation efforts.

Most recently, on July 11th, the Department conducted a special training conference for the FOIA Public Liaisons of all Federal agencies whose numbers total nearly 200 in order to review and emphasize their new responsibilities. At this conference, the Department discussed both the explicit roles of FOIA Public Liaisons as well as the less obvious but no less important roles that they can perform in support of their agency's chief FOIA officer regarding improvement plan implementation and related activities. Special emphasis was placed upon the importance of current implementation efforts and their timely reporting by all agencies in accordance with the Executive order's firm February 1, 2007, timetable.

Finally, the Department worked quite closely with many individual agencies as the June 14th deadline arrived in order to facilitate their timely and comprehensive completion of the planning requirement. To further this and to aid the review of all agencies' improvement plans, the Department has compiled these plans and makes them available for convenient public access at a single location on its FOIA Web site. Thus, interested persons can examine all agency FOIA improvement plans side by side just as they are able to do with the annual FOIA reports that agencies file.

In conclusion, Mr. Chairman, you can be assured that the Department of Justice looks forward to working together with the subcommittee on all matters pertaining to the Government-wide administration of the FOIA, including further activities in implementation of the Executive order. As this subcommittee considers this relatively new subject area of its oversight jurisdiction, it can be confident of the Department's strong and cooperative assistance on all such matters of mutual interest.

I would be very pleased to address any question that you or any other member of the subcommittee might have on this important topic.

[The prepared statement of Mr. Metcalfe follows:]

Department of Justice

STATEMENT

OF

DANIEL J. METCALFE
DIRECTOR
OFFICE OF INFORMATION AND PRIVACY

BEFORE THE
SUBCOMMITTEE ON GOVERNMENT MANAGEMENT, FINANCE, AND ACCOUNTABILITY
COMMITTEE ON GOVERNMENT REFORM
U.S. HOUSE OF REPRESENTATIVES

HEARING ON

"IMPLEMENTING FOIA [FREEDOM OF INFORMATION ACT] -
DOES THE BUSH ADMINISTRATION EXECUTIVE ORDER IMPROVE PROCESSING?"

PRESENTED ON

JULY 26, 2006

Statement of
Daniel J. Metcalfe
Director
Office of Information and Privacy
Department of Justice

Before the
Subcommittee on Government Management, Finance, and Accountability
Committee on Government Reform
U.S. House of Representatives
Hearing on
"Implementing FOIA [Freedom of Information Act] – Does the Bush Administration Executive Order Improve Processing?"

July 26, 2006

Mr. Chairman and Members of the Subcommittee:

I am the Director of the Department of Justice's Office of Information and Privacy (OIP), and I am pleased to be here this afternoon to address the subject of the Freedom of Information Act (FOIA), 5 U.S.C. § 552 (2000 & Supp. III 2003), the principal statute governing public access to Federal government records and information, and the status of the implementation of Executive Order 13,392 (Improving Agency Disclosure of Information). As the President said in his Order, "the effective functioning of our constitutional democracy depends upon the participation in public life of a citizenry that is well informed."

The Department of Justice is the lead Federal agency for the implementation of the Freedom of Information Act, and it works to encourage uniform and proper compliance with the Act by all agencies through its Office of Information and Privacy.

The Freedom of Information Act and its Government-wide administration have evolved greatly since the time of its enactment four decades ago. A very large role in the administration

of the FOIA, for example, is now played by electronic communications and the Internet, which is something that was entirely unforeseen in 1966 and could barely be envisioned even as recently as ten years ago. Today, the ninety-one Federal agencies that are subject to the FOIA handle many millions of FOIA requests per year, at a cost now approaching 400 million dollars annually, and they work hard to do so with the limited resources that are available to them.[1]

This does not mean, of course, that there is not room for improvement. On December 14, 2005, the President issued Executive Order 13,392, entitled "Improving Agency Disclosure of Information." In that Order, the President directed that the Executive branch's FOIA activities should be "citizen-centered and results-oriented," and he instructed each agency to take a number of specific, concrete actions in order to implement this policy. These actions have been taken within individual agencies, of course, but they have been coordinated by the Department of Justice and the Office of Management and Budget (OMB) on a Government-wide basis. I appreciate having this opportunity to describe to the Subcommittee these areas of FOIA activity.

Soon after the President issued his Order, the Department of Justice and OMB disseminated it throughout the Executive branch — to the heads of all departments and agencies as well as to all key FOIA personnel directly — and provided preliminary guidance to agencies regarding it. OMB's guidance, issued on December 30, 2005 by its Deputy Director, highlighted the Executive Order's requirements, drawing immediate attention to its most immediate requirement — its mandate for the appointment of a Chief FOIA Officer at each agency by January 13, 2006 (i.e., within thirty days of the Executive Order's issuance).[2] The Justice

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[1]The Federal workforce devoted to the administration of the FOIA throughout the Executive branch amounts in the aggregate to more than 5000 employee work-years.

[2]See OMB Memorandum M-06-04, available at:

Department's counterpart guidance memorandum comprehensively discussed the Order's provisions as well.

Shortly after January 13, the Justice Department posted a comprehensive list of all agency Chief FOIA Officers.[3] This represented an important step, ensuring that "a Chief FOIA Officer has been designated at a senior level at each agency."

The President also required that agencies establish FOIA Requester Service Centers and FOIA Public Liaisons to provide information to the public about the status of their FOIA requests, see Exec. Order No. 13,392 at Sec. 2(c), which they immediately began to do.[4]

The President further directed each agency to "conduct a review of the agency's FOIA operations" and to develop — for the agency head's approval — "an agency-specific plan to ensure that the agency's administration of the FOIA is in accordance with applicable law and the policies set forth in section 1 of this order." *Id.* at Sec. 3(a)-(b). The President required that each agency's plan "include specific activities that the agency will implement to eliminate or reduce the agency's FOIA backlog," as well as "concrete milestones, with specific timetables and outcomes to be achieved." *Id.* at Sec. 3(b). These reviews were required to be completed, and each agency's FOIA improvement plan developed, by June 14, 2006 (i.e., six months from the Executive Order's issuance).

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http://www.whitehouse.gov/omb/memoranda/fy2006/m06-04.pdf.

[3]This compilation can be found at the following Web site address: http://www.usdoj.gov/04foia/chieffoiaofficers.html.

[4]Many agencies, of course, were already beginning their Executive Order implementation activities by this time. For example, the Department of Justice held a meeting of the principal FOIA officers of its forty components on December 15, 2005, the day after Executive Order 13,392 was issued.

To best facilitate these critical agency reviews, and the consequent development of individual agency improvement plans, the Executive Branch convened a major conference for all of these newly designated Chief FOIA Officers, and accompanying key FOIA personnel, on March 8. This conference was keynoted by the Associate Attorney General and OMB's Deputy Director for Management. Their remarks were followed by detailed discussions of the Executive Order's provisions and implementation, to ensure that chief FOIA officers would understand fully and comprehensively be able to discharge their responsibilities. A wide range of potential improvement areas was presented for all agencies' consideration, in addition to those identified by the agencies themselves as particularly well suited to their own individual circumstances, as part of their review and planning processes

The following month, on April 13, OMB's Director issued to the heads of departments and agencies a memorandum entitled "Follow-up Memorandum on 'Implementation of the President's Executive Order "Improving Agency Disclosure of Information."'"[5] This memorandum emphasized the importance of "ensuring the success of this important Presidential initiative" and reminded agencies that their plans must include "specific activities that the agency will implement to eliminate or reduce the agency's FOIA backlog" and "concrete milestones, with specific timetables and outcomes to be achieved."

Then, as agencies advanced further in their ongoing reviews and planning, the Department of Justice conducted follow-up programs for all agencies, one each month before the deadline.[6] The Department provided to all agencies formatting guidance, which was ultimately

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[5]See OMB Memorandum M-06-12, available at: http://www.whitehouse.gov/omb/memoranda/fy2006/m06-12.pdf.

[6] Additionally, the Department has engaged in public outreach activities regarding the

reflected in the Department own plan,[7] as a model.[8]

The Department also provided extensive written guidance to all agencies. This guidance, which was issued on April 26 in coordination with OMB, was distributed to all agencies at the first of these follow-up sessions and also has been made available through the Department's FOIA Web site.[9] It contained discussions of more than two dozen potential improvement areas that were identified for possible inclusion in agency plans; it established a template for the uniform development and presentation of all plans; it included supplemental guidelines on the use of agency annual FOIA reports for reporting the results of Executive Order 13,392's implementation;[10] and it additionally addressed a breadth of questions and guidance points in

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Executive Order and its implementation at such forums as those held by the American Society of Access Professionals and the Freedom Forum's First Amendment Center, including a special address on the Executive Order at the International Conference of Information Commissioners that was held in England in May.

[7]See "U.S. Department of Justice Freedom of Information Act Improvement Plan Under Executive Order 13,392," for the Department's full plan which can be found at: http://www.usdoj.gov/04foia/ourplan.htm.

[8]The Department established a special Executive Order implementation team for the President's Order, that it made available to all agencies regarding their implementation and to address related questions for these purposes. Further descriptions of the Department's activities in this regard, which began immediately upon Executive Order 13,392's issuance, are contained in the its annual FOIA report for calendar year 2005, which can be found at: http://www.usdoj.gov/04foia/05rep.htm.

[9]See *FOIA Post*, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06), found at: http://www.usdoj.gov/oip/foiapost/2006foiapost6.htm.

[10]Under the President's Order, agencies are to report the results of their implementation of their FOIA improvement plans as part of their annual FOIA reports, which by statute are required to be completed and sent to the Justice Department by February 1 of each year. See 5 U.S.C. § 552(e)(1). Thus, the first formal reports of agencies' results and successes in FOIA improvement plan implementation will be due next February 1.

further aid of the Executive Order's implementation.[11]

More recently, on July 11, the Department conducted a special training conference for the FOIA Public Liaisons at all Federal agencies, whose numbers total nearly two hundred,[12] in order to review and emphasize their new responsibilities under the President's Order. At this conference, the Department discussed both the explicit roles of FOIA Public Liaisons under the Order (e.g., serving as supervisory officials in relation to agency FOIA Requester Service Centers) and the less obvious but no less important roles that they can perform in support of their agency's Chief FOIA Officer regarding improvement plan implementation and related activities.[13] Special emphasis was placed upon the importance of current implementation efforts and their timely reporting by all agencies in accordance with the Order's firm February 1, 2007 timetable. The Department also included in this session a presentation by the official who has

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[11]Both the Justice Department's oral and written guidance extensively addressed the larger subject-matter areas of timeliness/backlogs and the increased use of information technology in the processes of FOIA administration. See, e.g., *FOIA Post*, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (Potential Improvement Areas #2, #5, #6, #7, #8, #11, #12, #16, #17, #18, #22, #24, and #25).

[12]Under the President's Order, each of the ninety-one agencies that are subject to the Act must maintain at least one FOIA Requester Service Center and one corresponding FOIA Public Liaison. Many agencies, particularly the larger ones that administer the FOIA most efficiently on a decentralized basis, have multiple FOIA Public Liaisons designated. The Justice Department, for example, has thirty-four persons designated as FOIA Public Liaisons under the Order. See "DOJ Components' FOIA Service Centers/Liaisons," which is found at: http://www.usdoj.gov/04foia/servicecenters.htm.

[13]The Department also called upon FOIA Public Liaisons to work to ensure that absolutely all personnel at their agencies who work with the FOIA (i.e., even "program personnel" whose primary job responsibilities are not FOIA-related) have been fully educated about Executive Order 13,392's policies and customer-service principles. See *FOIA Post*, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (announcing FOIA Public Liaison program for July 11 and, in footnote 26, stressing that the Department would be "urging any agency that has not already done so to conduct an in-house training session on the policies of the executive order for all of its FOIA personnel").

been designated as the Chief FOIA Public Liaison at the Department of Defense (where more than a dozen FOIA Public Liaisons cover DOD's decentralized operations), in order to provide an individual agency perspective on implementation of the President's Order.[14]

Finally, the Department worked quite closely with many individual agencies as the June 14 deadline arrived in order to facilitate their timely and comprehensive completion of this requirement. To further this, and to aid the review of all agencies' improvement plans, the Department has compiled these plans and makes them available for convenient public access at a single location on its FOIA Web site. Thus, interested persons can examine all agency FOIA improvement plans under the President's Order side by side, just as they are able to do with the annual FOIA reports that agencies file. In both cases, the Department also has established a standard format for ease of reference.[15]

In conclusion, you can be assured that the Department of Justice looks forward to working together with the Subcommittee on matters pertaining to the Governmentwide administration of the Freedom of Information Act, including further Governmentwide activities in implementation of the President's Order. As this Subcommittee considers this relatively new

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[14]From almost the outset of the implementation of the President's Order, DOD has been a model agency, and has been held out as such, based upon both the speed and quality of its early and sustained implementation efforts.

[15]It should be noted in this regard that the Justice Department's formal guidance added a novel element that required agencies to group their improvement plan areas into three time periods, for even further ease of review. See *FOIA Post*, "Executive Order 13,392 Implementation Guidance" (posted 4/27/06) (Part II.F.). Currently, the Government Accountability Office (GAO) has been examining agency FOIA improvement plans, and the Justice Department is pleased to be working especially closely with GAO to facilitate its work in such ways.

subject area of its oversight jurisdiction,[16] it can be confident of the Department's strong and cooperative assistance on all such matters of mutual interest.

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

[16]Lastly, as regards the FOIA's overall place in the world, there is an aspect of it about which the Subcommittee might also wish to know: Its role as the leading model for similar freedom-of-information laws enacted around the globe. Since 1981, when the Office of Information and Privacy was established, I have met with representatives of what is now a total of more than ninety other nations and international governing bodies interested in the adoption of their own government information access laws (most commonly referred to as "transparency in government" overseas) — and now more than sixty-five nations, covering all continents of the world save Antarctica, have established openness-in-government regimes similar to the FOIA at their national government levels. See *FOIA Post*, "World Now Celebrates "International Right-to-Know Day" (posted 9/28/04); *FOIA Post*, "OIP Gives FOIA Implementation Advice to Other Nations" (posted 12/12/02). It is official United States Government policy to promote the adoption and full implementation of FOIA-like laws in other nations, *see id.*, modeled on our long experience with our law, and the worldwide trend in this direction has rapidly accelerated during the past few years. So the FOIA, and its evolution over the decades, holds significance for the processes of democracy building — and also, in the most recent international trend, fighting corruption — throughout the world.

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

STATEMENT OF LINDA KOONTZ

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

This important statute establishes that Federal agencies must provide the public with access to Government information, thus enabling them to learn about Government operations and decisions. As you know, under the act, agencies create annual reports that provide specific information their FOIA processing. In addition, a recent Executive order directs agencies to develop plans to improve FOIA operations, including goals to reduce backlogs in requests. These goals are to be measurable, outcome-oriented, and tied to timetables with specific milestones, so that agency heads can evaluate the success of the plans.

My remarks today will focus on 25 major Federal agencies as we have done in previous studies. As requested, I will first discuss the fiscal year 2005 annual reports, comparing those statistics to others reported since 2002. Second, I will discuss whether the improvement plans for these 25 agencies provided the kinds of goals and timetables required by the Executive order. My statement today is based on ongoing work we are performing for this subcommittee.

Citizens continue to request and receive increasing amounts of information from the Federal Government through FOIA. However, the rate of increase has flattened in recent years. In saying this, I am excluding statistics from the Social Security Administration which reported over 17 million requests for fiscal year 2005, a jump of about 16 million from the year before. Including those numbers would obscure year to year Government comparisons.

Based on the data from the other 24 agencies, the number of requests received and process in fiscal year 2005 has grown substantially since 2002 but rose only very slightly from 2004. The 24 agencies also report that in fiscal year 2005, they provided records in full about 87 percent of the time. However, for all 25 agencies, the number of pending requests at the end of the year has been steadily increasing, and the rate of increasing, increase has been greater every year since 2002. At the same time, median times to process requests varied greatly from agency to agency. The median times reported range from less than 10 days at some agency components to more than 100 days at others, sometimes much more than 100.

Regarding agency improvement plans, most that we have assessed to date include discussions of reducing backlog, but not all consistently followed the Executive order guidance. Three agencies had not published their plans by June 30th, and thus we could not analyze them for this hearing, and one agency reported no backlog.

Based on our ongoing analysis, 12 of the remaining 21 agencies followed the order's instruction to establish measurable, outcome-oriented goals for reducing or eliminating their backlogs as well as timetables with milestones for achieving these goals. Nine agencies did not do this, although they did provide goals and timetables for

other kinds of objectives such as performing staffing analyses and reviewing progress. These nine agencies accounted for a substantial portion, about 29 percent, of the requests reported to be pending at the end of fiscal year 2005.

In addition, agencies generally did not specify the dates or numbers they were using as the baselines for their existing backlogs. Explicit and well defined baselines will be important, so that agencies can measure and demonstrate improvement.

In conclusion, the President's Executive order creates a renewed results-oriented emphasis on improving request processing and reducing the backlogs of pending requests. However, without baseline measurement and tangible steps for addressing the accumulation of pending cases, the heads of these agencies could find it difficult to measure and evaluate the results of their planned activities. Accordingly, it will be important for Justice and the agencies to refine the plans, so that agencies can fully realize the goal of reducing backlogs and improving responsiveness to agency needs. When we complete our ongoing work, we expect to provide recommendations to help move this process forward.

Mr. Chairman, that completes my prepared statement. I will be happy to answer questions at the appropriate time.

[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

For Release on Delivery
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FREEDOM OF INFORMATION ACT

Preliminary Analysis of Processing Trends Shows Importance of Improvement Plans

Statement of Linda D. Koontz
Director, Information Management Issues

GAO-06-1022T

GAO
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Highlights

Highlights of GAO-06-1022T, a testimony before the Subcommittee on Government Management, Finance, and Accountability, Committee on Government Reform, House of Representatives

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. In addition, a recent Executive Order directs agencies to develop plans to improve their FOIA operations, including, among other things, goals to reduce backlogs in FOIA requests.

GAO has reported previously on the contents of these annual reports for 25 major agencies. For this hearing, GAO was asked to testify both on the annual reports for fiscal year 2005 and on the recently developed improvement plans for these 25 agencies. GAO based its testimony on its ongoing work on these topics. Upon completion of its ongoing review, GAO expects to make recommendations to improve agency implementation of the Executive Order, including efforts to reduce and eliminate backlog.

www.gao.gov/cgi-bin/getrpt?GAO-06-1022T.

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.

July 26, 2006

FREEDOM OF INFORMATION ACT

Preliminary Analysis of Processing Trends Shows Importance of Improvement Plans

What GAO Found

According to data reported by agencies in their annual reports, the public continues to request and receive increasing amounts of information from the federal government through FOIA; however, excepting one case—the Social Security Administration (SSA)—the rate of increase has flattened in recent years. (SSA reported an additional 16 million requests in 2005, dwarfing those for all other agencies combined, which together total about 2.6 million; SSA attributed this rise to an improvement in its method of counting requests. However, Justice officials have suggested that SSA consider treating the bulk of these requests as non-FOIA requests and thus not include them in future reports.) When SSA's numbers are excluded, data reported by the other 24 major agencies show that the number of requests received increased by 27 percent from fiscal year 2002 to 2005, but by only about 2.5 percent from fiscal year 2004. As more requests come in, agencies also report that they have been processing more of them—25 percent more from 2002 to 2005 (but only about 2.0 percent more than from 2004). Despite processing more requests, agencies have not kept up with the increase in requests being made: the number of pending requests carried over from year to year has been steadily increasing, rising to about 200,000 in fiscal year 2005—43 percent more than in 2002. The rate of increase in requests pending is also growing: the increase from fiscal year 2004 to 2005 is 24 percent, compared to 11 percent from 2003 to 2004.

Most of the agency improvement plans discussed reducing backlog, but not all consistently followed the Executive Order or implementing guidance provided by the Justice Department. Of the 25 agencies, 3 had not posted their plans in time to be included in this testimony, and 1 reported no backlog. Of the remaining 21 agencies, 12 followed the Executive Order's instruction to establish measurable, outcome-oriented objectives for reducing or eliminating their backlogs, as well as timetables with milestones for meeting these objectives. Nine agencies did not do this, although they accounted for a substantial fraction—about 29 percent—of the requests reported to be pending at the end of fiscal year 2005. (Most agencies did provide goals and timetables for other kinds of objectives, however, such as performing staffing analyses and reviewing progress.) In addition, agencies generally did not specify the dates or numbers they were using as the baselines for their existing backlogs, which will be important for measuring improvement. GAO's ongoing work suggests that factors contributing to these deficiencies include difficulties in coordinating responses among components in large, decentralized agencies and limitations in the systems that track FOIA processing. In addition, neither the Executive Order nor Justice guidance established a baseline date for measuring the backlog or directed agencies to establish such a date. Without clearly defined baselines, specific objectives, and timetables for reducing backlog, it could be challenging for agency heads, Justice, and the Congress to gauge progress in improving FOIA processes as intended by the Executive Order.

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 provide annual reports on their FOIA operations to the Attorney General, including specific information such as how many requests were received and processed in the previous fiscal year and how many requests were pending at the end of the year. In addition, the President issued an Executive Order[2] in December 2005 that is aimed at improving agencies' disclosure of information consistent with FOIA. Among other things, this order requires each agency to review its FOIA operations and develop improvement plans; by June 14, 2006, each agency was to submit a report to the Attorney General and the Director of the Office of Management and Budget (OMB) that summarizes the results of the agency's review and includes a copy of its improvement plan. These plans are to include specific outcome-oriented goals and timetables, by which the agency head is to evaluate the agency's success in implementing the plan. The Executive Order specifically requires that these plans address ways to eliminate or reduce any backlog of FOIA requests.

As requested, in my remarks today, I will discuss two topics, basing my discussion on ongoing work that we are performing for the Subcommittee: (1) statistics on the processing of FOIA requests as reflected in agencies' 2005 annual reports, highlighting any trends in

[1] See 5 U.S.C. § 552.

[2] Executive Order 13392, *Improving Agency Disclosure of Information* (Washington, D.C.: Dec. 14, 2005).

these reports since 2002, and (2) to what extent agencies addressed the Executive Order's requirement to provide measurable, outcome-oriented goals to reduce or eliminate backlog, along with timetables that include milestones for these goals.

To describe statistics on the processing of FOIA requests, we analyzed annual report data for fiscal years 2002 through 2005 from 25 major agencies[3] (herein we refer to this scope as governmentwide). To describe how agency improvement plans addressed the order's requirements regarding goals and timetables to address backlog, we analyzed the 22 agencies' plans that were published as of June 30, 2006, to determine whether they contained descriptions of activities to reduce backlog, along with goals and timetables that could be used to evaluate progress.[4] We also reviewed the Executive Order itself, implementing guidance issued by OMB and the Department of Justice, other FOIA guidance issued by Justice, and our past work in this area. Three agencies, the Departments of State and Homeland Security and the Agency for International Development, had not published their plans by June 30, and thus we could not analyze them for this hearing. These three agencies have since provided their plans. We discussed the content of this statement with officials of the Department of Justice, including the Director of the Office of Information and Privacy.

We conducted our review in accordance with generally accepted government auditing standards, except that we did not verify the accuracy and reliability of the data in agencies' annual reports in time to be included in this testimony. As a result, our findings on the status of FOIA implementation as reflected in agencies' annual reports are preliminary and may change when we complete our assessment of data reliability. We performed our work from April to July 2006.

[3] The agencies included are listed in table 2; these agencies are the 24 agencies covered by the Chief Financial Officers Act, plus the Central Intelligence Agency.

[4] Two GAO analysts independently analyzed each agency's plan to determine if it contained objective goals and timetables for reducing the backlog. When the analysts disagreed, they discussed the reasons for their differences and arrived at a consensus.

Results in Brief

The public continues to request and receive increasing amounts of information from the federal government through FOIA; however, excepting one case—the Social Security Administration (SSA)—the rate of increase has flattened in recent years.[5] Based on data reported by 24 major agencies in their annual FOIA reports, the number of requests received in fiscal year 2005 increased by 27 percent from 2002, but by only about 2.5 percent from 2004. As more requests come in, agencies also report that they have been processing more of them—25 percent more from 2002 to 2005 (but only about 2.0 percent more than from 2004). For 87 percent of requests processed in fiscal year 2005, agencies reported that responsive records were provided in full to requesters. However, the number of pending requests carried over from year to year has been steadily increasing, rising 43 percent since 2002.[6] Further, the rate of increase is growing: the increase from fiscal year 2004 to fiscal year 2005 is 24 percent, compared to 11 percent from 2003 to 2004. Finally, the median times to process requests varied greatly across the government, ranging from less than 10 days for some agency components to more than 100 days at others (sometimes much more than 100).

Most of the agency improvement plans discussed reducing backlog, but not all consistently followed the Executive Order or implementing guidance provided by the Justice Department. Of the 25 agencies, 3 had not posted their plans in time to be included in this testimony, and 1 reported no backlog. Of the remaining 21 agencies, 12 followed the Executive Order's instruction to establish measurable, outcome-oriented goals for reducing or eliminating

[5] We exclude SSA's statistics from our discussion of requests received, requests processed, and their disposition, because a change in the agency's counting methodology resulted in a report of over 17 million requests for fiscal year 2005, for a jump of about 16 million from the year before. Including these statistics in the governmentwide data would obscure year-to-year comparisons. This issue is discussed further on page 15 of this statement.

[6] These statistics include numbers reported by SSA, because they are not affected by the approximately 17 million requests mentioned in footnote 5, for which SSA does not keep statistics on processing times or pending requests.

their backlogs, as well as timetables with milestones for achieving these goals. Nine agencies did not do this, although they accounted for a substantial portion—about 29 percent—of the requests reported to be pending at the end of fiscal year 2005. (Most agencies did provide goals and timetables for other kinds of objectives, however, such as performing staffing analyses and reviewing progress.) In addition, agencies generally did not specify the dates or numbers they were using as the baselines for their existing backlogs, which will be important for measuring improvement. GAO's ongoing work suggests that factors contributing to these deficiencies include difficulties in coordinating responses among components in large, decentralized agencies and limitations in the systems that track FOIA processing. In addition, neither the Executive Order nor Justice guidance established a baseline date for measuring the backlog or directed agencies to establish such a date. Without clearly defined baselines, specific objectives, and timetables for reducing backlog, it could be challenging for agency heads, Justice, and the Congress to measure progress in improving FOIA processes, as intended by the Executive Order.

When we complete our ongoing review and analysis of FOIA statistics and agency improvement plans, we anticipate making recommendations to improve agency implementation of the Executive Order, including efforts to reduce and eliminate backlog.

Background

FOIA 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 (originally enacted in 1966),[7] 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.

[7] The act has been amended several times.

FOIA provides the public with access to government information either through "affirmative agency disclosure"—publishing information in the *Federal Register* or the Internet, 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.

Not all information held by the government is subject to FOIA. The act prescribes nine specific categories of information that are exempt from disclosure: for example, trade secrets and certain privileged commercial or financial information, certain personnel and medical files, and certain law enforcement records or information (attachment 1 provides the complete list). In denying access to material, agencies may cite these exemptions. The act requires agencies to notify requesters of the reasons for any adverse determination (that is, a determination not to provide records) and grants requesters the right to appeal agency decisions to deny access.

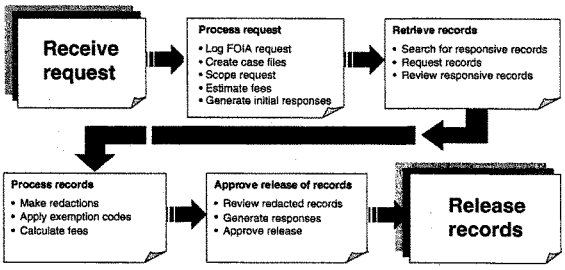
In addition, agencies are required to meet certain time frames for making key determinations: whether to comply with requests (20 business days from receipt of the request), responses to appeals of adverse determinations (20 business days from filing of the appeal), and whether to provide expedited processing 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.

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 (in general, this simply acknowledges receipt of the request). 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).[8]

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.

As agencies process FOIA requests, they generally place them in one of four possible disposition categories: grants, partial grants,

[8] Fees may be waived when requests are determined to be in the public interest.

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:* Agency 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 1.

Table 1: "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.

The Privacy Act Also Provides Individuals with Access Rights

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. Consequently, the Department of Justice's Office of Information and Privacy 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.

In addition, Justice guidance for the annual FOIA report directs agencies to include Privacy Act requests (that is, first-party requests) in the statistics reported. According to the guidance, "A Privacy Act request is a request for records concerning oneself; such requests are also treated as FOIA requests. (All requests for access to records, regardless of which law is cited by the requester, are included in this report.)"

Although FOIA and the Privacy Act can both apply to first-party requests, such requests are not in many cases processed in the same way as described earlier for FOIA requests. For example, most SSA first-party requests are processed by staff other than FOIA staff,

[9] See 5 U.S.C. § 552a.

specifically, staff in SSA's field and district offices and teleservice centers.[10]

Roles of OMB and Justice in FOIA Implementation

OMB and the Department of Justice both have roles in the implementation of FOIA. The act requires OMB to issue guidelines to "provide for a uniform schedule of fees for all agencies."[11] OMB issued this guidance in April 1987.[12]

The Department of Justice oversees agencies' compliance with FOIA and is the primary source of policy guidance for agencies. 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;
- 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 has lead responsibility for providing guidance and support to federal agencies on FOIA issues. This office first issued guidelines for agency preparation and submission of annual reports in the spring of 1997. It also periodically issues additional guidance on annual reports as well as on compliance, provides training, and

[10] According to SSA, its field organization is decentralized to provide services at the local level, and includes 10 regional offices, 6 processing centers, and approximately 1500 field offices.

[11] This provision was added by the Freedom of Information Reform Act of 1986 (Pub. L. 99-570).

[12] See OMB, *Uniform Freedom of Information Act Fee Schedule and Guidelines*, 52 FR 10011 (Mar. 27, 1987), effective April 27, 1987. Also 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.

maintains a counselors service to provide expert, one-on-one assistance to agency FOIA staff. Further, the Office of Information and Privacy 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.

1996 Amendments Established Annual FOIA Reports

In 1996, the Congress amended FOIA to provide for public access to information in an electronic format (among other purposes). These amendments, referred to as e-FOIA, also required 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.[13] The following are examples of information that is to be included in these reports:

- 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.

In 2001, we prepared the first in a series of reports on the implementation of the 1996 amendments to FOIA, starting from

[13] 5 U.S.C.§ 552(e).

fiscal year 1999.[14] In this and subsequent reviews, we examined the contents of these annual reports for 25 major agencies (shown in table 2).[15] They include the 24 major agencies covered by the Chief Financial Officers Act, as well as the Central Intelligence Agency and, until 2003, the Federal Emergency Management Agency (FEMA). In 2003, the creation of the Department of Homeland Security (DHS), which incorporated FEMA, led to a shift in some FOIA requests from agencies affected by the creation of the new department, but the same major component entities are reflected in all the years reviewed.

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

[15] GAO, *Information Management: Update on Implementation of the 1996 Electronic Freedom of Information Act Amendments*, GAO-02-493 (Washington, D.C.: Aug. 30, 2002); *Information Management: Update on Freedom of Information Act Implementation Status*, GAO-04-257 (Washington, D.C.: Feb. 18, 2004); and *Information Management: Implementation of the Freedom of Information Act*, GAO-05-648T (Washington, D.C.: May 11, 2005).

Table 2: Agencies Reviewed

Agency	Abbreviation
Agency for International Development	AID
Central Intelligence Agency	CIA
Department of Agriculture	USDA
Department of Commerce	DOC
Department of Defense	DOD
Department of Education	ED
Department of Energy	DOE
Department of Health and Human Services	HHS
Department of Homeland Security*	DHS
Federal Emergency Management Agency*	FEMA
Department of Housing and Urban Development	HUD
Department of Interior	DOI
Department of Justice	DOJ
Department of Labor	DOL
Department of State	State
Department of the Treasury	Treas
Department of Transportation	DOT
Department of Veterans Affairs	VA
Environmental Protection Agency	EPA
General Services Administration	GSA
National Aeronautics and Space Administration	NASA
National Science Foundation	NSF
Nuclear Regulatory Commission	NRC
Office of Personnel Management	OPM
Small Business Administration	SBA
Social Security Administration	SSA

Source: GAO.

*FEMA information was reported separately in fiscal year 2002. In fiscal years 2003, 2004, and 2005, FEMA was part of DHS.

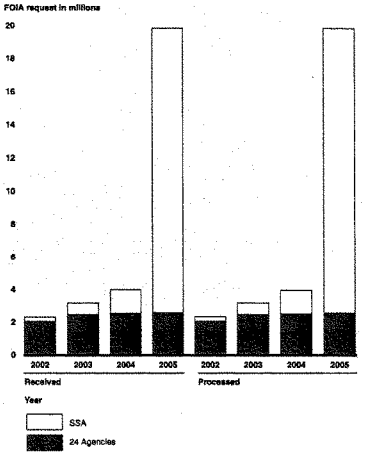
Increases in Requests Are Slowing, but Pending Cases Are Increasing

The annual FOIA reports for fiscal year 2005 show that many of the trends of previous years are continuing: Requests received and processed continue to rise; however, excepting one case—SSA—the rate of increase has flattened in recent years. We present SSA's statistics separately because the agency reported an additional 16

million requests in 2005, dwarfing those for all other agencies combined, which together total about 2.6 million. SSA attributed this rise to an improvement in its method of counting requests. Justice officials have raised questions about the inclusion of these numbers in FOIA statistics.

Figure 2 shows total requests reported governmentwide for fiscal years 2002 through 2005, with SSA's share shown separately. This figure shows the magnitude of SSA's contribution to the whole FOIA picture, as well as the scale of the jump from 2004 to 2005.

Figure 2: Total FOIA Requests with SSA Shown Separately, Fiscal Years 2002–2005

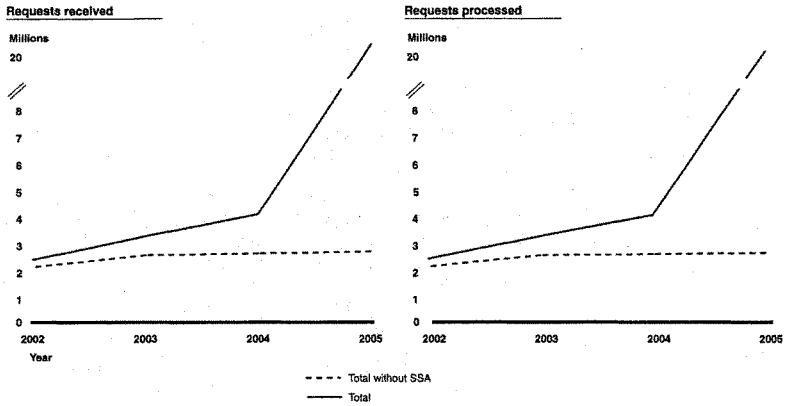


Source: GAO analysis, FOIA annual reports for fiscal years 2002-2005 (self-reported data).

Figure 3 presents these statistics on a scale that allows a clearer view of the rate of increase in FOIA requests received and processed in the rest of the government. As this figure shows, when SSA's numbers are excluded, the rate of increase is modest and has been

flattening: from fiscal year 2002 to 2005, requests received increased by about 27 percent, and requests processed increased by about 25 percent. From fiscal year 2004 to 2005, requests received increased about 2.5 percent, and requests processed increased about 2.0 percent.

Figure 3: Total FOIA Requests and FOIA Requests Processed, Fiscal Years 2002–2005



Source: GAO analysis, FOIA annual reports for fiscal years 2002-2005 (self-reported data).

According to SSA, the increases that the agency reported in fiscal year 2005 can be attributed to an improvement in its method of counting a category of requests it calls "simple requests handled by non-FOIA staff." In the past 4 years, SSA's FOIA reports have consistently shown significant growth in this category, which has accounted for the major portion of all SSA requests reported (see table 3). In each of these years, SSA has attributed the increases in this category largely to better reporting, as well as actual increases in requests.

Table 3: Comparison of SSA's Simple Requests Handled by Non-FOIA Staff to Totals, Fiscal Years 2002 to 2005

Fiscal year	Total requests received	Total requests processed	Simple requests handled by non-FOIA staff	Percentage of total processed
2005	17,257,886	17,262,315	17,223,713	99.8
2004	1,453,619	1,450,493	1,270,512	87.6
2003	705,280	704,941	678,849	96.3
2002	268,488	292,884	245,877	84.0

Sources: SSA FOIA reports (self-reported data), GAO analysis.

SSA describes requests in this category as typically being requests by individuals for access to their own records, or else requests in which individuals consent for SSA to supply information about themselves to third parties (such as insurance and mortgage companies) so that they can receive housing assistance, mortgages, disability insurance, and so on.[16] According to SSA's FOIA report, these requests are handled by personnel in about 1,500 locations in SSA, including field and district offices and teleservice centers. Such requests are almost always granted,[17] according to SSA, and most receive immediate responses. SSA has stated that it does not keep processing statistics (such as median days to process) on these requests, which it reports separately from other FOIA requests (for which processing statistics are kept).

According to SSA, in fiscal year 2005, the agency began to use automated systems to capture the numbers of requests processed by non-FOIA staff, generating statistics automatically as requests were processed; the result, according to SSA, is a much more accurate count. However, Justice officials have suggested that SSA consider treating the bulk of these requests as non-FOIA requests and thus not include them in future reports.

[16] According to SSA officials, most of these simple requests are for essentially the same types of information, such as copies of earnings records and verifications of monthly benefit amounts or Social Security numbers. The agency considers these requests to be covered by the Privacy Act and by FOIA; requests covered by both acts are to be reported in agencies' annual FOIA reports.

[17] Denials can occur in the case of discrepancies in the requests, such as incorrect Social Security numbers, for example.

Besides SSA, agencies reporting large numbers of requests received were the Departments of Agriculture, Defense, Health and Human Services, Homeland Security, Justice, the Treasury, and Veterans Affairs, as shown in table 4. The rest of the agencies combined account for only about 3 percent of the total requests received (if SSA is excluded). Table 4 presents, in descending order of request totals, the numbers of requests received and percentages of the total (calculated with and without SSA's statistics).

Table 4: Requests Received, Fiscal Year 2005

Agency	Total	Percentage of total including SSA	Percentage of total excluding SSA
SSA	17,257,886	86.78	—
VA	1,914,395	9.63	72.81
HHS	222,372	1.12	8.46
DHS	163,016	0.82	6.20
DOD	81,304	0.41	3.09
Treas	53,330	0.27	2.03
DOJ	52,010	0.26	1.98
USDA	51,516	0.26	1.96
DOL	23,505	0.12	0.89
EPA	12,201	0.06	0.46
OPM	12,085	0.06	0.46
DOT	9,597	0.05	0.37
DOI	6,749	0.03	0.26
State	4,602	0.02	0.18
HUD	4,227	0.02	0.16
SBA	3,739	0.02	0.14
DOE	3,729	0.02	0.14
CIA	2,935	0.01	0.11
ED	2,416	0.01	0.09
DOC	1,804	0.01	0.07
GSA	1,416	0.01	0.05
NASA	1,229	0.01	0.05
NRC	371	0.00	0.01
AID	369	0.00	0.01
NSF	273	0.00	0.01
Total excluding SSA	**2,629,190**	—	—
Total including SSA	**19,887,076**	—	—

Source: FOIA annual reports for 2005 (self-reported data).

Note: Abbreviations are as in table 2.

Most Requests Are Granted in Full

Most FOIA requests in 2005 were granted in full, with relatively few being partially granted, denied, or not disclosed for other reasons (statistics are shown in table 5). This generalization holds with or without SSA's inclusion. However, including SSA's numbers in the proportion of grants overwhelms the other categories—raising this number from 87 percent of the total to 98 percent. This is to be expected, since SSA reports that it grants the great majority of its simple requests handled by non-FOIA staff, which make up the bulk of SSA's statistics.

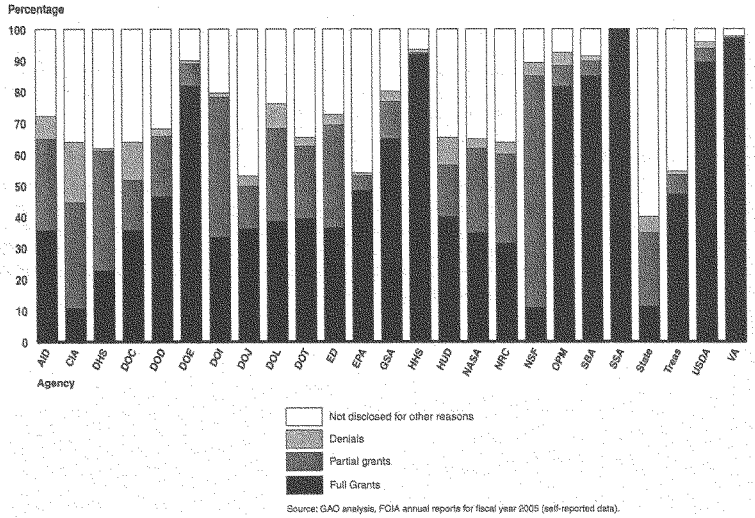
Table 5: Disposition of Processed Requests for Fiscal Year 2005

	Statistics excluding SSA		Statistics including SSA	
Disposition	**Number**	**Percentage**	**Number**	**Percentage**
Full grants	2,252,867	87.2	19,513,259	98.3
Partial grants	104,356	4.0	104,631	0.5
Denial	20,949	0.8	21,403	0.1
Not disclosed for other reasons	206,699	8.0	207,893	1.1
Total	**2,584,871**		**19,847,186**	

Source: FOIA annual reports for 2005 (self-reported data).

Four of the eight agencies that handled the largest numbers of requests (HHS, SSA, USDA, and VA; see table 4) also granted the largest percentages of requests in full, as shown in figure 4. This figure shows, by agency, the disposition of requests processed: that is, whether granted in full, partially granted, denied, or not disclosed for the "other" reasons shown in table 1.

Figure 4: Disposition of Processed Requests, by Agency (Fiscal Year 2005)



Source: GAO analysis, FOIA annual reports for fiscal year 2005 (self-reported data).

Note: Abbreviations are shown in table 2.

As the figure shows, the numbers of fully granted requests varied widely among agencies in fiscal year 2005. Seven agencies made full grants of requested records in over 80 percent of the cases they processed (besides the four already mentioned, these include DOE, OPM, and SBA). In contrast, 13 of 25 made full grants of requested records in less than 40 percent of their cases, including 3 agencies (CIA, NSF, and State) that made full grants in less than 20 percent of cases processed.

This variance among agencies in the disposition of requests has been evident in prior years as well.[18] In many cases, the variance can be accounted for by the types of requests that different agencies process. For example, as discussed earlier, SSA grants a very high proportion of requests because they are requests for personal information about individuals that are routinely made available to or for the individuals concerned. Similarly, VA routinely makes medical records available to individual veterans.

Processing Times Vary

For 2005, the reported time required to process requests (by track) varied considerably among agencies. Table 6 presents data on median processing times for fiscal year 2005. For agencies that reported processing times by component rather than for the agency as a whole, the table indicates the range of median times reported by the agency's components.

[18] 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).

Table 6: Median Days to Process Requests for Fiscal Year 2005, by Track

	Type of request processing track			
Agency	Simple	Complex	Single	Expedited
AID	—	—	55	34
CIA	7	68	—	—
DHS	16–61	3–242	—	2–45
DOC	12	40	—	8
DOD	16	85	—	—
DOE	5–106	10–170	—	1–12
DOI	2–43	28–89	—	1–15
DOJ	0–139	12–863	—	2–185
DOL	6–30	14–60	—	2–18
DOT	1–30	20–134	—	5–30
ED	35	66	—	24
EPA	13–32	4–166	—	8–109
GSA	—	14	—	—
HHS	10–26	60–370	5–173	14–158
HUD	21–65	35–160	—	9–70
NASA	19	49	—	15
NRC	12	75	—	20
NSF	—	—	14	—
OPM	—	—	14	1
SBA	—	—	7	—
SSA	15	39	10	17
State	14	142	—	136
Treas	2–86	3–251	—	1
USDA	2–90	10–1277	—	1–40
VA	—	1–60	—	1–10

Source: FOIA annual reports for fiscal years 2005 (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.

As the table shows, eight agencies had components that reported processing simple requests in less than 10 days (these components are part of the CIA, Energy, the Interior, Justice, Labor, Transportation, the Treasury, and USDA); for each of these agencies, the lower value of the reported ranges is less than 10. On the other hand, median time to process simple requests is relatively long at some organizations (for example, components of HHS, Justice, and USDA, as shown by median ranges whose upper end values are greater than 100 days).

For complex requests, the picture is similarly mixed. Components of four agencies (EPA, DHS, the Treasury, and VA) reported processing complex requests quickly—with a median of less than 10 days. In contrast, other components of several agencies (DHS, Energy, EPA, HHS, HUD, Justice, State, Transportation, the Treasury, and USDA) reported relatively long median times to process complex requests, with median days greater than 100.

Six agencies (AID, HHS, NSF, OPM, SBA, and SSA) reported using single-track processing. The median processing times for single-track processing varied from 5 days (at an HHS component) to 173 days (at another HHS component).

The changes from fiscal year 2004 to 2005 also vary. For agencies that reported agencywide figures, table 7 shows how many showed increased or decreased median processing times. Table 8 shows these numbers for the components that were reported separately.

Table 7: Changes in Median Processing Times Reported by Agencies for Different Processing Tracks

Processing track	Number of agencies using this track	Agencies with increased median times		Agencies with decreased median times		Agencies with unchanged median times	
		Number	%	Number	%	Number	%
Simple	7	3	42.9	3	42.9	1	14.3
Complex	8	5	62.5	2	25.0	1	12.5
Single	5	3	60.0	2	40.0	0	0.0
Expedited	5	2	40.0	3	60.0	0	0.0

Sources: Annual FOIA reports, GAO analysis.

Table 8: Changes in Median Processing Times Reported by Components for Different Processing Tracks

Processing track	Number of components using this track	Components with increased median times		Components with decreased median times		Components with unchanged median times	
		Number	%	Number	%	Number	%
Simple	122	57	46.7	46	37.7	19	15.6
Complex	105	52	49.5	44	41.9	9	8.6
Single	9	3	33.3	2	22.2	4	44.4
Expedited	43	25	58.1	13	30.2	5	11.6

Sources: Annual FOIA reports, GAO analysis.

Note: A total of 204 components are listed in the FOIA reports. Not all the components processed requests or used all the tracks.

These tables show that no one pattern emerges across tracks and types of reporting, and the numbers of agencies and components involved vary from track to track. The picture that emerges is of great variation according to circumstances.

To allow more insight into the variations in median processing times, we provide in attachment 2 tables of median processing times as reported by agencies and components in the annual FOIA reports in fiscal years 2004 and 2005. This attachment also includes information on the number of requests reported by the agencies and components, which provides context for assessing the median times reported.

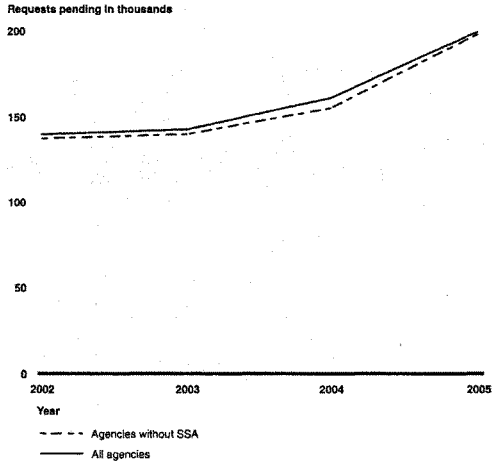
Agency Pending Cases Continue to Increase

In addition to processing greater numbers of requests, many agencies (11 of 25) also reported that their numbers of pending

cases—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 2005, about 200,000—43 percent more—were reported. In addition, the rate of increase grew in fiscal year 2005, rising 24 percent from fiscal year 2004, compared to 11 percent from 2003 to 2004. Figure 5 shows these results, illustrating the accelerating rate at which pending cases have been increasing.

These statistics include pending cases reported by SSA, because as the figure shows, these pending cases do not change the governmentwide picture significantly. As previously discussed, SSA's pending cases do not include simple requests handled by non-FOIA staff, for which SSA does not keep these statistics.

Figure 5: Total FOIA Requests Pending at End of Year, 2002–2005

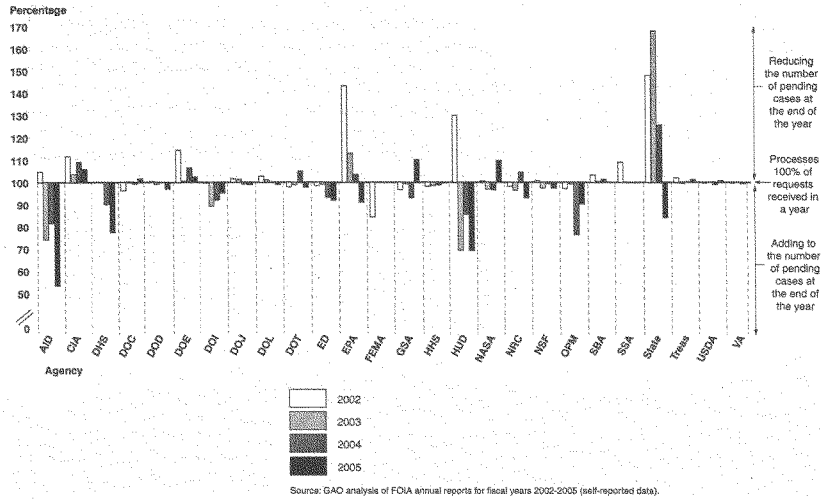


Source: GAO analysis, FOIA annual reports for fiscal years 2002-2005 (self-reported data).

Trends for individual agencies show mixed progress in reducing the number of pending requests reported from 2002 to 2005—some agencies have decreased numbers of pending cases, while others' numbers have increased. Figure 6 shows processing rates at the 25 agencies (that is, the number of requests that an agency processes relative to the number it receives). Eight of the 25 agencies (AID, DHS, the Interior, Education, HHS, HUD, NSF, and OPM) reported processing fewer requests than they received each year for fiscal years 2003, 2004, and 2005; 8 additional agencies processed less than they received in two of these three years.

In contrast, two agencies (CIA and DOE) had processing rates above 100 percent in all three years, meaning that each made continued progress in reducing their numbers of pending cases. Fifteen additional agencies were able to make at least a small reduction in their numbers of pending requests in 1 or more years between fiscal years 2003 and 2005.

Figure 6: Agency Processing Rate for 25 Agencies



Source: GAO analysis of FOIA annual reports for fiscal years 2002-2005 (self-reported data).

Notes: Abbreviations are as in table 2.

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, 2004, and 2005, DHS data were used.

About Half of FOIA Improvement Plans Do Not Include Goals and Timetables for Reducing the Backlog

The Executive Order, with its requirement for agencies to develop FOIA improvement plans, serves to focus agency managers' attention on the important role that FOIA plays in keeping citizens well informed about the operations of their government. By

requiring measurable goals and timetables, the Executive Order provides for a results-oriented framework by which agency heads can hold officials accountable for improvements in FOIA processing. Further, the Department of Justice's guidance on implementing the order provides several tangible suggestions for improving FOIA operations.

The Executive Order states that each agency shall develop an improvement plan by June 14, 2006, that includes measurable, outcome-oriented goals to reduce or eliminate backlog,[19] along with timetables that include milestones for these goals. According to this guidance, the goals and milestones in agency plans should focus on outcomes that are measurable and demonstrate whether or not intended results are being achieved.[20] Justice's implementation guidance directs agencies to include "means of measurement of success (e.g., quantitative assessment of backlog reduction expressed in numbers of pending requests, percentages, or working

[19] The Executive Order refers to "requests for records [that] have not been responded to within the statutory time limit (backlog)." The statute sets a time limit of 20 business days for agencies to determine whether to comply with a FOIA request. The law does not set a specific deadline for providing releasable records (although it does require agencies to make them available promptly), but in practice, agencies generally respond to requesters in one step—by providing or denying records—rather than in two steps—notifying requesters of their determination of whether to comply and if so providing records. In keeping with this practice, agencies have interpreted the Executive Order as referring to responses that provide or deny records, rather than responses providing a determination.

Justice officials told us in 2001 that, as a practical matter, they consider the FOIA requirement to report data on median processing days to be the basis for measuring compliance with the 20-day requirement. GAO, *Information Management: Progress in Implementing the 1996 Electronic Freedom of Information Act Amendments*, GAO-01-378 (Washington, D.C.: Mar. 16, 2001).

[20] The Executive Order states that plans shall include "specific activities that the agency will implement to eliminate or reduce the agency's FOIA backlog," as well as "concrete milestones, with specific timetables and outcomes to be achieved;" these milestones will be such that they can be used to "measure and evaluate the agency's success in the implementation of the plan."

days)" and provides agencies considerable leeway in choosing measures of timeliness.[21]

Most of the 22 agency plans available as of June 30 discussed reducing backlog, but not all consistently followed the Executive Order directions by establishing goals and timetables for reducing or eliminating their backlog. In all, 12 of the 21 agencies that reported a backlog included such goals and timetables, but the remaining 9 did not do so. (The Small Business Administration did not report a backlog.) These 9 agencies accounted for about 29 percent of the almost 200,000 requests pending at the end of fiscal year 2005 that were reported in the annual FOIA reports.

Table 9 summarizes the results of our analysis.

[21] According to Justice's guidance, "Agencies should consider a number of measures of timeliness, including number of pending requests, median processing times, average processing times (in addition, if that is feasible), number of requests processed in a year, duration of oldest pending requests, etc." "In determining such appropriate measurements, agencies should be able to carefully determine which ones best fit their individual circumstances, which can vary greatly from one agency to another."

Table 9: Inclusion in Agency FOIA Improvement Plans of Both Outcomes and Associated Milestones for Reducing Backlog

Agency	Outcome-oriented goals	Milestones related to goals	Comment
AID	—	—	Plan not provided in time for analysis
CIA	Yes	Yes	—
DHS	—	—	Plan not provided in time for analysis
DOC	No	No	Process goals and timetable only
DOD	No	No	Process goals and timetable only
DOE	Yes	Yes	—
DOI	Yes	Yes	—
DOJ	Yes	Yes	—
DOL	No	No	Process goals and timetable only
DOT	Yes	Yes	—
ED	Yes	Yes	—
EPA	Yes	Yes	—
GSA	No	No	Backlog reduction not part of improvement plan
HHS	Yes	Yes	—
HUD	Yes	Yes	—
NASA	No	No	Backlog reduction not part of improvement plan
NRC	Yes	Yes	—
NSF	No	No	Process goals and timetable only
OPM	Yes	Yes	—
SBA	—	—	No backlog
SSA	Yes	No	Timetable did not include milestones for outcome, only for processes
State	—	—	Plan not provided in time for analysis
Treas	Yes	Yes	—
USDA	No[a]	No[a]	—
VA	No	No	Process goals and timetable only
Total yes	**13**	**12**	

Source: GAO analysis of agency FOIA improvement plans.

[a]USDA provided objectives and timetables by component. Only the Office of Inspector General included outcomes and timetables.

As table 9 shows, 13 agencies included goals, but 1 of these (SSA) did not include a timetable associated with its goal.

The goals chosen by the 13 agencies varied. For example, OPM's plan set a goal of reducing and eliminating the agency's backlog by December 31, 2006. EPA's goal was to reduce its response backlog to less than 10 percent of the number of new FOIA requests received each year. Several agencies set goals to reduce backlog to various percentages of their current backlog (for example, the CIA, Energy,

the Interior, Justice, and the Treasury). HUD set an absolute goal of fewer than 400 pending requests.

Although the remaining 8 agency plans discussed efforts to improve FOIA processing, they did not contain goals for backlog reduction. In two cases (GSA and NASA), agencies did not include such goals because they did not include backlog reduction among the areas of improvement on which they planned to focus. These agencies did not consider their backlogs significant; nonetheless, the Executive Order specifically instructed agencies to include goals and timetables to address backlog.

In other cases, agencies did address backlog reduction but did not define goals. Many of these agencies did define process goals, such as establishing means to monitor and report on backlog, reviewing current processes, and identifying and reviewing tracking systems, but these were not accompanied by goals for backlog reduction:

- For example, the Department of Commerce's plan stated that, to the extent possible, its components would use current backlog numbers as a ceiling (these generally range from 9 to 13 percent of the workload) and work aggressively to reduce these numbers, focusing particularly on the 10 oldest requests in each component's backlog. However, although the plan provided milestone dates for FOIA officers to review progress in this area and assess any need to pursue alternatives (such as contract support) for achieving goals, the plan did not provide measurable targets for assessing success, such as percentage of reduction.
- Similarly, the Department of Defense set various process goals (identifying those FOIA Offices with backlogs greater than 50 cases, determining the staffing levels required to significantly reduce the backlog, and seeking the necessary funding to provide this additional staffing). However, it provided no measurable targets for reducing backlog.

In the timetables that agencies provided in their plans, 12 agencies provided milestones for goals that they had identified. As mentioned earlier, one agency (SSA) did not include a milestone for its goal of eliminating backlog. SSA provided instead a timetable that addressed process goals: reorganizing its Office of Public Disclosure

and developing a new information system. Like SSA, several agencies provided timetables for various activities that they included in their plans to reduce backlog, but these did not include milestones for outcome-oriented goals (for example, Defense provided milestones for the process goals described above).

In addition to setting goals and milestones for those goals, in order to demonstrate that goals are achieved, plans should also include baselines against which results can be measured. In the case of backlog, these numbers can differ from day to day, so specifying a baseline is crucial. Baselines can be defined on the basis of a date from which an agency intends to measure, the number it is using as its baseline, or both. Publicly available baselines are important to promote accountability as well as the transparency of government processes.

However, most of the agency improvement plans do not clearly define baselines for their existing backlogs. An exception was OPM: in describing its goal to eliminate backlog by December 31, 2006, it specified its present backlog as 107 requests. Similarly, the Department of Education referred to measuring its success in terms of having fewer open cases at the end of each year, based on a backlog that it specified as 480 as of June 2, 2006. In other cases, agencies did not specify whether they planned to measure from the date of their plans, from the end of fiscal year 2005, or from some other baseline. Some agencies did, however, describe plans to perform analyses that would measure their backlogs so that they could then establish the necessary baselines.

Our ongoing work suggests that factors contributing to these deficiencies included difficulties in coordinating responses among components in large decentralized agencies and limitations in the way that agency systems track FOIA processing. In addition, neither the Executive Order nor Justice guidance established a baseline date for measuring the backlog or directed agencies to establish such a baseline. Uncertainty regarding defined baselines could hinder the measurement of progress in reducing backlog. Without clearly defined baselines, specific objectives, and timetables for reducing backlog, the risk is that agency heads, Justice, the Congress, and the public could be hampered in determining whether

and how well agencies have achieved the Executive Order's aims of improving FOIA processing and agency disclosure of information.

When we complete our ongoing review and analysis, we expect to make recommendations aimed at improving agency implementation of the Executive Order, including efforts to reduce and eliminate backlog.

In summary, FOIA continues to be a valuable tool for citizens to obtain information about the operation and decisions of the federal government. Since 2002, agencies have received increasing numbers of requests and have also continued to increase the number of requests that they process. In addition, agencies continue to grant most requests in full. However, the rate of increase in pending requests is accelerating.

Given these continuing trends, the President's Executive Order creates, among other things, a renewed, results-oriented emphasis on improving request processing and reducing the backlog of pending requests. However, our ongoing work suggests that agencies are not yet fully complying with the order's requirements for measurable, outcome-oriented goals and associated timetables. In addition, agencies have not all established clear baselines for their existing backlogs. Without a baseline measurement and tangible steps for addressing the accumulation of pending cases, the heads of these agencies may be limited in their ability to measure and evaluate success in implementing their plans as the President's order requires. Accordingly, in moving forward, it will be important for Justice and the agencies to continue to refine these plans so that the goal of reducing backlogs can be fully realized and the federal government can remain responsive to citizen needs. When we complete our ongoing work, we expect to provide recommendations to help move this process forward.

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, Vernetta Marquis, Alan Stapleton, Shawn Ward, and Elizabeth Zhao.

Attachment 1: Freedom of Information Act Exemptions

The act prescribes nine specific categories of information that is exempt from disclosure:

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).

Attachment 2. Median Processing Times Reported

The attached tables present median processing times as reported by agencies in their annual FOIA reports in fiscal years 2004 and 2005. To provide context, we include numbers of requests processed for each agency or component. We also indicate (in columns headed "±") whether the median days to process rose (+), fell (–), or remained unchanged (=). (We also use "~" to indicate other types of changes, such as the establishment of a new component.)

Agencies report median processing times according to processing tracks: that is, some agencies divide requests into simple and complex categories and process these in separate tracks, whereas others use a single track. Accordingly, the tables show these tracks where applicable. In addition, agencies are required to subject some requests to expedited processing, and these are reported as a separate track.

Tables for the agencies are presented in the following order, which corresponds to the order generally used in the figures and tables provided in the statement:

AID	Agency for International Development
CIA	Central Intelligence Agency
DHS	Department of Homeland Security
DOC	Department of Commerce
DOD	Department of Defense
DOE	Department of Energy
DOI	Department of the Interior
DOJ	Department of Justice
DOL	Department of Labor
DOT	Department of Transportation
ED	Department of Education
EPA	Environmental Protection Agency
GSA	General Services Administration
HHS	Department of Health and Human Services
HUD	Department of 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	Department of Veterans Affairs

Agency for International Development

No. = number of requests processed; Days = median days to process; ± = change from 2004 to 2005

	Single					Expedited				
	No.		Days			No.		Days		
Agency	2004	2005	2004	2005	±	2004	2005	2004	2005	±
AID	209	196	54	55	+	3	1	13	34	+

+ increase

– decrease

= no change

~ other change (change in reporting, new component, etc.)

Sources: Annual FOIA report, GAO analysis.

Central Intelligence Agency

No. = number of requests processed; Days = median days to process; ± = change from 2004 to 2005

	Simple					Complex					Expedited				
	No.		Days			No.		Days			No.		Days		
Agency	2004	2005	2004	2005	±	2004	2005	2004	2005	±	2004	2005	2004	2005	±
CIA	501	577	7	7	=	2,834	2,533	63	68	+	1	0	10	n/a	

+ increase

– decrease

= no change

~ other change (change in reporting, new component, etc.)

Sources: Annual FOIA report, GAO analysis.

Department of Homeland Security

No. = number of requests processed; Days = median days to process; ± = change from 2004 to 2005

	Simple					Complex					Expedited				
	No.		Days			No.		Days			No.		Days		
Component	2004	2005	2004	2005	±	2004	2005	2004	2005	±	2004	2005	2004	2005	±
Office of the Secretary/ Privacy Office	279	604	19	16	–	98	134	66	102	+	48	1	9	11	+
Office of the Inspector General	n/a	0	n/a	n/a		21	14	44	91	+	0	3	n/a	5	
Office of the General Counsel	(a)	0	(a)	n/a	~	(a)	1	(a)	222	~	(a)	0	(a)	n/a	~
Information Analysis & Infrastructure Protection	n/a	0	n/a	n/a		n/a	51	n/a	30	~	n/a	0	n/a	n/a	
Emergency Preparedness & Response	101	186	14	61	+	128	345	48	178	+	28	14	9	45	+
Science & Technology	(a)	1	(a)	30	~	(a)	1	(a)	210	~	(a)	0	(a)	n/a	~
U.S. Coast Guard	6,735	6,035	13	16	+	638	608	21	21	=	30	11	11	2	–
U.S. Secret Service	0	0	n/a	n/a		912	701	111	149	+	0	0	n/a	n/a	
U.S. Citizenship & Immigration Services	105,567	85,307	16	45	+	27,850	19,532	31	55	+	580	95	8	15	+
US-VISIT	(a)	14	(a)	17	~	(a)	1	(a)	60	~	(a)	0	(a)	n/a	~
Border & Transportation Security															
CBP	2,317	3,174	20	17	–	1,986	3,815	30	12	–	4	890	3	17	+
TSA	828	11	8	16	+	1,307	1,199	29	13	–	2	2	45	28	–
ICE	1,124	661	84	35	–	n/a	881	n/a	242	~	n/a	0	n/a	n/a	
FLETC	n/a	0	n/a	n/a	~	1,451	1,834	5	3	–	0	0	n/a	n/a	

+ increase

– decrease

= no change

~ other change (change in reporting, new component, etc.)

Sources: Annual FOIA report, GAO analysis.

[a]Component did not exist.

Department of Commerce

No. = number of requests processed; Days = median days to process; ± = change from 2004 to 2005

	Simple					Complex					Expedited				
	No.		Days			No.		Days			No.		Days		
Agency	2004	2005	2004	2005	±	2004	2005	2004	2005	±	2004	2005	2004	2005	±
Commerce	1,564	1,321	13	12	–	465	511	41	40	–	6	2	5	8	+

+ increase

– decrease

= no change

~ other change (change in reporting, new component, etc.)

Sources: Annual FOIA report, GAO analysis.

Department of Defense

No. = number of requests processed; Days = median days to process; ± = change from 2004 to 2005

	Simple					Complex					Expedited				
	No.		Days			No.		Days			No.		Days		
Agency	2004	2005	2004	2005	±	2004	2005	2004	2005	±	2004	2005	2004	2005	±
Defense	63,443	66,979	17	16	–	12,972	11,385	59	85	+	841	411	1	0	–

+ increase

– decrease

= no change

~ other change (change in reporting, new component, etc.)

Sources: Annual FOIA report, GAO analysis.

Department of Energy

No. = number of requests processed; Days = median days to process; ± = change from 2004 to 2005

	Simple					Complex					Expedited				
	No.		Days			No.		Days			No.		Days		
Component	2004	2005	2004	2005	±	2004	2005	2004	2005	±	2004	2005	2004	2005	±
National Nuclear Security Administration Service Center Albuquerque	118	76	30	15	–	99	108	58	170	+	0	0	n/a	n/a	
Bonneville Power Administration	54	54	12	20	+	0	0	n/a	n/a		0	0	n/a	n/a	
Carlsbad Field Office	0	654	n/a	20		10	14	35	57	+	0	0	n/a	n/a	
Chicago Operations Office	0	36	n/a	21		38	0	21	n/a		0	0	n/a	n/a	
Golden Field Office	21	11	14	33	+	2	1	20.5	66	+	0	0	n/a	n/a	
Idaho Operations Office	45	46	11	13	+	34	34	41	36	–	0	0	n/a	n/a	
National Energy Technology Operations	9	7	20	10	–	9	26	25	30	+	0	0	n/a	n/a	
Office of Naval Reactors	*(a)*	7	*(a)*	10	~	*(a)*	0	*(a)*	n/a		*(a)*	0	*(a)*	n/a	~
Oak Ridge Operations Office	1,012	970	158	31	–	139	42	257	112	–	30	14	7	12	+
Ohio Environmental Management Consolidated Business Center	89	156	152	28	–	0	0	n/a	n/a		10	0	5	n/a	~
Office of Repository Development	42	71	15	19	+	29	13	60	73	+	0	0	n/a	0	
Richland Operations Office	0	190	n/a	31		115	0	18	n/a		0	0	n/a	n/a	
Rocky Flats Environmental Management Consolidated Business Center	0	794	n/a	106		16	0	916	n/a		0	0	n/a	n/a	
Savannah River Operations Office	65	40	61	73	+	0	0	n/a	n/a		0	0	n/a	n/a	
Office of Scientific and Technical Information	1	3	1	10	+	0	0	n/a	n/a		0	0	n/a	n/a	
Southeastern Power Administration	3	0	10	n/a		0	0	n/a	n/a		0	0	n/a	n/a	
Southwestern Power Administration	5	4	10	5	–	0	2	n/a	10		0	0	n/a	n/a	
Strategic Petroleum Reserve	13	13	10	21	+	0	2	n/a	82		0	4	n/a	1	

	Simple					Complex					Expedited				
	No.		Days			No.		Days			No.		Days		
Component	**2004**	**2005**	**2004**	**2005**	**±**	**2004**	**2005**	**2004**	**2005**	**±**	**2004**	**2005**	**2004**	**2005**	**±**
Western Area Power Administration	35	40	10	10	=	2	4	20	15	–	0	1	n/a	5	
Department of Energy Headquarters	395	384	81	41	–	0	0	n/a	n/a		0	0	n/a	n/a	

+ increase

– decrease

= no change

~ other change (change in reporting, new component, etc.)

Sources: Annual FOIA report, GAO analysis.

[a]Component did not exist.

Department of the Interior

No. = number of requests processed; Days = median days to process; ± = change from 2004 to 2005

	Simple					Complex					Expedited				
	No.		Days			No.		Days			No.		Days		
Component	**2004**	**2005**	**2004**	**2005**	**±**	**2004**	**2005**	**2004**	**2005**	**±**	**2004**	**2005**	**2004**	**2005**	**±**
Department of the Interior	4,126	6,206	3–834	2–43	~	30	189	0–99	28–89	~	63	25	2–64	1–15	~
Office of the Secretary	*(a)*	*(a)*	n/a	n/a		*(a)*	*(a)*	99	89	–	*(a)*	*(a)*	64	2	–
Office of Inspector General	*(a)*	*(a)*	834	7	–	*(a)*	*(a)*	n/a	n/a		*(a)*	*(a)*	2	1	–
Office of the Solicitor	*(a)*	*(a)*	15	18	+	*(a)*	*(a)*	n/a	n/a		*(a)*	*(a)*	n/a	n/a	
Office of Surface mining	*(a)*	*(a)*	21	13	–	*(a)*	*(a)*	0	55	+	*(a)*	*(a)*	n/a	n/a	
Minerals Management Service	*(a)*	*(a)*	22	n/a		*(a)*	*(a)*	n/a	28		*(a)*	*(a)*	14	n/a	
Bureau of Land Management	*(a)*	*(a)*	n/a	23		*(a)*	*(a)*	56	57	+	*(a)*	*(a)*	5	6	+
Fish and Wildlife Service	*(a)*	*(a)*	35	29	–	*(a)*	*(a)*	n/a	n/a		*(a)*	*(a)*	10	15	+
National Park Service	*(a)*	*(a)*	20	19	–	*(a)*	*(a)*	n/a	n/a		*(a)*	*(a)*	10	n/a	
Bureau of Reclamation	*(a)*	*(a)*	20	18	–	*(a)*	*(a)*	n/a	n/a		*(a)*	*(a)*	8	1	–
U.S. Geological Survey	*(a)*	*(a)*	18	14	–	*(a)*	*(a)*	n/a	n/a		*(a)*	*(a)*	n/a	n/a	
Bureau of Indian Affairs	*(a)*	*(a)*	158	43	–	*(a)*	*(a)*	n/a	n/a		*(a)*	*(a)*	n/a	n/a	

+ increase

– decrease

= no change

~ other change (change in reporting, new component, etc.)

Sources: Annual FOIA report, GAO analysis.

[a]Statistics not broken down by component.

Note: The Department of Interior reported the number of requests processed as a department, not by individual components.

Department of Justice

No. = number of requests processed; Days = median days to process; ± = change from 2004 to 2005

	Simple					Complex					Expedited				
	No.		Days			No.		Days			No.		Days		
Component	**2004**	**2005**	**2004**	**2005**	**±**	**2004**	**2005**	**2004**	**2005**	**±**	**2004**	**2005**	**2004**	**2005**	**±**
Office of the Attorney General	401	213	17	27	+	23	35	480	362	−	2	3	135	96	−
Office of the Deputy Attorney General	246	108	17	29	+	15	10	291	363	+	0	2	n/a	62	
Office of the Associate Attorney General	52	40	44	89	+	4	0	344	n/a		1	2	47	112	+
Antitrust Division	145	131	18	19	+	13	14	412	484	+	1	0	18	n/a	
Bureau of Prisons	15,047	13,243	15	16	+	680	475	28	29	+	13	25	1	3	+
Bureau of Alcohol, Tobacco, Firearms, and Explosives	2,437	1,719	7	8	+	0	0	n/a	n/a		0	0	n/a	n/a	
Civil Division	859	466	9	10	+	0	0	n/a	n/a		0	1	n/a	7	
Civil Rights Division	473	565	8	8	=	60	100	283	359	+	0	0	n/a	n/a	
Community Relations Service	8	2	10	10	=	0	0	n/a	n/a		0	0	n/a	n/a	
Criminal Division	0	0	n/a	n/a		1,414	1,291	16	35	+	2	1	31	97	+
Drug Enforcement Administration	0	0	n/a	n/a		1,933	1,569	12	16	+	0	0	n/a	n/a	
Environment and Natural Resources Division	0	0	n/a	n/a		177	145	40	53	+	0	0	n/a	n/a	
Executive Office for Immigration Review	7,811	9,367	29	43	+	681	476	89	149	+	65	27	26	44	+
Executive Office for United States Attorneys	4,848	3,751	46	58	+	0	0	n/a	n/a		73	84	195	169	−
Executive Office for United States Trustees	0	0	n/a	n/a		61	65	6	19	+	0	0	n/a	n/a	
Federal Bureau of Investigation	10,253	10,828	6	6	=	(b)	(b)	n/a	n/a		35	14	41	42	+
Foreign Claims Settlement Commission	17	9	5	5	=	0	0	n/a	n/a		0	0	n/a	n/a	
Justice Management Division	3,128	2,130	8	(c)		31	35	35	(c)		0	0	n/a	n/a	
National Drug Intelligence Center	80	58	22	21	−	3	3	30	73	+	0	0	n/a	n/a	
Office of Community Oriented Policing Services	101	61	14	8	−	0	0	n/a	n/a		2	0	6	n/a	

	Simple					Complex					Expedited				
	No.		Days			No.		Days			No.		Days		
Component	2004	2005	2004	2005	±	2004	2005	2004	2005	±	2004	2005	2004	2005	±
Office of Dispute Resolution	8	4	5	5	=	0	0	n/a	n/a		0	0	n/a	n/a	
Office of the Federal Detention Trustee	27	11	7	8	+	2	0	105	n/a		0	1	n/a	7	
Office of Information and Privacy	434	443	12	13	+	1	1	397	52	–	0	1	n/a	185	
Office of the Inspector General	241	208	10	11.5	+	0	0	n/a	n/a		0	0	n/a	n/a	
Office of Intelligence Policy and Review	28	33	8	6	–	6	17	27	31	+	0	2	n/a	16	
Office of Intergovernmental and Public Liaison	15	6	41	46	+	0	0	n/a	n/a		0	1	n/a	38	
Office of Justice Programs	493	206	1	2	+	59	108	25	25	=	0	0	n/a	n/a	
Office of Legal Counsel	55	68	10	10	=	9	16	30	30	=	0	1	n/a	40	
Office of Legal Policy	47	76	37	58	+	2	3	188	863	+	0	2	n/a	28	
Office of Legislative Affairs	58	63	84	86	+	6	9	386	330	–	0	2	n/a	67	
Office of the Pardon Attorney	40	43	29	21	–	3	0	100	n/a		0	0	n/a	n/a	
Office of Professional Responsibility	129	86	19	15	–	7	9	389	334	–	0	0	n/a	n/a	
Office of Public Affairs	20	22	137	139	+	3	3	226	730	+	0	0	n/a	n/a	
Office of the Solicitor General	73	64	60	60	=	0	0	n/a	n/a		2	22	8	10	+
Office on Violence Against Women	*(a)*	14	*(a)*	50	~	*(a)*	0	*(a)*	n/a	~	*(a)*	0	*(a)*	n/a	~
Professional Responsibility Advisory Office	13	14	3	3.5	+	0	0	n/a	n/a		0	0	n/a	n/a	
Tax Division	226	237	0	0	=	27	26	15	28	+	0	0	n/a	n/a	
U.S. Marshals Service	1,531	999	21	26	+	16	17	130	195.5	+	0	0	n/a	n/a	
U.S. National Central Bureau--INTERPOL	271	184	5	6	+	10	18	24	21	–	2	3	3	2	–
U.S. Parole Commission	0	0	n/a	n/a		1,351	1,011	20	12	–	0	0	n/a	n/a	

+ increase

– decrease

= no change

~ other change (change in reporting, new component, etc.)

Sources: Annual FOIA report, GAO analysis.

[a] Component did not exist.

[b] In addition to the expedited track, the FBI maintains three tracks for requests: small (0 to 500 pages), medium (501 to 2,500 pages), and large (more than 2,500 pages). The former is reported in the "simple requests" category; the latter two are reported as "complex requests." Therefore FBI's complex requests were excluded from analysis

[c] Justice Management Division used average days opposed to median days, so it was excluded

Department of Labor

No. = number of requests processed; Days = median days to process; ± = change from 2004 to 2005

	Simple					Complex					Expedited				
	No.		Days			No.		Days			No.		Days		
Component	2004	2005	2004	2005	±	2004	2005	2004	2005	±	2004	2005	2004	2005	±
Occupational Safety and Health Administration	8,410	7,855	7	13	+	2,695	3,431	18	45	+	34	82	4	18	+
Employment Standards Administration	6,670	6,948	17	13	−	1,057	904	23	37	+	89	73	5	9	+
Mine Safety and Health Administration	1,150	0	17	n/a		0	1,058	n/a	20		0	3	n/a	7	
Employment and Training Administration	480	270	15	20	+	35	94	20	30	+	1	5	2	10	+
Employee Benefits Security Administration	367	1,456	11	7	−	65	257	40	34	−	0	2	n/a	10	
Office of the Assistant Secretary for Administration and Management	152	151	13	13	=	62	35	20	26	+	1	1	2	4	+
Administrative Law Judges	215	206	2	10	+	0	0	n/a	n/a		0	6	n/a	3	
Veterans' Employment and Training Service	71	87	27	10	−	15	19	29	39	+	2	1	8	8	=
Office of the Inspector General	71	47	30	28	−	8	28	60	50	−	0	0	n/a	n/a	
Bureau of Labor Statistics	56	54	13	17	+	0	0	n/a	n/a		0	0	n/a	n/a	
Office of Adjudicatory Services	25	52	7	6	−	4	0	18	n/a		2	0	2	n/a	
Womens Bureau	27	19	15	10	−	0	2	n/a	25		0	0	n/a	n/a	
Office of Disability Employment Policy	12	23	20	30	+	0	0	n/a	n/a		0	0	n/a	n/a	
Office of the Assistant Secretary for Policy	3	16	25	20	−	2	1	25	60	+	1	0	25	n/a	
Office of Congressional and Intergovernmental Affairs	0	0	n/a	n/a		0	0	n/a	n/a		0	0	n/a	n/a	
Bureau of International Labor Affairs	4	24	16	7	−	9	2	30	14	−	0	0	n/a	n/a	
Office of the Chief Financial Officer	12	8	10	7	−	0	0	n/a	n/a		0	0	n/a	n/a	
Office of Public Affairs	7	8	7	7	=	0	0	n/a	n/a		0	0	n/a	n/a	

	Simple					Complex					Expedited				
	No.		Days			No.		Days			No.		Days		
Component	**2004**	**2005**	**2004**	**2005**	**±**	**2004**	**2005**	**2004**	**2005**	**±**	**2004**	**2005**	**2004**	**2005**	**±**
Office of Small Business Programs	22	22	30	10	–	0	0	n/a	n/a		0	0	n/a	n/a	
Office of the Solicitor	62	30	12	14	+	7	3	54	30	–	0	1	n/a	2	

+ increase

– decrease

= no change

~ other change (change in reporting, new component, etc.)

Sources: *Annual FOIA report*, GAO analysis.

Department of Transportation

No. = number of requests processed; Days = median days to process; ± = change from 2004 to 2005

	Simple					Complex					Expedited				
	No.		Days			No.		Days			No.		Days		
Component	2004	2005	2004	2005	±	2004	2005	2004	2005	±	2004	2005	2004	2005	±
Office of the Secretary of Transportation	320	150	1	1	=	394	87	82	77	–	0	10	n/a	30	
Office of Inspector General	60	50	6	8	+	46	34	51	64	+	3	0	57	n/a	
Federal Aviation Administration	5,162	4,401	4	3	–	2,231	2,179	31	28	–	45	46	8	9	+
Federal Highway Administration	331	294	9	16	+	30	31	30	134	+	0	17	n/a	13	
Federal Railroad Administration	0	0	n/a	n/a		524	451	95	90	–	0	0	n/a	n/a	
National Highway Traffic Safety Administration	0	0	n/a	n/a		367	263	23	20	–	0	0	n/a	n/a	
Federal Transit Administration	192	199	68	29	–	0	0	n/a	n/a		0	0	n/a	n/a	
Saint Lawrence Seaway Development Corporation	36	0	18	n/a		0	33	n/a	20		0	0	n/a	n/a	
Maritime Administration	0	124	n/a	30		155	0	30	n/a		0	0	n/a	n/a	
Research and Special Programs Administration	85	43	19	15	–	89	75	135	40	–	11	1	5	5	=
Federal Motor Carrier Safety Administration	0	0	n/a	n/a		778	823	58	31	–	0	0	n/a	n/a	
Bureau of Transportation Statistics	46	67	5	11	+	0	6	n/a	20		0	0	n/a	n/a	

+ increase

– decrease

= no change

~ other change (change in reporting, new component, etc.)

Sources: Annual FOIA report, GAO analysis.

Department of Education

No. = number of requests processed; Days = median days to process; ± = change from 2004 to 2005

	Simple					Complex					Expedited				
	No.		Days			No.		Days			No.		Days		
Agency	2004	2005	2004	2005	±	2004	2005	2004	2005	±	2004	2005	2004	2005	±
Education	1,566	1,874	0-30	35	~	442	329	2-134	66	~	74	16	3-21	24	~

+ increase

– decrease

= no change

~ other change (change in reporting, new component, etc.)

Sources: Annual FOIA report, GAO analysis.

Environmental Protection Agency

No. = number of requests processed; Days = median days to process; ± = change from 2004 to 2005

	Simple					Complex					Expedited				
	No.		Days			No.		Days			No.		Days		
Component	2004	2005	2004	2005	±	2004	2005	2004	2005	±	2004	2005	2004	2005	±
Headquarters	2,188	1,717	19	19	=	1	42	170	58	–	6	2	16	20	+
Region 1 New England Region	317	249	19	18	–	0	2	29	46	+	0	0	n/a	n/a	
Region 2 New Jersey, New York, Puerto Rico, U.S. Virgin Islands and 7 Tribal Nations	2,949	1,912	27	30	+	7	2	49	40	–	1	1	9	8	–
Region 3 Mid-Atlantic	1,748	1,699	15	13	–	0	9	n/a	4		1	0	7	n/a	
Region 4 Southeast Region	1,034	852	21	19	–	5	71	75	41	–	1	0	6	n/a	
Region 5 Mid-West Region	2,011	1,920	18	18	=	2	3	70	30	–	0	0	n/a	n/a	
Region 6 South Central Region	860	624	18	32	+	1	0	353	n/a		0	2	n/a	109	
Region 7 America's Heartland Region	651	767	23	27	+	0	2	n/a	166		0	0	n/a	n/a	
Region 8 Mountains and Plains Region	387	332	13	15	+	0	0	n/a	n/a		0	0	n/a	n/a	
Region 9 Pacific Southwest Region	725	588	16	18	+	0	39	n/a	38		1	0	6	n/a	
Region 10 Pacific Northwest Region	454	273	20	20	=	1	0	19	n/a		1	0	27	n/a	

+ increase

– decrease

= no change

~ other change (change in reporting, new component, etc.)

Sources: Annual FOIA report, GAO analysis.

General Services Administration

No. = number of requests processed; Days = median days to process; ± = change from 2004 to 2005

	Simple					Complex					Expedited				
	No.		Days			No.		Days			No.		Days		
Agency	2004	2005	2004	2005	±	2004	2005	2004	2005	±	2004	2005	2004	2005	±
GSA	0	0	n/a	n/a		1,182	1,561	14	14	=	0	0	n/a	n/a	

+ increase

– decrease

= no change

~ other change (change in reporting, new component, etc.)

Sources: Annual FOIA report, GAO analysis.

Department of Health and Human Services

Two tables are provided for this department, because its components report both multitrack (simple and complex) processing and single-track processing.

No. = number of requests processed; Days = median days to process; ± = change from 2004 to 2005

	Simple					Complex				
	No.		Days			No.		Days		
Component	2004	2005	2004	2005	±	2004	2005	2004	2005	±
Office of the Secretary	0	0	n/a	n/a		0	0	n/a	n/a	
Administration for Children and Families	*(a)*	0	*(a)*	n/a	~	*(a)*	0	*(a)*	n/a	~
Administration on Aging	0	0	n/a	n/a		0	0	n/a	n/a	
Centers for Medicare & Medicaid Services	31,051	33,583	9	10	+	652	722	77	86	+
Office of the Assistant Secretary for Public Health	72	179	10	10	=	446	611	60	60	=
Agency for Healthcare Research and Quality	0	0	n/a	n/a		0	0	n/a	n/a	
Centers for Disease Control and Prevention	0	0	n/a	n/a		0	0	n/a	n/a	
Food and Drug Administration	13,626	15,539	25	26	+	1,993	1,987	325	370	+
Health Resources and Services Administration	0	0	n/a	n/a		0	0	n/a	n/a	
Indian Health Services	0	0	n/a	n/a		0	0	n/a	n/a	
National Institutes of Health	0	0	n/a	n/a		0	0	n/a	n/a	
Substance Abuse and Mental Health Services Administration	0	0	n/a	n/a		0	0	n/a	n/a	

	Single					Expedited				
	No.		Days			No.		Days		
Component	2004	2005	2004	2005	±	2004	2005	2004	2005	±
Office of the Secretary	1,147	934	55	69	+	1	1	2	60	+
Administration for Children and Families	*(a)*	137	*(a)*	40	~	*(a)*	4	*(a)*	41	~

	Single					Expedited				
	No.		Days			No.		Days		
Administration on Aging	13	22	5	5	=	0	0	n/a	n/a	
Centers for Medicare & Medicaid Services	0	0	n/a	n/a		11	42	66	158	+
OASPH	0	0	n/a	n/a		0	0	n/a	n/a	
Agency for Healthcare Research and Quality	76	94	25	34	+	0	0	n/a	n/a	
Centers for Disease Control and Prevention	977	1,134	36	36	=	2	2	52	52	=
Food and Drug Administration	2,921	1,007	113	86	–	0	2	n/a	100	
Health Resources and Services Administration	416	380	20	20	=	0	6	n/a	14	
Indian Health Services	158,277	151,428	32	32	=	0	0	n/a	n/a	
National Institutes of Health	10,583	13,382	182	173	–	0	0	n/a	n/a	
Substance Abuse and Mental Health Services Administration	132	206	38	45	+	0	0	n/a	n/a	

+ increase

– decrease

= no change

~ other change (change in reporting, new component, etc.)

Sources: Annual FOIA report, GAO analysis.

[a]Component did not exist.

Department of Housing and Urban Development

No. = number of requests processed; Days = median days to process; ± = change from 2004 to 2005

	Simple					Complex					Expedited				
	No.		Days			No.		Days			No.		Days		
Component	2004	2005	2004	2005	±	2004	2005	2004	2005	±	2004	2005	2004	2005	±
Headquarters	1,676	984	95	65	–	248	271	161	160	–	70	74	42	22	–
Field	1,510	1,150	21	21	=	10	15	30	35	+	95	160	23	70	+
Office of Inspector General	354	254	55	45	–	0	0	n/a	n/a		15	15	9	9	=

+ increase

– decrease

= no change

~ other change (change in reporting, new component, etc.)

Sources: Annual FOIA report, GAO analysis.

National Aeronautics and Space Administration

No. = number of requests processed; Days = median days to process; ± = change from 2004 to 2005

	Simple					Complex					Expedited				
	No.		Days			No.		Days			No.		Days		
Agency	2004	2005	2004	2005	±	2004	2005	2004	2005	±	2004	2005	2004	2005	±
NASA	1,069	938	18	19	+	454	410	33	49	+	44	3	26	15	–

+ increase

– decrease

= no change

~ other change (change in reporting, new component, etc.)

Sources: Annual FOIA report, GAO analysis.

Nuclear Regulatory Commission

No. = number of requests processed; Days = median days to process; ± = change from 2004 to 2005

	Simple					Complex					Expedited				
	No.		Days			No.		Days			No.		Days		
Agency	2004	2005	2004	2005	±	2004	2005	2004	2005	±	2004	2005	2004	2005	±
NRC	357	303	11	12	+	27	28	47	75	+	5	14	60	20	–

+ increase

– decrease

= no change

~ other change (change in reporting, new component, etc.)

Sources: Annual FOIA report, GAO analysis.

National Science Foundation

No. = number of requests processed; Days = median days to process; ± = change from 2004 to 2005

	Single					Expedited				
	No.		Days			No.		Days		
Agency	2004	2005	2004	2005	±	2004	2005	2004	2005	±
NSF	309	266	20	14	–	0	0	n/a	n/a	

+ increase

– decrease

= no change

~ other change (change in reporting, new component, etc.)

Sources: Annual FOIA report, GAO analysis.

Office of Personnel Management

No. = number of requests processed; Days = median days to process; ± = change from 2004 to 2005

	Single					Expedited				
	No.		Days			No.		Days		
Agency	2004	2005	2004	2005	±	2004	2005	2004	2005	±
OPM	9,310	10,898	9	14	+	0	2	n/a	1	

+ increase

– decrease

= no change

~ other change (change in reporting, new component, etc.)

Sources: Annual FOIA report, GAO analysis.

Small Business Administration

No. = number of requests processed; Days = median days to process; ± = change from 2004 to 2005

	Single					Expedited				
	No.		Days			No.		Days		
Agency	2004	2005	2004	2005	±	2004	2005	2004	2005	±
SBA	1,927	3,737	5	7	+	0	0	n/a	n/a	

+ increase

– decrease

= no change

~ other change (change in reporting, new component, etc.)

Sources: Annual FOIA report, GAO analysis.

Social Security Administration

No. = number of requests processed; Days = median days to process; ± = change from 2004 to 2005

	Simple					Complex				
	No.		Days			No.		Days		
Agency	2004	2005	2004	2005	±	2004	2005	2004	2005	±
SSA	397	364	19	15	–	882	1,014	37	39	+

	Single					Expedited				
	No.		Days			No.		Days		
Agency	2004	2005	2004	2005	±	2004	2005	2004	2005	±
SSA	1,321	1,555	14	10	–	0	31	n/a	17	

+ increase

– decrease

= no change

~ other change (change in reporting, new component, etc.)

Sources: Annual FOIA report, GAO analysis.

Note: The tables exclude SSA's category of "simple requests handled by non-FOIA staff" and "simple request for Social Security number applications and other Office of Earnings Operations records." The category SSA labels "fast track" was reported under "single track."

Department of State

No. = number of requests processed; Days = median days to process; ± = change from 2004 to 2005

	Simple					Complex					Expedited				
	No.		Days			No.		Days			No.		Days		
Agency	2004	2005	2004	2005	±	2004	2005	2004	2005	±	2004	2005	2004	2005	±
State	1,236	1,647	6	14	+	3,710	2,216	209	142	–	17	7	184	136	–

+ increase

– decrease

= no change

– other change (change in reporting, new component, etc.)

Sources: Annual FOIA report, GAO analysis.

Department of the Treasury

No. = number of requests processed; Days = median days to process; ± = change from 2004 to 2005

	Simple					Complex					Expedited				
	No.		Days			No.		Days			No.		Days		
Component	2004	2005	2004	2005	±	2004	2005	2004	2005	±	2004	2005	2004	2005	±
The Departmental Offices	332	307	2	2	=	782	790	172	251	+	0	0	n/a	n/a	
Alcohol and Tobacco Tax and Trade Bureau	0	168	n/a	86		201	17	78	93	+	0	1	n/a	1	
Office of the Comptroller of the Currency	322	4,635	10	2	–	8,030	179	50	73	+	0	0	n/a	n/a	
Bureau of Engraving and Printing	69	76	4	3	–	44	12	60	31	–	1	0	5	n/a	
Financial Management Service	0	0	n/a	n/a		529	351	7	10	+	0	0	n/a	n/a	
Internal Revenue Service	0	0	n/a	n/a		51,985	42,533	21	21	=	0	0	n/a	n/a	
United States Mint	0	0	n/a	n/a		67	316	15	15	=	0	0	n/a	n/a	
Bureau of the Public Debt	0	0	n/a	n/a		91	90	4	3	–	0	0	n/a	n/a	
Office of Thrift Supervision	0	0	n/a	n/a		1,827	4,003	15	12	–	2	0	n/a	n/a	
Treasury Inspector General for Tax Administration	0	208	n/a	4		256	161	172	30	–	0	0	10	n/a	
Financial Crimes Enforcement Network	0	18	n/a	6		32	122	99	95	–	0	0	n/a	n/a	

+ increase

– decrease

= no change

~ other change (change in reporting, new component, etc.)

Sources: Annual FOIA report, GAO analysis.

Department of Agriculture

No. = number of requests processed; Days = median days to process; ± = change from 2004 to 2005

	Simple					Complex					Expedited				
	No.		Days			No.		Days			No.		Days		
Component	2004	2005	2004	2005	±	2004	2005	2004	2005	±	2004	2005	2004	2005	±
Agricultural Marketing Service	139	120	19	22	+	0	0	n/a	n/a		0	0	n/a	n/a	
Animal and Plant Health Inspection Service	435	922	77	90	+	59	193	800	1,277	+	37	20	53	40	−
Departmental Administration	47	53	35	29	−	0	0	n/a	n/a		0	1	n/a	7	
Farm Service Agency	32	44	16	14	−	0	0	n/a	n/a		0	0	n/a	n/a	
Food, Nutrition and Consumer Service	190	137	6	15	+	0	0	n/a	n/a		0	0	n/a	n/a	
Farm Service Agency	30,430	41,743	14	2	−	22,377	1,155	54	10	−	476	247	13	1	−
Forest Service	1,846	1,426	15	18	+	1,807	2,196	21	18	-	5	42	8	14	+
Food Safety and Inspection Service	0	544	n/a	26		535	0	73	n/a		0	0	n/a	n/a	
Grain Inspection, Packers and Stockyards Administration	52	113	10	8	−	0	0	n/a	n/a		0	0	n/a	n/a	
Grain Inspection, Packers and Stockyards	23	44	5	8	+	0	0	n/a	n/a		0	0	n/a	n/a	
National Appeals Division	322	358	15	18	+	6	12	17	16	−	2	4	5	9	+
Office of Budget and Program Analysis	4	7	1	2	+	0	0	n/a	n/a		0	0	n/a	n/a	
Office of Communications	339	303	18	24	+	0	0	n/a	n/a		0	0	n/a	n/a	
Office of the Chief Financial Officer	0	0	n/a	n/a		36	19	15	16	+	0	0	n/a	n/a	
Office of the Chief Information Officer	2	10	1	10	+	0	0	n/a	n/a		0	0	n/a	n/a	
Office of Civil Rights	0	0	n/a	n/a		82	43	15	28	+	0	0	n/a	n/a	
Office of General Counsel	0	0	n/a	n/a		12	12	34	34	=	0	0	n/a	n/a	
Office of the Inspector General	133	178	5	4	−	47	58	112	102	−	5	7	1	3	+
Research, Education and Economics	0	87	n/a	15		164	115	15	15	=	0	4	n/a	15	
Risk Management Agency	73	57	20	20	=	7	25	60	40	−	1	0	5	n/a	
Rural Development	0	0	n/a	n/a		1,484	1,623	12	12	=	0	0	n/a	n/a	

+ increase

~ decrease

= no change

~ other change (change in reporting, new component, etc.)

Sources: Annual FOIA report, GAO analysis.

Department of Veterans Affairs

The department reports all processing in one track, but it refers to this track as complex, rather than single track.

No. = number of requests processed; Days = median days to process; ± = change from 2004 to 2005

	Complex					Expedited				
	No.		Days			No.		Days		
Component	2004	2005	2004	2005	±	2004	2005	2004	2005	±
Acquisition & Material Management	376	289	4	2.5	–	0	0	n/a	n/a	
Administration	0	1,463	n/a	4		0	0	n/a	n/a	
Board of Contract Appeals	0	0	n/a	n/a		0	0	n/a	n/a	
Board of Veterans Appeals	1,006	1,049	49	19	–	0	0	n/a	n/a	
Congressional & Legislative Affairs	0	*(a)*	n/a	*(a)*	~	0	*(a)*	n/a	*(a)*	~
Diversity Management & Equal Employment Opportunity	0	0	n/a	n/a		0	0	n/a	n/a	
General Counsel	67	65	35	15	–	0	2	n/a	10	
Human Resources Management	45	1	31.5	4	–	0	0	n/a	n/a	
Inspector General	347	287	10	16	+	0	0	n/a	n/a	
Information Technology Support Service	0	0	n/a	n/a		0	0	n/a	n/a	
Office of Management	0	0	n/a	n/a		0	0	n/a	n/a	
National Cemetery Administration	0	19	n/a	15		16	0	18	n/a	
Office of the Assistant Secretary for Human Resources & Administration	0	0	n/a	n/a		0	0	n/a	n/a	
Office of the Assistant Secretary for Public & Intergovernmental Affairs	0	0	n/a	n/a		0	0	n/a	n/a	
Office of the Deputy Assistant Secretary for Budget	0	8	n/a	1		16	0	1	n/a	
Office of the Deputy Assistant Secretary for Intergovernmental Affairs	0	10	n/a	1		0	0	n/a	n/a	
Office of Finance	58	63	15	11.5	–	0	0	n/a	n/a	
Office of Information & Technology	53	72	11.5	51	+	0	0	n/a	n/a	

	Complex					Expedited				
	No.		Days			No.		Days		
Component	2004	2005	2004	2005	±	2004	2005	2004	2005	±
Office of Resolution Management	16	12	5	10	+	0	0	n/a	n/a	
Office of Small & Disadvantaged Business Utilization	0	1	n/a	1		0	0	n/a	n/a	
Policy and Planning	0	0	n/a	n/a		0	0	n/a	n/a	
Public Affairs	0	0	n/a	n/a		0	0	n/a	n/a	
Security & Law Enforcement	0	*(a)*	n/a	*(a)*	~	0	*(a)*	n/a	*(a)*	~
Office of the Secretary	16	6	45	60	+	0	0	n/a	n/a	
Veterans Benefits Administration	93,296	83,332	15	15.5	+	384	88	5	4.5	–
Veterans Canteen Service	0	0	n/a	n/a		0	0	n/a	n/a	
Veterans Health Administration	1,699,079	1,814,837	4	1	–	20,730	13,409	1	1	=
White House Liaison	0	0	n/a	n/a		0	0	n/a	n/a	

+ increase

– decrease

= no change

~ other change (change in reporting, new component, etc.)

Sources: Annual FOIA report, GAO analysis.

[a]Component did not exist.

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Mr. PLATTS. Thank you, Ms. Koontz.

We again appreciate both of your testimonies and, in a broader sense, both of you for your service in your respective positions to our Nation and our citizens, and your important work.

I would like to begin the questions with maybe a broad perspective or question on the Executive order. Aside from the actual plans being submitted and having a strategy going forward, what would you say is the most significant improvement that has come from the Executive order being issued within the departments and agencies, from your read of how FOIA is looked at or being acted upon?

Mr. METCALFE. I think I can speak to that, Mr. Chairman, by making reference to a word that was used by Senator Cornyn in his statement just a few minutes ago. He said that the very existence or issuance of the Executive order has elevated the whole subject of Freedom of Information and the Freedom of Information Act's administration in particular. I think part of that elevation idea is that it has drawn more and more attention to it. It has drawn a higher level of attention to it within agencies just in the appointment of the Chief FOIA officers, for example, at very high levels, and a high level of accountability.

I know that when I talk to Federal agencies, and I work very hard to encourage them to do the right thing and to administer the act in a uniform and consistent and proper fashion, I am able to wield the Executive order, if you will, in that sort of conversation. What is more important than that perhaps is that in turn I encourage them to wield it internally within the agencies. From time to time, you might imagine that FOIA officers get some resistance or less than maximum cooperation from others involved in the process, who are necessary participants, program personnel and the like, and the Executive order and its importance can be wielded in a very positive way in that sense.

Mr. PLATTS. Thank you.

Ms. Koontz.

Ms. KOONTZ. I would agree that the Executive order has provided more emphasis on the importance of FOIA and on FOIA processing. Two things in particular that occur to me, and one is that it improves accountability through requiring agencies to appoint chief FOIA officers which I think is important, and in addition, it provides a results-oriented framework for agencies to move forward. And I think if agencies are serious in terms of their improvement plans, I think we will see, we may see significant improvements in FOIA operations.

Mr. METCALFE. I have to concur, of course, with what Ms. Koontz says as well. I think she is absolutely correct in that respect as well.

Mr. PLATTS. Thank you.

I think the fact that the President issued the Executive order, in raising the kind of focus and attention and in that having certain requirements such as submitting the plans by June 14th. At that time, three of the departments and agencies, the State Department and USAID and Department of Homeland Security, had not submitted theirs. They have since. But again, even though the President said I want this done, three did not do it when it was sup-

posed to be done, and it really goes to the final comments of our first panel about consequences.

Are you aware of any consequences that have been pursued or announced for failure to meet that deadline or, as we go forward from here to the November 15th timeframe, any consequences that have been delineated out there?

Mr. METCALFE. Well, as to the first part of your question, Chairman Platts, I would have to say no, I am not aware of anything that you have delineated per se. I do know that as the process unfolded, that we worked very hard with agencies to remind them of the importance of meeting that deadline.

Ms. Koontz correctly points out that three of the agencies did not meet it. The State Department, although not having its report and plan in by the June 30th cutoff that they needed to perform their good work at GAO, it did have its plan in by July 7th, and AID, I believe, was in roughly the same timeframe. DHS was in a slightly different category. I believe it was more recent, but I can tell you firsthand, based upon talking to DHS, that it was not for lack of high level attention to that and trying to move the process forward as quickly as possible.

As for consequences in a broader sense, I can point out that the Executive order has built right into it a couple of mechanisms that are of note. The first is that the Attorney General is charged by the President under the Executive order to file a report, submit a report rather to the President by October 14th with an eye toward the agencies' plans; and the second is that at the first stage of agency reporting of their results, agencies are obligated if they do not meet any particular milestone in their plan, to report that as a deficiency or at least as a failure to meet a milestone to the President's Management Council. That is built right into the Executive order itself.

As to consequences in a broader sense, and I know the question of penalties has been raised in a broader sense, even discussed at the hearing last May, I do have additional information regarding that, and I am not sure whether you want to get into that quite yet at this time.

Mr. PLATTS. We will come back to on that.

Ms. Koontz, did you have anything you wanted to add?

We are going to come back for additional rounds, but I would like to yield to the ranking member, Mr. Towns, for the purpose of questions.

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

I sort of want to pick up on something you started. Mr. Metcalfe, can you offer us specific examples of what DOJ has done to enforce agency compliance with FOIA?

Mr. METCALFE. How much time do you have, Congressman, because we have been doing a lot of things for a great many years? And I am not trying to be flip in my response. There are many, many things that we have done.

Mr. TOWNS. How about a few? I have a little time.

Mr. METCALFE. All right. The first is something that we used to call our Short Guide to the FOIA, and we lost our right to call it that many years ago. We prepare a very lengthy guidance document for Federal agencies. It is one of GSA's, pardon me, GPO's big

sellers, and we send it around Government-wide. We do an enormous amount of training, both individualized at agencies and on a Government-wide basis as well. We have a FOIA counselor service that sometimes is known affectionately as the hotline. We receive more than 3,000 telephone inquiries per year.

We handle litigation, and that can lead to a guidance function as well, but I think perhaps the final thing I should mention with respect to Government-wide guidance is that we do develop policy and disseminate that. All of that policy is aimed toward making sure that agencies understand the best and most proper way to apply the law and to do so on a uniform basis.

Perhaps I can sum up my answer by saying we take great pains every year in an annual report that we file with Congress. It is filed on a calendar year basis under the law as it stands, not a fiscal year basis, and we file that April 1st of every year. At the final portion of that report, we have many pages that are called, the report is titled Department of Justice's Efforts to Encourage Uniform Compliance with the act. You can just read through that and see the many, many different things that we do.

Mr. TOWNS. The Department of Homeland Security has not submitted a FOIA improvement plan as required by the Executive order.

Mr. METCALFE. I apologize for interrupting, Congressman Towns, but my understanding, and this is something I learned just today, is that it has finally been submitted.

Mr. TOWNS. It has happened?

Mr. METCALFE. Yes, sir, and I learned that from Ms. Koontz who sometimes educates me just as I do her. We go back and forth that way, very symbiotically.

Mr. TOWNS. Well, I thank both of you for educating me because as of this morning, that had not been. When did that happen?

Ms. KOONTZ. We received the DHS plans, I believe, on Monday, but I don't know that it has been made publicly available on the Web site, but they anticipated the hearing and did give us a copy of the report.

Mr. METCALFE. I think Ms. Koontz is correct, that it is regrettably not yet posted. There is sometimes a lag between issuing and posting, unfortunately.

Mr. TOWNS. Right. Well, let me just move to the question. If an agency does not comply, what do you do?

Mr. METCALFE. Well, I assume by that question, Congressman Towns, you mean the June 14th deadline that we are speaking of.

Mr. TOWNS. That is correct, yes.

Mr. METCALFE. Well, we did a number of things. We did have some agencies, as you know, that had not met that deadline, and in every one of those instances, someone in my office and then followed up by me personally contacted the agency to discuss that. In some instances, we had extensive discussions about particular difficulties that had been encountered by the agencies. I should emphasize here that it is a relatively small number of agencies involved here, just a handful or two or so. That led to most of those agencies complying very quickly. However, as you have identified, there were three agencies that took a little bit longer than that.

Mr. TOWNS. I guess to you Ms. Koontz, if we were to remove sensitive or intelligence-related information, how well would intelligence community agencies like the CIA and State have done in fulfilling FOIA requests?

Ms. KOONTZ. That is a question I cannot answer based on the data that we have in the annual reports. I have no way of removing that kind of specific information, those specific requests.

Mr. TOWNS. Let me try it this way then. Is there a correlation between the increase in the number of FOIA request backlogs and the restrictive policies put in place by certain agencies?

Ms. KOONTZ. We are still in the early stages of our work. We haven't run those kinds of analyses. I don't know if it is even possible to do those kind of correlations based on the data that we have, but we will look very closely at the data that was reported, and we will be following up with individual agencies to see what it is we can learn from that.

Mr. TOWNS. I see my time has expired. Mr. Chairman, we are getting another round?

Mr. PLATTS. Yes, Mr. Towns, we will come back.

Mr. TOWNS. Thank you.

Mr. PLATTS. Mr. Gutknecht.

Mr. GUTKNECHT. Thank you, Mr. Chairman.

In response to what Mr. Towns just said or at least it sparked my memory of something that happened to me recently and for the benefit of the committee and those that may be here. I was briefed recently by some folks in the Intelligence Committee about a couple of issues, and one of the pieces of information seemed incredibly innocuous, and then they quickly said, but that is top secret.

I said, why?

They said, well, the information itself is not but how we got it is, and so we have to sometimes be sensitive to the sources of the information that we have.

So I do want to give some benefit of the doubt to Homeland Security.

I want to come back to something I raised earlier that I have been involved with and more importantly, my staff has been involved with for over, I think, it is almost 2 years. It is over a year and a half. That is there is an individual who had embezzled a bunch of money from his clients, and he was ultimately convicted. The local newspaper, the Faribault County Register, wanted to run a picture of his mugshot, and the local U.S. Marshal's Office in St. Paul said that they don't give out those, even after they are convicted.

Mr. Metcalfe, is there a clearly defined policy because it is our understanding and particularly through the Newspaper Association, that varies from region to region? Is there a set policy on that?

Mr. METCALFE. Congressman, I remember your mentioning that in your opening statement, and I have been thinking about that a bit since then, so that I can give you a clear and comprehensive answer. In general, and I am speaking now about the policy of the U.S. Marshal Service, a component of the Department of Justice. In general, they have a policy of applying a privacy exemption, specifically Exemption 7(c) of the FOIA, which is the Law Enforcement

Privacy Exemption, to such photographs that are commonly referred to as mugshots.

I think I can discern, however, a basis or perhaps the basis for your questioning in that regard, in that there is an appellate court decision that was issued by the Sixth Circuit Court of Appeals. The plaintiff in that case was the Detroit Free Press. It came down many years ago, and it ruled a different way. The Marshal Service, I believe, does follow an exception to its policy for any FOIA requestor within the geographic boundaries of the Sixth Circuit, Tennessee, Kentucky, Michigan, and Ohio, based upon that decision. That is my best current understanding, sir.

Mr. GUTKNECHT. I think that is a very good understanding. You have done a better job of explaining it than anybody.

Mr. METCALFE. Well, I had more time to think about it, perhaps, sir.

Mr. GUTKNECHT. But I have waded into this, and it leads me to my next question. Finally, on March 21st of this year, I wrote a letter to the Assistant Attorney General who is responsible for this and on May 1st, I got sort of an acknowledgment that they received my letter and that they would get back to us. Today is what, July 27th.

Mr. METCALFE. I believe it is the 26th, sir.

Mr. GUTKNECHT. The 26th, as of today, we have not received any further correspondence on this matter. The reason I raise that is I don't think Members of Congress ought to get special treatment, but if it takes a Member of Congress that long to get a response, I think it is legitimate for us to ask is that pretty much the standard because we heard from Ms. Koontz that some are as quickly as 10 days. That really hasn't been the experience we have heard about.

Obviously, if people get a quick response and get what they want, they probably don't call us, but if it takes us that long to get an answer, is it fair to assume that maybe other people take a long time as well?

Mr. METCALFE. Congressman, if I could speak to that just to interject, I think I can say two things in particular directly responsive to your question. The first is that, although I do not know of the current status of any such particular matter, I would be pleased to take that back with me today and to express your concern regarding what we would call a congressional inquiry type matter.

The second thing goes to the phrasing I just used which is I think it is important, please correct me if I am mistaken, to keep in mind that your correspondence was a congressional inquiry; it was not a FOIA request. By that, I mean to say it is a delineation that is significant. Sometimes there are considerations that come into play with responding very, very carefully to a congressional correspondence item that have nothing to do with FOIA requests per se. So the two really are distinct.

Mr. GUTKNECHT. Ms. Koontz, though, more specifically, would you include in your 10 days, does a letter of acknowledgment of the receipt of a request constitute a response?

Ms. KOONTZ. I am sorry. Does it a constitute a response to the request?

Mr. GUTKNECHT. As you keep score, when you said some were responded to in as quickly as 10 days, is that 10 day response merely an acknowledgment or is a real response to what the request was?

Ms. KOONTZ. My understanding is it is a real response to the request. I think the thing that is important to keep in mind here is that FOIA processing varies widely among different agencies and probably within different departments and different components within agencies. Some FOIA requests are very straight forward. It could even be a request for a one's own medical records, say, at the VA, which can be turned over instantly or within a very short period of time.

Others at other departments, you can imagine at the CIA, we are talking about having to maybe search voluminous amounts of information, perhaps redact information that should be kept confidential. The level of complexity, the numbers, the types, the missions of agencies cause this to be very different at different places and at different points in time.

Mr. GUTKNECHT. We understand that. Mr. Chairman, I am not a big believe in PowerPoint demonstrations always, but I think this is one where it might be helpful if you could put together something that would put into context because I do think there is a big difference between simply requesting whether or not grand-dad ever got his Purple Heart or other kinds of information that may contain therein some sensitive things that do need to be redacted. I understand that.

Mr. Chairman, I hope we will have another round because I want to get to a couple of other questions.

Mr. METCALFE. Mr. Chairman, if I could ask just for a brief interjection.

Mr. PLATTS. Yes.

Mr. METCALFE. I am able to give a very specific response to Congressman Gutknecht on that exact question and very quickly say, no, an acknowledgment letter such as you describe is not responding to a FOIA request as a matter of both law and policy. agencies issue acknowledgment letters all the time, but that has nothing to do with complying with the statutory deadline. A full decision and disclosure thereafter are what is necessary to comply.

Mr. PLATTS. Thank you for that important clarification, Mr. Metcalfe. We will come back around for a second round.

I want to followup on that exact point with Mr. Gutknecht on the difference in looking, Ms. Koontz, at your data and as always at GAO, you do a great job of compiling and presenting. If I am reading it correctly in the materials included in your statement, where it has for each of the departments and agencies, the numbers of requests processed in 2004 and 2005 and the median response time, I tried to pick two that don't get into national security and law enforcement that are more sensitive. The Small Business Administration which has no backlog is what they are saying, and for 2005, they had I think 3,737 requests processed with a median days to process of seven. Comparing that to the Department of Education which had 1,874 and a median days of 35.

Are you able to share any insights on that comparison of why we would see such a disparity, one getting twice as many requests and yet its median response time is one-fifth the amount of time of the

other agency and neither one of them being in National Security, things that we would think of as more sensitive for our Nation?

Ms. KOONTZ. I think you zeroed in on some questions that we certainly have about the data. The one, the information that we presented in this report is based on what the agencies report in their annual reports which is aggregate data. What we don't get from the annual reports is a sense of what the character of those requests are or how difficult they are or what they are for. I think until you could go in and actually look at individual requests and understand what the differences are, I don't think that you could answer that question, and that would be, I mean, tremendously difficult to do too because it is talking about going back to the individual requests and evaluating them.

Mr. PLATTS. I agree. It will be challenging, but it may be something, as we try to get to the crux of the problem here, that would give us a more factual basis of what is working or what is not working because it is quite a different in median time and again for two agencies you would expect to have more straight forwarding handling of these types of requests.

Ms. KOONTZ. I think what might be, I mean, frankly, the only way to really I think understand FOIA and some of the barriers in terms of processing is to get down to that level as well. This might be the kind of thing that perhaps as we do our ongoing work, we can identify some examples like that and talk about the differences between, say, an SBA and some other agency or the difference between VA and SSA and why they are able to process things so quickly compared to other agencies where it is much more difficult. So that might illuminate some of these differences.

Mr. PLATTS. Mr. Metcalfe, a followup on that same issue is with your efforts in compliance, I assume as opposed to a stick approach of, hey, you are not doing this; you are not following the law. As far as knowledge sharing, is there any effort within the Department of Justice to say to Education, we have looked at your annual numbers, and based on what you are telling us, you are taking five times as much time as SBA is with half of the workload; perhaps we want to get the two of your agencies together to see what they are doing differently?

Is there any type of dialog of that nature that departments interact and say, what are you doing that is working compared to apparently what is not working ours?

Mr. METCALFE. Yes, Congressman, I think my answer is best twofold. One is with respect to the ongoing activities we have in general and have had for many years of getting agencies together in a program such as our FOIA Administrative Forum where we get journeymen FOIA officers from all the different agencies together to share best practices and ideas like that and the like. We do do that sort of thing and have done it for a while.

Now beyond that, under the current Executive order, we have a basis for focusing and discussing even more particularly as we see what agencies do in the implementation of their plans in this current phase that will end in mid-January or February 1st of next year.

Mr. PLATTS. Is there, when you do those programs, mandatory participation of departments and agencies?

Mr. METCALFE. I think the word mandatory, Chairman Platts, is a little bit strong, but I can tell you this. We have no trouble filling the seats. As a matter of fact, it is quite to the contrary. We have run a backlog, if you will, of our own of people who are waiting lists for our training, and we train literally thousands and thousands of agency personnel as there is turnover in that particular area and always new people are coming in. So, although it is not mandatory in the sense in which I think you mean it in the question, it has never struck us as a difficulty in getting people there.

Mr. PLATTS. Maybe pursuant to the Executive order, having the chief FOIA officers that have now been designated is a sense of there being a formal and more mandatory participation. Something I am assuming you don't do that may provide that incentive in a maybe less public way but inside the agencies, more public, is when they come into that meeting, if these charts that GAO put together with number of requests and median times to process are listed across the board where all of them are together and they are all going to say, hey, we look pretty good up there or they are going to say, we don't look good up there. The next time I walk into that meeting room, I am going to do my best to improve my process because I am going to be with my colleagues.

Mr. METCALFE. I take your point, Chairman Platts, and I appreciate your reminding me that under the current Executive order, we have had programs that are perhaps not most precisely described as mandatory but pretty darn close. That program we had for chief FOIA officers on March 8th was just such a program, and then the one that we had for all the FOIA Public Liaisons on July 11th was very much along those lines as well. Those are people who are at a lower level within the agencies. As we all know as a practical matter, the ability to mandate, if you will, attendance increases, the lower the level of the employee, but we were very pleased with the level of attendance we had on March 8th, getting all of those chief FOIA officers together.

Mr. PLATTS. Is there anything in the works now for a followup on that as they have now submitted their plans and move forward?

Mr. METCALFE. Well, we are going to be following the Executive order itself. To use a phrase that was used earlier, that is basically a blueprint of what is done, and the next step under the Executive order is for the Attorney General to file that report to the President. Frankly, that is our focus at this point. That is not so very far away. But I think one could reasonably imagine that we would be doing very logical things in the future entirely consistent with, I think, the very good things that we have done thus far this year.

Mr. PLATTS. I appreciate your Department's efforts, and I do think the more transparency, the more incentive, because with that transparency and sunshine shooting in, the more people feel obliged to try to bring their scores or in this case, their compliance times, up.

Mr. METCALFE. Absolutely, and we believe in transparency about transparency as well.

Mr. PLATTS. Exactly.

I yield to the ranking member, Mr. Towns.

Mr. TOWNS. Thank you, Mr. Chairman.

Let me just go back to you, Mr. Metcalfe. What is the Justice Department doing in its oversight of agencies that have a higher percentage of FOIA requests that end up in litigation? Does the Justice Department support agencies waiting until a lawsuit takes place? What is your position on all this?

Mr. METCALFE. OK, I think for purposes of clarity, Congressman Towns, I probably should divide that question into its two basic parts. As to the first part, we do handle litigation. We are very much aware of what happens in litigation and agencies that are sued and the results of those, and we certainly factor that into our training programs.

For example, just one concrete example, I gave a presentation just last week for several hours, together with the Deputy Director of OIP, and two of the cases that I emphasized right there were cases in which two agencies—they will remain nameless today, but their initials are—no, I am kidding. I won't say that.

Two agencies that were sued in that case——

Mr. TOWNS. I missed the initials.

Mr. METCALFE. You know, this mic, it is just going on and off. It is in and out. That is the problem.

But we made very specific use of those two cases involving those two agencies, Congressman Towns, to help educate other agencies as well.

As to the second part of your question, I think it was a little bit different, and please help me to remember it correctly.

Mr. TOWNS. Actually, do you wait until a lawsuit is filed before releasing information?

Mr. METCALFE. Yes, pardon me. Strike that last word, please. Yes, I now remember your question. No, agencies in general or generally speaking do not do that and ought not to do that as a practice whatsoever. I think that what is underlying your question has to do with the question of attorneys' fees and specifically how things work under the Supreme Court's Buckhannon decision, and that is a decision that does have an effect on the award of attorneys' fees, but we make it very clear to agencies that they ought not to do that. As a matter of fact, one of the cases that I alluded to earlier had that aspect to it, where the judge criticized an agency for doing something that could be perceived as what you mention in your question, Congressman Towns, and we held that agency up a negative model. We said: Don't do that; that is not the way to do things.

Mr. TOWNS. I want to just sort of followup on something I think Mr. Gutknecht asked earlier. I just want to get clarification of it. Now if it is a congressional request, that is handled differently? Did you say that? I want to make certain I understand that.

Mr. METCALFE. Yes, I think it is accurate across the board for virtually all, if not all, Federal agencies to say they have certain channels for handling certain things. One channel or track is the FOIA, and the FOIA track handled by FOIA personnel, and almost all agencies have congressional Affairs Offices that work very hard on handling congressional inquiries. They are tracked or channeled in different ways. Sometimes a congressional inquiry can verge on the subject matter of a FOIA request or even be about the handling

of a FOIA request, but their handling on different tracks is distinct.

Mr. TOWNS. What is DOJ doing to ensure that agencies with significant classified information, such as DHS or DOD, are complying with the requirements of FOIA and EFOIA for commonly requested information?

Mr. METCALFE. OK, there are multiple elements built into your question, Congressman Towns. Let me say first, and this is going to sound like a hypertechnical point, and I apologize if it strikes you that way. We do a lot to encourage agency compliance, but we don't have the absolute authority to ensure anything. So I am just picking up on that word first.

But with respect to classified information and whether information is withheld or not, we work with agencies to make sure that they understand how that part of the FOIA works, Exemption 1, and a big part of our guide to the FOIA deals with all the case law discussing the standards and requirements under Exemption 1.

The third part of your question, however, goes to an additional element of the FOIA, I believe. I think you were talking about frequently requested records.

Mr. TOWNS. Right.

Mr. METCALFE. That specifically is a reference to a provision of the FOIA that was added in 1996, Subsection A(2)(d) that basically says that if an agency has received a FOIA request and processed records and then either envisions, based upon its own experience, that there will be multiple requests in the future or in fact receives those multiple requests in the future for that same information, it has an automatic obligation to make that information affirmatively available in the reading room. If it is information generated or created by the agency rather after November 1, 1996, that has to be produced electronically in the electronic reading room.

So the best way I can integrate those two elements together to answer your question in sum is to say if information is found not to be classified, sort of around the edges, if you will, of classification parameters, and if it is requested multiply, then we strongly encourage agencies, and they are doing a better and better job all the time, to meet that obligation under the 1996 amendments and to get that information out on their electronic FOIA Web sites.

Mr. TOWNS. Thank you very much, Mr. Chairman. Thank you, and I yield back.

Mr. METCALFE. Thank you.

Mr. PLATTS. Thank you, Mr. Towns.

Mr. Gutknecht.

Mr. GUTKNECHT. Thank you, Mr. Chairman.

I want to come back to some of the points that have been raised by the panel that spoke first, and let me just put it into my own view. There are three or four things that I think we need to revisit as a Congress. Let me just throw them out and I would like to get your responses to them.

First is the issue of whether or not we should have some kind of, the term I would use, sunset upon any exemptions, the idea of making each agency defend on some kind of a regular basis whether or not they should be exempted from provisions of FOIA.

Second is clarifying the burden of proof. It is something that I think most of us thought we had already resolved, but apparently there are still some differences about that, whether or not that burden should be on the Government or the person or groups that are requesting information.

I mentioned the mugshot issue. I think that needs to be clarified, and we ought to have uniform policy throughout the United States relative to the availability to the media, particularly of convicted felons. I understand here in the United States, we believe people are innocent until found guilt, and I would even acknowledge that we don't need to necessarily require that those be released if someone is simply charged with a crime.

Finally, an issue that has been raised, and I would like to get your response to this, is whether or not maybe it is time to have some kind of an office of ombudsman where there is some kind of a fair or honest broker in this whole process because, well, I won't even get into because.

I would just like your response on what you think about a sunset, the burden of proof. We have already talked about the mugshot issue, so I don't know if you want to respond to that. Then finally, the issue of some kind of an ombudsman. I would appreciate your responses to those.

Thank you.

Mr. METCALFE. Well, Congressman Gutknecht, I suppose I have to divide those four into a couple of categories at least to give you the best answer that I am capable of giving today, and the first is that the sunset provision and the mugshot issue are those that were posed, if I understand you correctly, in light of possible perspective legislation. That is not something that I am in a position to speak to today. That is something that is sort of hypothetical. I know witnesses say they don't like to answer hypotheticals all the time, but that is something maybe for a later day. I don't want to, by that answer, convey lack of caring about those issues. It is just that it is a little bit premature at this point.

With respect to the burden of proof, though, I think I can speak to that directly, again not in a legislative context because there might be a misconception there, and help me please if I misunderstand you or you misunderstand me. The law is very clear, I mean crystal clear, that the burden of proof is on the Government. That is something very distinct, not entirely unique but very distinct about FOIA and FOIA litigation. When we go to court, a FOIA requestor, now a plaintiff before the judge, can sit back and just say: Listen, I made a FOIA request. I am not happy with the response I got. That is it.

Then the Government has the burden of proof in all respects going forward. So that is something that is very solid as a matter of FOIA statutory law and case law and practice as well.

Finally, with the respect to the ombudsman, that might be in that first category because obviously that does connect to legislation that I think was introduced that we are not really discussing here today, but I can point out that it is a fact that the Office of Information and Privacy has an ombudsman function. We have had it for many years. I don't want to mislead the subcommittee by suggesting it is a very large scale activity, but that very same an-

nual report that I mentioned earlier in response to Congressman Towns contains, at the end, a discussion of our ombudsman activity and also contains a citation to some publications where we have talked about that. So it is a fact that we have done that on an admittedly relatively small scale in our office for many, many years.

Ms. KOONTZ. Most of these areas, I cannot comment on because I think our work hasn't been directed in these particular areas, but I did want to comment for a moment on the office of ombudsman, at least something related. What we have seen in our previous work, when we were particularly looking at fee-related sorts of issues, is that one particular agency that we studied, that communication between the agency and with the FOIA requestor was not always as clear as it needed to be. One of the things that we walked away from that study with was that agencies needed to say more about why they were making decisions and why they came out the way that they did because we found that in the absence of information, individuals filled in the blanks themselves and came up with all kinds of actual erroneous conclusions.

So it would seem to me that related to this, one of the things that we probably need to do, which I think also isn't contained in the Executive order, and that is to improve the way we communicate with requestors, so that they actually understand the basis for what the decisions are.

Mr. GUTKNECHT. Thank you, Mr. Chairman.

Mr. PLATTS. Thank you, Mr. Gutknecht.

I want to followup, Mr. Metcalfe, on that burden of proof issue. I don't have the exact language. I couldn't find it quickly in front of me. With the issuance of the Ashcroft memo that rescinded the Reno position, and I will paraphrase. Under Reno, it was find a way to comply and to make the information available, and Attorney General Ashcroft took a different approach where it was emphasizing the use of exemptions to deny the request. Am I paraphrasing that wrongly? If not, it seems that memo that is standing as of today is really trying to undercut the integrity of the right to know and the Government's right to explain why it shouldn't be released.

Mr. METCALFE. I do disagree with you very strongly, Chairman Platts, that the Ashcroft memo undercuts the integrity of anything, including FOIA administration. I can tell you that I am intimately familiar with both of those memoranda, and I think part of what you said does reflect a misconception or an over-generalization or an overstatement.

You did use the phrase, different approach. I think, undeniably, the two memoranda take a somewhat different approach and that they are different in tone to be sure, but they cannot alter the burden of proof under the FOIA, which is built right into the statute itself. Again, having been very closely involved in the processes leading up to and including the issuance of those memoranda, I think they are best looked at—I have stated this publicly in many forums—as largely a matter of difference in tone and approach to the FOIA.

Mr. PLATTS. How would you summarize the Ashcroft memo of its intent? If I am paraphrasing it inaccurately, how would you paraphrase its use of exceptions and how it is giving guidance?

Mr. METCALFE. I think the best paraphrase of it, Chairman Platts, would be to focus on one word in particular that appears over and over in the memo, and that is careful. The Ashcroft memorandum encourages agencies or urges Agencies to be careful in their FOIA decisionmaking. By that, I mean to say in their consideration of FOIA exemptions, whether the exemptions, pardon me, whether the interest involved in particular records are cognizable under exemption and whether the information should be withheld.

Also, I should hasten to add, it does speak of the concept of discretionary disclosure. It does not advocate discretionary disclosure in the way that the Reno memorandum did. That is a change in policy to some degree but not to a complete degree, and it is not the radical change that has been portrayed in many quarters since late 2001 or early 2002.

Mr. PLATTS. All right, I have learned as one of five kids that we sometimes have to agree to disagree in a respectful way because I do see it differently, especially in the tone. I would acknowledge and you are very much correct in saying it doesn't change the statutory burden.

Mr. METCALFE. I, in turn, concur with your characterization of tone, Chairman Platts. Absolutely, we are on exactly the same page in that respect.

Mr. PLATTS. Yes, and that is, I guess, part of the concern. The intent, I think, of the Freedom of Information Act from the beginning was this is a Government of, for, and by the people, and when in doubt, be open with the exceptions of true National Security and personal privacy. I thought it was unfortunate that memo was issued and changed that tone from the top. We will have to disagree on maybe how it was interpreted.

Mr. METCALFE. If I could respectfully just add one more relatively small point or maybe not so small point with Ms. Koontz sitting here, on my side of the disagreement and that is GAO, not long after the issuance of the Ashcroft memorandum, undertook a study, I believe at the request of the predecessor of this subcommittee, if I am correct, and Ms. Koontz directed that study. It concluded that as a practical matter, the import or effect of it was not nearly as it had been portrayed or suggested in many quarters. Is that a fair characterization, would you say, Ms. Koontz?

Ms. KOONTZ. I should probably clarify what we did at the request of Senator Leahy. Early after the Ashcroft memo was issued, we undertook a survey of FOIA personnel to determine what they thought the effect of this would be on discretionary disclosures, and at the time, 48 percent of the FOIA officers said that they didn't think that it would increase, decrease the likelihood of discretionary disclosures. However, there was a full third of the FOIA officers who did think that it was likely to decrease discretionary disclosures. Now that is entirely based on their views and that there was no way for us to verify that as a matter of fact.

Mr. METCALFE. I have to concur, Chairman Platts, that there certainly is an impact with respect to discretionary disclosures. Undeniably, although it is mentioned as a concept, as a basic point of practice in the Ashcroft memo, we are not advocating that under

the Ashcroft memo nearly as much as we did under the Reno memo. That is absolutely so.

Mr. PLATTS. Thank you.

A final quick question and then if Mr. Towns has any other questions, and then we will need to move to our third panel.

That is just, Mr. Metcalfe, you mentioned to a previous question from Mr. Towns about DHS and getting them to reply and what your response was when they didn't meet the deadline. You stated that through staff in your office, there were communications of where is it or why haven't you complied. Can you capture what was the main basis for their explanation? Why didn't they? Why did it take 5 weeks past a Presidentially set deadline for them to comply?

Mr. METCALFE. OK, I will try to answer that in two particular respects, Chairman Platts. The first thing is I should clarify that with DHS in particular, that was not something that was handled at the staff level in my office. I personally made a series of calls to a series of individuals at a very high level, basically the highest levels that one might imagine at DHS.

Mr. PLATTS. Are you saying to the Secretary's Office of the Chief FOIA Office?

Mr. METCALFE. I am reluctant to go into detail about that, but I have no basis to disagree with your characterization. [Laughter.]

I wanted to make very sure that this was well understood at DHS. By that time, I thought there was a darn good chance, not a certainty but a darn good chance that there would be a hearing at the end of July, and that is part of the landscape to be sure.

As to what their circumstances were, I am reluctant to go into any detail that they disclosed to me because I think it might be more appropriate to ask DHS, and by that, I mean to say, and I don't mean to imply that there is some terrible thing that I know, that I am concerned about blurting out to their disadvantage. Far from the contrary, I can assure you in general that there was very positive, constructive, high level attention being paid to this, and that if you heard from DHS directly, you probably would reach the same conclusion.

Mr. PLATTS. The final followup to that, and this certainly is asking your opinion because you only can give that with the question I am going to ask. If this hearing had not been scheduled for today, do you think that plan would have been submitted on Monday or would we still be waiting for it?

Mr. METCALFE. I would hesitate to hazard a guess as to that. I would be speculating even if it were educated speculation.

Mr. PLATTS. Understood, it is a speculation, but what would be your best speculation you could offer?

Mr. METCALFE. My best answer is I am genuinely not certain.

Mr. PLATTS. OK, I appreciate it.

Ms. Koontz, any thoughts on the issue, the fact that it was 5 weeks until we got it, 5 weeks late, and it happened to arrive or be issued, not public yet, 2 days before this hearing on this issue?

Ms. KOONTZ. I think without the actions of the Department of Justice, we wouldn't have a DHS plan today, and I think it is probably important for you to know that the report we did receive essentially states that they believe that their plan as it exists right

now is adequate and that they are going to reissue it anyway in 3 months.

Mr. PLATTS. And they are going to come back in 3 months, right. So I read that to be that while we have to issue something because there is a hearing, but we are telling you up front it is really not a plan that we can act on.

Ms. KOONTZ. Right.

Mr. PLATTS. Really, from the fulfilling the intent of the requirement, we really don't have a compliance.

Ms. KOONTZ. That would be correct.

Mr. METCALFE. If I add just one thing briefly, Chairman Platts, and again I am not suggesting that I am here carrying the water, so to speak, for DHS.

Mr. PLATTS. I want to say, sincerely, your insights and your frankness have been very much appreciated. Your taking your responsibility such as Ms. Koontz referenced and your getting engaged personally with DHS, I think is admirable and we are glad for it.

Mr. METCALFE. I appreciate your comments. Frankly, I think it is characteristic of how we have taken our efforts very seriously throughout the implementation of the Executive order, including suggesting 27 possible areas for inclusion, not that they are mandatory, to use a word you used earlier, far from it.

But there is one additional fact that I can throw out just for the record because I am aware of it. The position that holds responsibility over FOIA administration within DHS' structure is the Chief Privacy Officer. That person also has oversight, if you will, over FOIA as well, and the current incumbent in that position was named last Friday and took office just Monday morning. I wished him well among other things when I spoke with him Monday morning.

Mr. PLATTS. How long was it vacant, the position, do you know?

Mr. METCALFE. I can provide a little bit of information. The first Chief Privacy Officer at DHS, Nuala O'Connor Kelly, I believe resigned or left Government, I am going to say about the second week of September of last year. Her Deputy, Maureen Cooney, was acting in that position, and I know Maureen announced not so very long ago that she would be leaving the Department sometime soon, and it was not long after that announcement that Hugo Teufel, who I had known when he was at the Department of the Interior in the Solicitor's Office, was named to replace Maureen.

Mr. PLATTS. The reason I ask is I appreciate that the current officer is new, but this is something that they had 6 months knowledge that it was due in June. So the acting, whoever was there being responsible for fulfilling an Executive order, there were persons there in a position that should have been working to fulfill the requirements of the Presidential order.

Mr. METCALFE. Chairman Platts, you sound just as I do when I am on the phone in a situation like that. As a matter of fact, I dare say you could very amply do my job with exactly that approach.

Mr. PLATTS. I am not sure about that, especially because what perhaps you need a little more of is mandatory compliance authority versus advisory authority. Maybe it would make herding the

sheep a little easier if you could tell them what to do rather than as far as encouraging them what to do.

Mr. METCALFE. Not to abuse your metaphor, but I think sometimes it is more like herding cats.

Mr. PLATTS. I can imagine. [Laughter.]

Mr. Towns, did you have anything else?

Mr. TOWNS. I just have one question I would like to ask Ms. Koontz. Now that the Executive order has been issued and agencies have begun to comply, what are the areas of FOIA that will need addressing that we will need to?

Ms. KOONTZ. There are many, many areas that agencies have identified for improvement, and that includes in reducing the backlog, in streamlining FOIA processing, in doing more information dissemination particularly via the Web, and then in solving all the sort of underlying issues that are barriers to better processing, faster processing, and better customer service.

Mr. TOWNS. Is there anything we need to do on this side? I am talking about Members of Congress.

Ms. KOONTZ. I think that you need to continue your oversight over what the agencies are doing, what Justice is doing, and I am hoping to supply you a more detailed report sometime soon.

Mr. TOWNS. We are looking forward to receiving it.

Ms. KOONTZ. Thank you.

Mr. TOWNS. Thank you.

On that note, I yield back, Mr. Chairman.

Mr. PLATTS. Thank you, Mr. Towns.

To both of our witnesses, again, our sincere thanks for your testimony here today and again your work day in and day out, very important work in both the oversight roles at the GAO and the day to day efforts at Justice. We are grateful for your efforts and look forward to continuing to work with you and your offices on this important issue of ensuring open and accessible Government.

Mr. METCALFE. Chairman Platts, if I could just raise on final point, that is particularly in light of I know there was some question or misconception at the hearing last year on May 11, 2005. I plan to stay for the third panel and to be here during the entirety of this hearing, and if there is any further question that you or any other member of the subcommittee, I would be more than glad to attempt my best to respond to that question.

Mr. PLATTS. We appreciate that one more indication of the serious approach you take to your responsibilities. Thank you.

Mr. METCALFE. Thank you, sir.

Mr. PLATTS. We will stand in recess, again, for about 2 minutes while we reset for the third panel.

[Recess.]

Mr. PLATTS. The subcommittee is reconvened.

We are pleased, on our third panel, to have Ms. Tonda Rush. I am getting ahead of myself here, sorry.

We are all set? OK.

We reconvene with our third panel. We are pleased to have Ms. Tonda Rush, public policy director, National Newspaper Association, and Ms. Patrice McDermott, the director of OpenTheGovernment.Org. We appreciate your written testimony.

If we could have you both stand, we will swear you in and then begin with your testimonies.

[Witnesses sworn.]

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

Ms. Rush, we will begin with you. We do appreciate your written testimonies as well as the background information that came with the testimonies. We will try to stay to roughly that 5 minutes, but if you need to go over a little bit, we understand.

Ms. Rush.

STATEMENTS OF TONDA RUSH, PUBLIC POLICY DIRECTOR, NATIONAL NEWSPAPER ASSOCIATION; AND PATRICE MCDERMOTT, DIRECTOR, OPENTHEGOVERNMENT.ORG

STATEMENT OF TONDA RUSH

Ms. RUSH. Good afternoon, Mr. Chairman and Ranking Member Towns. I appreciate the opportunity to be here today.

I am Tonda Rush. I am the Director of Public Policy for the National Newspaper Association. We are a 2,500 member organization of community newspapers, weeklies and dailies. The organization is 121 years old. Our members are mostly family owned newspapers. They rely upon public records to inform their local communities.

I appear here also on behalf of the Sunshine in Government Initiative. It is an informal network of nine media organizations which are listed in our written statement.

My purpose here today is threefold: first, to support the subcommittee and the good work it has already done in examining the Freedom of Information Act and to note the contributions of Congressmen Smith, Waxman, and Sherman as well as Senators Cornyn and Leahy for their legislative proposals to improve the act; No. 2, to commend the progress created by Executive Order 13392 but to note that it does not supplant the need for legislation; and No. 3, to suggest elements in the Open Government Act, H.R. 867, that we believe this subcommittee should consider.

The Freedom of Information Act is too often met with indifference and sometimes outright hostility. If journalists find it difficult to use, a concerned citizen must find it nearly impossible. The free flow of information upon which our democracy rests depends upon the proper working of this law. Still, it is used by the persistent and by the determined. We detail in our written testimony, a sample of some news stories based upon FOIA research.

Congress has often revisited this archive and restated the importance of FOIA. At the same time, this subcommittee has already recognized the problems with FOIA FE backlogs, unwarranted denials, and paucity of alternatives to litigation as a means of resolving disputes.

Mr. Chairman, the President's Executive Order 13392 spurred the agencies to consider improvements. It was unquestionably a positive step forward, but the EO did not go far enough. It did not provide concrete incentives for speedier processing, nor did it discourage unwarranted denials.

It also, perhaps most importantly, did not specifically charge the head of the agencies with treating FOIA requestors with the same seriousness that agencies treat their customary stakeholders. If a FOIA requestor was accorded the status, for example, that a pharmaceutical company receives from the FDA or a consulate staff would receive from the State Department, it would go a long way to increase our citizens' trust in their stakeholder role in democracy. Still, it was an improvement. It will lead to a better flow of information.

However, Mr. Chairman, even a perfect Executive order could not substitute for action by Congress. Since 1955, when the early drafters of FOIA began their work, it was the member's of the people's House who recognized that meaningful access to the people's records would have to be guaranteed by Congress. This body has revisited FOIA periodically since 1966, and each time it rediscovers the importance of the congressional role.

That role is critical here today, and we would like to point to some key elements in H.R. 867 for this subcommittee to explore. First, the bill proposes an ombudsman. This is an issue of keen interest to me because most of our members are small businesses. Even if the Federal Court appeals process worked perfectly, and it does not, very few news rooms can afford to use this remedy. The result is the general public finds Washington ever more distant and strange as their local media cannot adequately keep them informed as we need our voters to be. We believe it is time for Congress to consider a path of alternative dispute resolution.

The Office of Information and Privacy has carried out a portion of this role admirably over the past few decades, but we believe Congress should examine the role models provided by the States such as Connecticut, New York, and Virginia where public offices exist to help members of the public to deal with records custodians. Some States like Texas use the Attorney General's Office in that role. Like our Justice Department, the Attorneys General are in a good position to insist upon compliance with law, but when the mediator and the Government's lawyer are the same, the Justice Department must serve two masters. In Texas, that problem is addressed somewhat through two separate divisions within the Attorney General's Office, but in Washington, that solution does not seem as viable. A solution tailored to the Federal structure is needed, and we hope to work with the subcommittee to design it.

Second, Congress clearly needs to restore requestors' access to attorneys' fees. The footdragging of agencies and denying records right up to the courthouse door was once discouraged by fee awards if the requestor substantially prevailed in the settlement. Since the 2001 Supreme Court decision tightened standard for those awards, the agencies once again believe they have the leverage to deny requests until the very last minute without incurring fee awards.

We also wish that Congress would put teeth into the deadlines in the statute. Delays are the largest category of complaint. They have always been so. A mediator could help some of that. Funding and training of agency staff will help some of that, but outright defiance of time limits will still occur and H.R. 867 address delays through forfeiture of most exemption claims.

Finally, Mr. Chairman, the existence of the Exemption (b)(3) in the statute has created an open flank in the law that has bedeviled the Oversight Committee since day one. There are many ways to create exemptions by reference, and yet there is no central referral system or approval process to keep the FOIA from be nibbled to death by (b)(3)'s. H.R. 867 proposes one solution. There are other possibilities, but we believe a solution must be found.

Other parts of the bill that are important to our organizations include a system for tracking numbers for requests, better reporting of agency performance, and an overall heightened attention to the public's right to know.

We look forward to working with this subcommittee, Mr. Chairman, and exploring the legislation further and helping the subcommittee to carry out its oversight duties in the Freedom of Information Act.

Thank you.

[The prepared statement of Ms. Rush follows:]

Testimony
Tonda Rush, Director of Public Policy
National Newspaper Association
Representing
The Sunshine in Government Initiative
Wednesday, July 26, 2006

Thank you, Mr. Chairman, for the opportunity to discuss ways of strengthening the federal government's implementation of the Freedom of Information Act (FOIA) and the related Executive Order 13392 ("Improving Agency Disclosure of Information").

Introduction

I am Tonda Rush, director of public policy for the National Newspaper Association (NNA). NNA was established in 1885 by weekly and small daily newspaper publishers and it remains the voice of community newspapers in the United States. We represent owners, publishers and editors. Our membership includes over 2,500 newspapers. Our main headquarters is housed at the University of Missouri-Columbia. We have an office as well in Arlington, Virginia.

My testimony today has three purposes:

- To build upon the good work this committee has already done in examining the need to improve 5 USC 552, the Freedom of Information Act;
- To discuss Executive Order 13392, which was a positive step for the executive branch, but does not supplant the need for legislation;
- To suggest elements in H.R. 867, the OPEN Government Act that would help this committee to finish this work.

I appear before this committee as a media attorney with long experience in access law. I am also a former journalist, and I own an interest in community newspapers in Kansas. As public policy director of NNA, I represent newspapers that perform a critical mission in local communities. Most of them are family-owned. Their reporting staffs may range from one to a dozen persons, but are rarely large enough to field a good softball team.

Their focus is local news. These are the newspapers that cover the school board meeting, public business at City Hall and the courthouse, high school sports and traffic accidents on the interstate. They rely heavily upon open meetings and open records laws to enable their reporting. And when the story leads to the federal government, they rely upon the Freedom of Information Act and its related policies to help them explain the workings of Washington to their readers. Both the actual use of FOIA and the critical role the federal open records act plays as a mentoring policy for state and local government laws and the officials who administer them are critical to these newspapers.

I am also testifying today on behalf of the Sunshine in Government Initiative (SGI), a coalition that includes NNA and eight other media organizations committed to promoting policies that ensure the government is accessible, accountable and open.[1]

I have over thirty years experience with FOIA as a journalist and later as a media representative in Washington. I can truly say that this is one of the most challenging times in my experience to work as a journalist covering any level of government. In a time of shrinking newsroom budgets, the indifference and sometimes outright hostility shown the Freedom of Information Act and other open government laws and practices makes the journalist's mission difficult indeed. If journalists, with their training and expertise, find the use of these laws growing ever tougher, the inquiring and concerned citizen must find it nearly impossible. It is important for all of us to remember that access laws exist for the benefit of the public and our democracy, and are not to be ruled by the interests of those who govern, report, adjudicate or other subset of our free society.

Our democracy envisions a free market of ideas with a free flow of information to help people make big and small decisions on everything from determining how our government leaders are doing and which communities provide safe places for raising families, to which dishwashing detergent is the best value.

Not all government information can or should be made public, of course. But the FOIA statute on the books already recognizes that circumstances require withholding of records from the public and gives ample opportunity for agencies to withhold records when, for example, secrecy would be necessary to protect national security, commercial interests or individual privacy, even if we disagree with the decisions that are sometimes made.

According to a compilation by the National Security Archive, stories, using FOIA alerted the public to the following matters of public interest:

- Abnormally high salmonella rates in turkey processing plants and weaknesses in federal food safety programs brought to light in April 2006 by FOIA and the *Minneapolis Star Tribune*

- Patients jeopardized by insufficient Medicare oversight. Investigative work by *The Washington Post* using FOIA found Medicare officials knew about problems at health care facilities. One Florida hospital receives equal reimbursements for new patients and heart patients with recurring infections.

- Unrecovered fines owed taxpayer coffers. Reporters working for the Associated Press, which is a member of SGI, found a large increase in the amount of money owed the federal government in fines. AP reported that the Justice Department

[1] SGI member organizations include the American Society of Newspaper Editors, Associated Press, Association of Alternative Newsweeklies, Coalition of Journalists for Open Government, National Newspaper Association, Newspaper Association of America, Radio-Television News Directors Association, Reporters Committee for Freedom of the Press, and Society of Professional Journalists.

> was owed more than $35 billion in fines from criminal and civil cases alone. In some cases, the government collected a fraction of the assessed fine. In other cases, the government is still waiting to be paid.[2]

Congressional oversight of FOIA is critical

We very much appreciate the attention that the House Government Reform Committee – and this Subcommittee in particular – has given to the problems the public faces in obtaining information from federal agencies. As the full Committee's most recent "Citizen's Guide" to FOIA states in its very first sentence, "The Freedom of Information Act (FOIA) establishes a presumption that records in the possession of agencies and departments of the executive branch of the U.S. Government are accessible to the people." The Guide clearly stated the high standard by which FOIA should operate when it noted:

> With the passage of the FOIA, the burden of proof shifted from the individual to the government. Those seeking information are no longer required to show a need for information. Instead, the 'need to know' standard has been replaced by a 'right to know' doctrine. The government now has to justify the need for secrecy.[3]

In an age when the public can obtain tremendous volumes of information from government and elsewhere with a few keystrokes, FOIA has become less reliable, less effective, and a less timely vehicle for informing the public of government activities and newsworthy stories.

The hearing you held in this committee on May 11, 2005, Mr. Chairman, superbly documented key problems that the public faces in exercising its right to know. Those problems, briefly listed, include delays, backlogs, unwarranted denials and a paucity of alternatives to litigation as a means of resolving disputes.

As you know, the President issued Executive Order 13392 spurring agencies to review operations and create goals, objectives and timelines for improvements. SGI viewed it as a possibly very positive step – but the devil is in the details. Its impact will depend upon how seriously the agencies choose to take it and how vigorously they carry forth its spirit.

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[2] All stories cited in "FOIA in the News – 2004-2006," National Security Archive, http://www.gwu.edu/~nsarchiv/nsa/foia/stories.htm; accessed 7/20/2006. "Salmonella rates high at state plants; Tests at turnkey processors in Minnesota have found levels close to failing federal standards," *Star Tribune* (Minneapolis, MN), April 14, 2006, at 1A , by David Shaffer; "Inefficient Spending Plagues Medicare; Quality Often Loses Out as 40-Year-Old Program Struggles to Monitor Hospitals, Oversee Payments," *The Washington Post*, July 24, 2005, at A1, by Gilbert M. Gaul. "Washington owed billions of dollars: Fraction of fines actually gets paid; Penalties get axed, ignored, forgotten," *Kansas City Star*, March 19, 2006, by Martha Mendoza and Christopher Sullivan, the Associated Press.

[3] House of Representatives Committee on Government Reform, "A Citizen's Guide on Using the Freedom of Information Act and Privacy Act of 1974 to Request Government Records," Sept..20, 2005.

The recent debate and agency Improvement Plans resulting from the executive order make quite clear two fundamental truths.

First, EO 13392 sparked some material improvements and also drew attention to the law, which is a positive step by itself.

Second, the executive order does not address problems that only actions of Congress can truly solve.

FOIA is a statute imposed by Congress upon the executive branch over the agencies' persistent protests. The government's resistance is nothing new. Agencies resisted public access under the Administrative Procedures Act, opposed the 1966 law, opposed the 1974 amendments and have tried to roadblock every improvement this body has contemplated. But Congress has not permitted those objections to thwart its efforts to hold accountable those who spend the public's money and act in the public's name. Congress has recognized that, while greater efficiency within agencies is laudatory, the roles of both Congress and the judiciary must be carried out to ensure the public's rights of access.

H.R. 867, the OPEN Government Act introduced by Rep. Lamar Smith in the House and by Senators Cornyn and Leahy in the Senate as S. 394, seeks to reawaken Congress to this duty. With 31 House co-sponsors (and 5 Senate co-sponsors), it shows the bipartisan willingness of Congress to re-engage in this old duty – making the government responsive to its stakeholders. It contains important provisions to improve FOIA and we support this legislation. It offers several major efficiency improvements that would help make agency FOIA operations more effective. We are especially supportive of the citizen-centered provisions in the bill, including the mediation concept it would establish. These provisions are still needed, even following the Executive Order. H.R. 2331 sponsored by Congressman Waxman, and H.R. 1620 sponsored by Congressmen Brad Sherman and Lamar Smith also are efforts to advance pro-FOIA policies this Congress. We applaud this Subcommittee for holding two hearings on FOIA this Congress and want to continue to work with you to develop needed FOIA improvements legislation. The record created by your 2005 hearings lays an excellent foundation for progress.

The Executive Order has spurred useful introspection by agencies

A review of the Implementation Plans filed by various agencies yields mixed results. Some agencies, such as the Department of Defense, conducted in-depth, comprehensive reviews of their FOIA operations and reported candidly on problems encountered, while setting forth concrete steps to remedy those problems. Other agencies were much less ambitious, instead downplaying problems and pledging more reviews, often with overly extended timetables for implementation.

In addition, many of the problems identified were what could be considered "low hanging fruit", in that they do not constitute major impediments to efficient FOIA processing. For example, one component of the U.S. Department of Justice reported that the inability to search a key database prevented it from tracking the extent of its own backlog of

requests. Other managers encountered problems which also proved easy to fix, such as the need to purchase new photocopiers that automatically paginate scanned documents for easier processing, review and release. Undoubtedly, some agencies, and as a result, some requesters, will benefit from the implementation of the order. But while these common-sense reforms must occur, federal agencies face larger problems that copier purchases and better management of FOIA offices alone simply cannot fix.

The EO does not go far enough

Unfortunately, the meaningful reform so desperately needed to make FOIA work again will not come from the order. It fails to address some of the most pressing problems facing FOIA today, such as the lack of alternatives to litigation to resolve disputes, the lack of incentives to speed processing, and excessive litigation costs caused by unwarranted denials.

Among other issues, it does not place sufficient responsibility upon the agency head. The FOIA officer must at the least have the backing of the agency's political head, but if the agency head is not compelled to act, the FOIA officer's recommendations could lead to little progress in meaningful public access. The cabinet secretary, bureau head, or executive director must begin to afford FOIA requesters the status of any other stakeholder. If FOIA requesters were regarded as seriously, say, as the Food and Drug Administration regards pharmaceutical companies seeking new drug approvals, or the State Department regards consuls from allied countries, in short, if agencies truly made this accountability law one of its missions, and not an afterthought – the EO will have accomplished a great deal. But it does not clearly mandate such seriousness.

It also does not give clear direction on how agencies are to trim the time for requests.

Finally – although this list could go on – the EO provides few positive incentives to agencies for implementing FOIA well. For individuals, career advancement or training, improved pay and training and other career development may strengthen the professionalism of FOIA requests. FOIA processing is not a widely coveted, senior level berth with a promising career path in most agencies. The devotion of many FOIA staff to complying with the law is a testament to their personal commitments, rather than to their response to the usual performance stimuli. Some agencies did examine ways to improve the professionalism of FOIA staff, but far too few agencies have addressed this problem.

In short, the EO turned a spotlight on the same problems this subcommittee has examined. Possibly, the agency reports will spur the Attorney General to more concrete action. That will certainly be helpful. But, Congress still has its own mission.

Key Areas for Strengthening Agency Implementation of FOIA

Looking forward, Congress can go beyond the executive order to address the key obstacles facing requesters, such as the lack of alternatives dispute resolution, the lack of

incentives to speed processing, and excessive litigation costs caused by unwarranted denials.

The next steps lead back to where this law began: the recognition by Congress that citizens need the leverage of federal statutes to break down the many barriers to the records created with their funds, and by their power. This lesson is nothing new. Congressman John Moss and his colleagues spent several Congresses identifying these barriers in the 1960s and they concluded what this subcommittee has realized: the critical role here is the role of Congress.

We next point to key elements in H.R. 867 as fertile ground to explore.

Create a real alternative to litigation through mediation: Draw on many states' successful experiences with open government ombudsman

This is an issue of keen interest to me. Most of NNA's members are small businesses. Even if the federal court review path worked perfectly – and it does not – the time, money and lost opportunity cost is sufficient disincentive to use this act as often as reporters and others should use it.

The inevitable consequence is that Washington becomes ever more distant, and ever stranger, to the people sitting in local communities and relying – as they virtually all do – upon local media to understand their most immediate worlds. By giving reporters no effective alternative to the courts, the FOIA is sometimes a mere illusion.

Impact of few options to mediation. But right now, requesters have little alternative to litigation once an agency gives a final adverse decision. And although federal courts are mandated to expedite review of these decisions, the dozens of comparable expedition statutes that the court administrators must also balance negate a good measure of even this safeguard. Unlike many state governments, Uncle Sam does not require its attorney general to be the public's advocate for openness. Rather, our Justice Department is cast in various, often conflicting roles: it provides some training and guidance, but has little authority to require response; it collects data and analyzes compliance; and then it has to serve as the agency's lawyer when a decision to withhold is challenged in court.

Congress has already passed the law that says public records are presumed to be open. Now it should give the public the tools to use the law.

An independent mediator would field appeals and help the public. The Justice Department can effectively advocate for exempt records and oversee legal policy on behalf of its administration. Let the independent office be the public's helper. The Office would handle appeals from any person and provide a focus of expertise for journalists, researchers, decision-makers and others outside the executive branch.

Mediators work well in the states. The experience of several states shows that an independent ombudsman can be effectively structured in many ways. The model states, in

our estimation, are Connecticut and New York. According to an article in the Spring 2005 issue of *News Media and the Law*, a publication of the Reporters Committee for Freedom of the Press, which is a member of the Sunshine in Government Initiative, both states allow the state ombudsperson to regulate procedural aspects of the state open records law, respond to inquiries from the public and write advisory opinions.[4]

In several states, the Attorney General's office serves as the ombudsman. This structure can create a conflict of interest for that office between assisting the public and defending agencies in FOIA disputes. Because much of the AG's work involves closed access by local governments these conflicts are not as significant as those facing the Justice Department. When the "client" agency has its own counsel, the AG can serve as expert adviser. When the agency has to rely upon the AG as its own attorney, the role of AG as public advocate can be complex.

Texas' solution to this problem is particularly insightful. To mitigate against this conflict, the Attorney General of Texas separates into separate divisions, with the attorneys defending agencies distinct from the attorneys responding to the public. Kentucky does the same. Florida's attorney general handles public inquiries and mediates disputes but does not represent agencies in FOIA disputes (agency lawyers must defend agency decisions). Virginia's commission works for the state legislature and has advisory powers only, but remains influential. And in New York, the highly effective state government Committee on Open Government advises the public and officials and hears appeals. The Committee's annual report recommends improvements to strengthen openness in government.

In short, the states provide a wide array of models. However, the federal government's structure is sufficiently different that a solution tailored to the need probably will be necessary.

Reinstate requesters' ability to recover legal fees (attorney fees)

Congress long ago recognized that the cost of filing suit against the federal government to overturn a denial under FOIA is too expensive for most requesters, so it allowed requesters to recover fees if the requester is successful in that litigation.

But from the beginning, requesters found that the only way to force a decision on a record was to file suit. And then on the eve of oral argument, the government often proffers the information. Courts properly awarded attorneys' fees in cases such as this where the requester substantially prevailed, even if only in settlement.

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[4] Connecticut's office is an independent state agency. Ryan Lozar, "Policing compliance," News Media and the Law, Spring 2005 (Vol. 29, No. 2), page 12. Available at http://www.rcfp.org/news/mag/29-2/cov-policing.html; accessed July 11, 2006.

Unfortunately, many requesters have of late been denied financial recovery due to a 2001 court decision unrelated to FOIA [5]. Now, when faced with the real possibility that a court will rule against them, an agency may "voluntarily" grant the request and thereby avoid paying the requester's legal fees. This practice is wasteful – both of the government's resources and of the citizen's – as it encourages litigation that could have been avoided. It is also unfair. It leaves the requester, who is simply trying to exercise his or her legal right to obtain documents from the government under FOIA, stuck with the legal bill for the agency's non-responsiveness. This is a significant loophole in Congress' intent to help requesters with limited resources.

To address this key fault in the implementation of FOIA, Congress should clarify that the courts may award attorney fees to requesters when the judge determines the agency chose to release documents as a result of a lawsuit.

Other Areas for Congress to Review

There are other ways the federal government could improve FOIA processing.

Reduce delays by giving meaning to the deadlines

Agencies should face meaningful sanctions for unnecessary delays. We believe the addition of a mediator or ombudsman would result in fewer delays that are of shorter duration. But history has witnessed many delays that were simply stubborn refusals, or chronic indifference. No mediator will repair those. Congress needs to put teeth into its law. Under the OPEN Government Act, an agency that fails to respond substantively within the statutory time limit of twenty days forfeits its right to withhold documents except to protect national security and personal privacy.

Other possibilities for sanction clearly exist. Reluctance to create or use them – in the face of the resource limitations and mission ambiguities – has prevented their implementation.

A recent report by the Coalition of Journalists for Open Government documented funding woes and processing reductions for several agencies. Backlogs for some agencies would have been eliminated if those agencies had simply processed the same number of requests in 2005 as they processed in 2004.

If better processes eliminated the confused, the under-staffed and the bureaucratically challenged, the remaining non-responses would stand out as better candidates for sanction. We would like to continue to work with the subcommittee on defining these possibilities.

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[5] Buckhannon Board & Care Home, Inc. v. West Virginia Dept. Of Health And Human Resources (99-1848) 532 U.S. 598 (2001)

Ensure adequate public discussion of new "b(3) exceptions" from FOIA

One of the biggest dangers to FOIA is the proliferation of "(b)(3) exceptions," which are passed without adequate deliberation. According to the Justice Department, about 140 of these statutes – so named for the subsection of FOIA that created them – exempt specific information from disclosure under FOIA. Too often these bills sail through Congress without debate because they are attached to larger legislation or caught too late in the process. Collectively, they are a steadily eroding FOIA's effectiveness.

Congress could remedy this in several ways:

- Section 8 of the OPEN Government Act essentially instructs the courts to consider as legitimate (b)(3) exemptions only those statutes that specifically reference the Freedom of Information Act and establish clear criteria for withholding documents. This is a straightforward solution that would ensure the bill's intent is clearly written into the law. In Senate, this provision was incorporated into a stand alone bill, S. 1181, which was reported by the Senate Judiciary Committee, and approved by the U.S. Senate on June 24, 2005. The House of Representatives could take meaningful action this year by taking up and passing this good government, common sense provision before the 109th Congress concludes.

- Through rule or policy, Congress could also ensure greater public debate of b(3) exemptions by exploring development of an Open Government Impact Assessment. All new legislation passing through Congress could be flagged for its impact on open government. We would look forward to exploring with this committee how such assessment could be efficiently conducted.

- This committee should consider seeking referral of all legislation containing (b)(3) for a specific review time. This would allow time for review to see if the (b)(3) is justified and, if it is, to address that need.

Such referrals would not necessarily mean the Committee would be required to take up every bill. But they would avoid the stealth exemptions that have plagued FOIA from its beginning. This committee and its predecessors have long carried the principal burden to strengthen, clarify and refine language so the eventual law that emerges from Congress is strong and clear enough to avoid collateral damage to FOIA. It is important for you to continue in that role.

Raise FOIA's visibility and importance across the executive branch

More attention should be paid to identify and educate federal agencies, the requester community, the public and decision makers about best practices and to strengthen FOIA processing across the executive branch. The Justice Department issues guidance, conducts training programs and remains visible among the community of frequent FOIA requesters. But more needs to be done to elevate the importance of FOIA across the

executive branch, in academia and among the public. More needs to be done to document FOIA's role in holding government accountable, rooting out waste of taxpayer dollars, and catalyzing reforms that make government work better and make the public safer. And agencies should make explicit as part of their core missions affirmatively informing the public of scientific research, health care quality assessments and other information.

In short, the current law already has safeguards to protect the public's right to know *and* the need to keep secrets when necessary. The more people understand the Freedom of Information Act, the less we'll see ill-informed attempts to write overbroad and damaging new laws shielding germs of critical information from the disinfecting powers of sunlight.

Establish a tracking system for requesters. The federal government should create tracking numbers tied to a tracking system so requesters can quickly identify the status of a request. The OPEN Government Act would create such a system.

Improve reporting. Finally, the federal government should standardize, clarify and simplify agency reporting on FOIA compliance in all areas. The Sunshine in Government Initiative identifies numerous reporting improvements that should be made in a letter dated March 17, 2006 to the Attorney General (see attached).

Conclusion

The President's Executive Order was welcome and helpful overall. If it is followed, it should lead to faster and more complete responses and it should help citizens to locate the information they seek. It will be useful only if taken seriously by agency heads, and therefore the language of the order should have been more explicit and directive. However, even in its best light, a presidential order cannot substitute for the check and balance action of Congress in creating sound statutory rules to protect the public's access to information. H.R. 867 and other legislation referenced in this testimony open debate on provisions that Congress should consider. NNA and SGI believe this subcommittee should continue to examine these bills--particularly with respect to the several recommendations we make here. We look forward to working with the committee in reporting out legislation to strengthen the Freedom of Information Act.

Appendix: Financial Disclosure

Pursuant to House Rule XI(2)(g), I declare that the National Newspaper Association almost never requests federal dollars, either in grants or contracts. However, NNA has co-sponsored a program recognizing United States Postal Service employees in the past two years with financial assistance from the Postal Service in amounts varying from $20,000 to $28,000.

Sunshine in Government Initiative

March 15, 2006

The Honorable Alberto R. Gonzales
Attorney General
Robert F. Kennedy Building, Room 5137
Tenth Street and Constitution Avenue, NW
Washington, DC 20530

The Honorable Joshua B. Bolten
Director, Office of Management and Budget
1650 Pennsylvania Avenue, NW
Washington, DC 20503

Dear Attorney General Gonzales and Director Bolten:

Under the Dec. 14, 2005 Executive Order: Improving Agency Disclosure of Information, each agency shall designate a Chief FOIA Officer who is charged with developing an agency specific plan on FOIA compliance, including concrete milestones for measurement of the agency's success in implementing the plan. The Department of Justice and Office of Management and Budget have the authority to issue guidance to the agencies re: implementation of the Order.

The undersigned groups are members of the Sunshine in Government Initiative, a media coalition committed to open government and access to government information. As major users of the Freedom of Information Act ("FOIA"), we submit the following recommendations on issues to be addressed in the agency-specific plans. These recommendations can be divided into two general categories:

- **External Reporting**: the production of particular data, in certain formats, to allow for adequate public oversight of FOIA compliance; and
- **Internal Review**: the adoption of certain "best practices" to improve FOIA compliance

External Reporting

The statistics reported by agencies on FOIA processing are, at best, difficult to understand and, at worst, misleading in two ways. First, vital data regarding backlogs and processing times is currently provided in terms of a median number. Second, different agencies define "response" in different ways. The overall result is the failure to paint an accurate picture of how long the typical FOIA requester must wait to actually receive requested documents or an official denial of his or her request. This makes it difficult to create benchmarks for meaningful reform. We suggest standardizing data presented in agency-specific plans and annual reports in two ways:

A. Rather than simply providing data on the time it takes to "respond" to a FOIA request, agencies should provide data on the following key points in the FOIA process:

1. The overall number of FOIA requests pending at the beginning of the fiscal year and the number of received requests that went unfulfilled in the particular fiscal year.
2. The time that elapses from the date on which a FOIA request is first received by an agency (when it is "time stamped" as received) until the request is received by the actual person who will process the request and is logged for processing.
3. The time that elapses from the date a FOIA request is received by the person processing the request until the agency responds.
4. For granted requests, the time that elapses from the date a FOIA request is first received by an agency (when it is "time stamped" as received) until the documents are sent to the requester.
5. The time required to adjudicate administrative appeals. Information should be provided regarding the (a) time required for a final decision to be rendered by the appellate reviewer, and (b) if the appeal is successful, the time that elapses from the filing of the appeal until the documents are sent to the requester.
6. The number of requests for expedited review that are filed with the agency each year, the number of requests granted and the response time in cases of expedited review.

B. The information provided in categories 2-6 above, should (1) reflect all components of an agency, as well as the agency as a whole and (2) be presented in terms of (a) *median* time, (b) *average* time and (3) *range* of time, from shortest to longest, for each category.

Internal Review

While standardized reporting of data is important to public oversight of FOIA, real change comes from within. Each agency should seek to expand the "best practices" used to reduce backlogs. We believe the following suggestions merit attention:

1. The Chief FOIA Officer should be highly active within his or her agency and highly interactive with the public.

The Chief FOIA Officer carries great potential to effect change. The duties of the Chief FOIA Officer should be spelled out in the DOJ Guidance document sent to the agencies. We would recommend the following:

- There must be oversight of each Chief FOIA Officer to ensure that he or she is actively endeavoring to meet the goals of the Executive Order. At a minimum, the Chief FOIA Officer should have already met with the agency's FOIA staff to discuss the Executive Order and any changes in agency practices and procedures that are planned. Specific focus should be placed on creating a more customer-friendly atmosphere.
- The Chief FOIA Officer should schedule public forums to receive comments on improving FOIA performance, as explicitly recommended in the EO, and incorporate those comments in the agency plan.

2. Technology is a key to alleviating the burden on understaffed FOIA offices.

Technology is vastly under-utilized in the fight against mounting FOIA backlogs. Agencies should consider taking advantage of the various software products available on the market to streamline both processing of requests and compliance with annual reporting requirements. They also must engage in proactive efforts to identify, index and post on the Internet information that may be of interest to the public. This should include, at a minimum:

- A comprehensive index to information available without a FOIA request should be posted on agency websites and in agency reading rooms.
- Agencies should affirmatively post or link to new documents whenever possible to allow the public to access information without a FOIA request.
- Section 2(c)(vi) of the Executive Order recommends the use of technology to create a "tracking system" that allows automated response to status inquiries; this should be mandatory, as it allows staff to focus on fulfilling requests.

3. Redundancy in the processing of FOIA requests can and should be reduced.

A major hindrance to efficient FOIA processing is time spent reviewing documents previously released to the public or that should be released without a FOIA request. Each agency should, at a minimum, have a written policy encouraging FOIA officers – and others – to make information available whenever possible without a FOIA request. This would include records frequently granted when requested or that do not contain any information that might fall into one of the exemption categories. Specifically:

- A clear definition should exist for "frequently requested documents." OMB has stated that three requests trigger Section (a)(2)(D) of FOIA, which requires that the records then be placed on the Internet. Each agency should adhere to the three-request standard.
- Each agency should create a process by which prior decisions to release or withhold a document are recorded and accessible the next time the document is requested. This will ensure that the entire review process need not be repeated each time a request is filed.

4. The procedures related to expedited processing, multi-track processing, fee waivers and administrative appeals should be clear and easily accessible to the public.

The rules regarding these intricate and discrete applications of FOIA are often ignored by both requesters and FOIA staff alike. Agencies should:

- Make clear the methods used to expedite a request.
- Have clearly written and uniform guidelines for determining whether a FOIA request is complex or simple; these guidelines should be conspicuously posted on agency websites.
- Thoroughly review the fee waiver process with an eye toward uniformity among. Annual reports should include the number of fee waiver requests filed and the number granted.
- Increase-oversight of the administrative appeal process. Those who adjudicate administrative appeals must be independent of those who made the original decision; they must also be insulated from undue interference from their superiors. Chief FOIA Officers should personally review a certain number of administrative appeal decisions each year to ensure that the process works correctly.

We thank you for considering these comments and suggestions. For further information, please contact Kevin Goldberg, General Counsel, American Society of Newspaper Editors at 202-293-3860.

Sincerely,

The Sunshine in Government Initiative

American Society of Newspaper Editors
The Associated Press
Association of Alternative Newsweeklies
Coalition of Journalists for Open Government
National Newspaper Association
Newspaper Association of America
Radio-Television News Directors Association
The Reporters Committee for Freedom of the Press
Society of Professional Journalists

cc: Mr. Robert D. McCallum, Jr., Associate Attorney General
Mr. Clay S. Johnson III, Deputy Director for Management, Office of Management and Budget
Mr. Daniel J. Metcalfe, Director, Office of Information and Policy, Department of Justice
Mr. Glenn Schlarman, Chief, Information Policy and Technology Branch, Office of Management and Budget
Agency Chief FOIA Officers

REPORT OF THE

VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA

HOUSE DOCUMENT NO. 105

COMMONWEALTH OF VIRGINIA
RICHMOND
2005

REPORT OF THE VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA

COMMONWEALTH OF VIRGINIA
DECEMBER 2005

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OF THE
VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

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Staff

Division of Legislative Services

Maria J.K. Everett, *Executive Director*
Alan Gernhardt, *Staff Attorney*
Darlene Jordan, *Operations Staff Assistant*

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REPORT OF THE VIRGINIA FREEDOM OF INFORMATION ADVISORY COUNCIL

To: The Honorable Mark R. Warner, Governor of Virginia
and
The General Assembly of Virginia

Richmond, Virginia
December 2005

INTRODUCTION

"The laws and customs that anchor open government...are most at risk when insecure times such as these breed the illusion that if only information and ideas could be rationed to the few and withheld from the many, then our people would be made stronger by their ignorance, more alert by their blinkered vision, more united by their isolation."

Editorial, *Editor & Publisher*,
2003

Established by the 2000 Session of the General Assembly[1], the Virginia Freedom of Information Advisory Council (the "Council") was created as an advisory council in the legislative branch of state government to encourage and facilitate compliance with the Freedom of Information Act (FOIA). As directed by statute, the Council is tasked with furnishing advisory opinions concerning FOIA upon request of any person or agency of state or local government; conducting training seminars and educational programs for the members and staff of public bodies and other interested persons on the requirements of FOIA; and publishing educational materials on the provisions of FOIA[2]. The Council is also required to file an annual report on its activities and findings regarding FOIA, including recommendations for changes in the law, to the Governor and the General Assembly.

The Council is composed of 12 members, including one member of the House of Delegates; one member of the Senate of Virginia; the Attorney General or his designee; the Librarian of Virginia; the director of the Division of Legislative Services; one representative

[1] Chapters 917 and 987 of the 2000 Acts of Assembly.
[2] Chapter 21 (§ 30-178 et seq.) of Title 30 of the *Code of Virginia*.

of local government; two representatives of the news media; and four citizens.

The Council provides guidance to those seeking assistance in the application of FOIA, but cannot compel the production of documents or issue orders. By rendering advisory opinions, the Council hopes to resolve disputes by clarifying what the law requires and to guide the future public access practices of state and local government agencies. Although the Council has no authority to mediate disputes, it may be called upon as a resource to assist in the resolution of disputes and keep the parties in compliance with FOIA. In fulfilling its statutory charge, the Council strives to keep abreast of trends, developments in judicial decisions, and emerging issues. The Council serves as a forum for the discussion, study, and resolution of FOIA and related public access issues and for its application of sound public policy considerations to resolve disputes and clarify ambiguities in the law. Serving as an ombudsman, the Council is a resource for the public, representatives of state and local government, and members of the media.

EXECUTIVE SUMMARY

During this reporting period, December 1, 2004 to December 1, 2005, the Council undertook two studies resulting from the examination of three bills referred to the Council by the 2005 Session of the General Assembly[3] that did not advance during the 2005 legislative session. Council-formed subcommittees included a PPEA/PPTA[4] Subcommittee to study the issues raised by HB 2672 and an Electronic Meetings Subcommittee to review the issues raised by HB 2670. HB 2672 (Delegate Plum) would have amended an existing meeting exemption to allow for closed meetings to discuss records exempt from public disclosure relating to the Public-Private Education Facilities and Infrastructure Act (PPEA). The PPEA/PPTA Subcommittee, while not recommending HB 2672 as written, examined the concern that the current record exemption for PPEA and PPTA proposals was being improperly applied, resulting in the withholding of more records than is authorized under the current FOIA[5] exemption. The work of the PPEA/PPTA Subcommittee resulted in recommended legislation to the Council for the 2006 Session of the General Assembly that would (i) clarify what PPEA/PPTA records are exempt under FOIA, (ii) require a formalized process between a public body and private entity to designate trade secrets, financial records, and other records submitted by a private entity to protect the financial interest or competitive position of the parties, and (iii) make conceptual proposals and proposed interim and/or comprehensive agreements publicly available before such agreements become binding. HB 2760 (Delegate Reese) would have allowed local public bodies to conduct meetings under FOIA through electronic communication means (telephone or audio/visual)[6]. Currently, only state public bodies may conduct meetings in this manner. The Electronic Meetings Subcommittee examined the feasibility of expanding the authorization for the conduct of electronic communication meetings to local public bodies and voted not to recommend HB 2760 in light of the significant relaxation of the

[3] HB 1733 (Delegate Cosgrove), HB 2672 (Delegate Plum), and HB 2760 (Delegate Reese).
[4] The Public-Private Education Facilities and Infrastructure Act of 2002, (§ 56-575.1 et seq.) and the Public-Private Transportation Act of 1995, (§ 56-556 et seq.).
[5] The Virginia Freedom of Information Act (§ 2.2-3700 et seq.).
[6] Section 2.2-3708.

procedural requirements made to § 2.2-3708 by the 2005 Session of the General Assembly. Further, the Electronic Meetings Subcommittee recommended that the issue be revisited in 2006 after some experience with the new rules governing electronic meetings.

As of this writing, the Council is considering two pieces of legislation to recommend to the 2006 Session of the General Assembly.[7] The first legislative proposal would add a mandated fifth response to a FOIA request--the requested records do not exist or cannot be located after diligent search. Currently under FOIA, a public body is under no obligation to create records that do not exist in response to a specific request nor is a public body required to respond to a requester if the requested record does not exist or cannot be found. The lack of a required response in these instances leads to confusion and exacerbates any feelings of distrust. The Council, in a written opinion (AO-16-04) has previously opined that a public body should make this written response where applicable in order to avoid confusion and frustration on the part of the requester. The second legislative proposal relates to public access to procurement records under the PPEA and PPTA, discussed above.

The Council was successful in seeing its 2005 legislative recommendation enacted into law in 2005. Specifically, SB 711 (Houck), recommended by the Council resulted in significant relaxation of the procedural rules for the conduct of electronic meetings[8] by state public bodies, including reduced notice of such meetings, elimination of the limitation of the number of meetings that may be conducted electronically, and elimination of the requirement that an audio or audio/visual recording of any such meeting be retained. SB 711 was incorporated into the nearly-identical bill recommended by the Joint Commission on Technology and Science (JCOTS), SB 1196 (Newman). SB 1196/SB711 passed as a joint recommendation of the Council and JCOTS.

The Council continued to monitor Virginia Supreme Court decisions relating to FOIA. In *Cartwright v. Commonwealth Transportation Commissioner of Virginia,* 270 Va. 58; 613 S. E. 2d 449; 2005 Va LEXIS 62, decided June 9, 2005, the issue before the court was whether the circuit court (in Chesapeake) erred in denying a petition for a writ of mandamus[9] brought in accordance with FOIA (§ 2.2-3713) on the ground that the petitioner had an adequate remedy at law. The Supreme Court noted that this was the first time that it had considered whether a writ of mandamus filed as specifically authorized in FOIA may

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[7] The Council will meet on December 29, 2005 to take final action on its two legislative proposals.

[8] SB1196/711 reduces the notice required for electronic communication meetings from 30 days to seven working days. The bill also (i) eliminates the 25 percent limitation on the number of electronic meetings held annually; (ii) eliminates the requirement that an audio or audio/visual recording be made of the electronic communication meeting, but retains the requirement that minutes be taken pursuant to § 2.2-3707; (iii) allows for the conduct of closed meetings during electronic meetings; (iv) changes the annual reporting requirement from the Virginia Information Technology Agency to the Virginia Freedom of Information Advisory Council and the Joint Commission on Technology and Science; and (v) expands the type of information required to be reported. The bill specifies that regular, special, or reconvened sessions of the General Assembly held pursuant Article IV, Section 6 of the Constitution of Virginia are not meetings for purposes of the electronic communication meeting provisions. The bill also defines "electronic communication means."

[9] Writ of mandamus is used to compel a public official to perform a ministerial duty imposed on him by law.

be denied because of the availability of another adequate remedy at law. The facts that gave rise to the case involved a FOIA request made by a citizen for particular documents prepared by the Virginia Department of Transportation (VDOT). The FOIA request was denied. The Court held that the circuit court erred in denying the petition for mandamus. In its decision, the Court stated, "We hold that a citizen alleging a violation of the rights and privileges afforded by the FOIA and seeking relief by mandamus pursuant to Code § 2.2-3713 (A) is not required to prove a lack of adequate remedy at law, nor can the mandamus proceeding be barred on the ground that there may be some other remedy at law available."

The Council also kept abreast of the ongoing FOIA disputes between Lee Albright, a Nelson County citizen, and the Virginia Department of Game and Inland Fisheries (VDGIF). Mr. Albright advised the Council of his attempts to get records from VDGIF and of the need to file lawsuits to gain access to the requested records. He discussed the favorable outcome of his most recent FOIA suit against VDGIF for violation of FOIA. Mr. Albright indicated that he had received advisory opinions from the Council on this issue, but unfortunately, those opinions did not seem to influence the Department's actions. Mr. Albright expressed concern that a lawsuit was the only remedy under FOIA to force a public body to comply with the law. The members of the Council shared Mr. Albright's concern that citizens should not have to endure the difficulties Mr. Albright has encountered, especially in light of the mandatory disclosure requirements of FOIA. The Council examined the issue of whether FOIA should be amended to provide additional remedies for violation[10]. The Council determined that no action was required as the occurrence was an aberration when considered as a whole and that ultimately, the remedies available under FOIA proved sufficient to redress violations committed by a public body thereby reaffirming the citizens' right of access to government records.

The Council continued its commitment to developing and updating quality educational materials on the application and interpretation of FOIA for dissemination to the public. This year, the Council developed two new guides to ensure compliance with the provisions of FOIA concerning allowable charges for record production and a primer on conducting electronic meetings. "*Taking the Shock out of FOIA Charges; a guide to allowable charges for record production under the Freedom of Information Act*" attempts to provide much-needed guidance on how to correctly assess charges under FOIA to ensure compliance with the letter of the law as well as the spirit of the law. This new pamphlet served as the basis for a training segment on charges at the 2005 FOIA Workshops. The primer on electronic meetings (teleconferencing and audio/visual) provided the user with a "how to" guide to comply with the requirements for the conduct of these technology-based meetings. Both new guides are available on the Council's website.

The Council continued its commitment to FOIA training. The annual FOIA workshops, approved by the Virginia State Bar for continuing legal education credit, the Department of Criminal Justice Services for law-enforcement credit, and the Virginia School Board Association for academy points, were held in Abingdon, Harrisonburg, Fairfax, Richmond

[10] Excerpted from a memorandum written by Alan Gernhardt, Staff Attorney to the Council dated August 31, 2005 detailing the experiences of a citizen, Lee Albright, in seeking records from the Virginia Department of Game and Inland Fisheries.

and Norfolk and reached approximately 350 persons statewide, including government officials, media representatives and citizens. After conducting annual statewide FOIA workshops in each of the six years since the Council's creation in 2000, the Council viewed declining attendance over the last two years as a sign that its basic training mission had been successfully accomplished. The Council welcomed the opportunity to provide other relevant training programs to meet the needs of government officials, the media, and citizens alike. Statewide workshops will continue to be offered in odd-numbered years to provide training to new public officials and employees. In even-numbered years, the Council will provide a forum to address topic-specific issues such as public access in light of HIPPA[11], the Patriot Act, and other federal and state laws. In addition to the 2005 statewide FOIA workshops, the Council was requested to conduct 47 specialized training programs throughout Virginia for various groups, agencies of state and local government, and others interested in receiving FOIA training. These specialized programs are tailored to meet the needs of the requesting organization and are provided free of charge. This year, the Council is pleased to announce that all of its training programs, whether the annual workshops or specialized programs, have been approved by the Virginia State Bar for continuing legal education credit for licensed attorneys.

For this reporting period, the Council, with a staff of two attorneys, responded to over 1,600 inquiries. Of these inquiries, 16 resulted in formal, written opinions. The breakdown of requesters of written opinions is as follows: 4 by government officials, 11 by citizens, and 1 by media. The remaining 1,652 requests were for informal opinions, received via telephone and e-mail. Of the 1,652 requests, 756 were made by government officials, 687 by citizens, and 209 by media.

March 2005 marked the observance of *Sunshine Week* statewide, which resulted in various articles and reports by print and broadcast media to inform the public of its right to know. As a result of the 2005 *Sunshine Week*, there has been increased awareness of the Council, its role, and FOIA generally. Virginia is ranked as one of the top ten states for effective FOIA laws. Plans for a 2006 Sunshine Week are being made and in 2006, will include active participation by the Council to raise the public's awareness of its right to know about the operation of government.

WORK OF THE COUNCIL

The Council held four meetings during this reporting period in which it considered a broad range of issues, including the appropriateness of adding a fifth mandated response to FOIA requests, public access to PPEA/PPTA procurement records, the adequacy of remedies for FOIA violations, and the expansion of authorization for the conduct of electronic communication meetings to local and regional public bodies. A condensed agenda for each of the Council's meetings appears as Appendix D. The Council's discussions and deliberations are chronicled below.

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[11] The federal Health Insurance Portability and Accountability Act.

Mr. PLATTS. Thank you, Ms. Rush. We appreciate, again, your testimony on behalf of your members and especially as a former newspaper boy myself.

Ms. RUSH. I am glad to hear that, Mr. Chairman.

Mr. PLATTS. One of my early jobs as a teen, I had a Sunday route in my neighborhood. In fact, when I ran for the Statehouse, that neighborhood was one in which I must have done an OK job because I did very well in that neighborhood at the ballot box for my first campaign. I have fond memories of delivering the paper and actually remain a diehard reader of newspapers. I begin each morning in my District with being able to commute daily to Washington from Pennsylvania. I rarely leave the house without reading my morning paper, local morning paper, from front to back.

Ms. RUSH. I am glad to hear that.

Mr. PLATTS. I try to do the evening one. I maybe don't read the evening one as thoroughly because it is usually about midnight when I get to it. We are glad to have the success of our newspapers throughout the country.

Again, thanks for your testimony.

Ms. RUSH. Thank you, Mr. Chairman.

Mr. PLATTS. Ms. McDermott.

STATEMENT OF PATRICE MCDERMOTT

Ms. MCDERMOTT. Thank you, Mr. Chairman and Ranking Member Towns for the opportunity to speak today on the agency's responses to Executive Order 13392, and to the broader issues you raised in your letter of invitation to participate in this hearing.

My name is Patrice McDermott. I am the Director of OpenTheGovernment.Org, a coalition of journalists, government, consumer and good government groups, environmentalists, labor, and others united to make Federal Government a more open place in order to make us safer, strengthen public trust in Government, and support our democratic principles.

As you and the members of the subcommittee are clearly aware, July 4th was the 40th Anniversary of the Freedom of Information Act, and that it was created to "ensure an informed citizenry vital to the functioning of a democratic society, needed to check against corruption, and to hold the Governors accountable to the governed."

In recognition of this important milestone in the history of disclosure of agency information, OpenTheGovernment.Org in collaboration with 12 organizations including Ms. Rush's and many individuals within them undertook a look at the sample of the plans submitted by Federal agencies in response to the Executive order. That report is titled FOIA's 40th Anniversary: Agencies Respond to the President's Call for Improved Disclosure of Information, and I request that the report and the two attachments submitted with it be made part of the hearing record.

Mr. PLATTS. Without objection.

Ms. MCDERMOTT. Thank you.

For the purposes of this hearing, I want to focus on two of the improvement areas listed by the Department of Justice in its implementation guidance. These two are numbers one and two: affirmative disclosure, posting frequently requested records, policy

manuals, policy manuals and FAQs on Web site, and two, proactive disclosure on Web of publicly available information.

These improvement areas seem to me to be the ones that have the most impact on the ability of the general public to understand what an agency does and what kind of information it creates. They give us an opportunity to discuss questions you raised in your letter, and they are illustrative of an ongoing problem confounding efforts to institute procedural reforms to FOIA. These are problems that have been identified several times today, the lack of enforcement and thus the ramifications for agency heads when reforms are ignored.

In response to your first question in your letter of invitation, I would say that the public's right to know what its Federal Government is doing and what is being done in the name of the public through the Government and those to whom it delegates authority and responsibility are fundamental to the proper functioning of our form of government. I agree with James Madison's famous statement that a people who intend to govern themselves must arm themselves with the power that knowledge gives. I fear that the public is being disarmed by actions in the executive branch, some of them sanctioned by the Congress, that serve to restrict and diminish the public's access to information by and about our Government.

In response then to your second question, whether I think the Federal Government is currently providing requestors with the most responsible disclosure possible under FOIA, I would say no, although I have to admit I am not entirely sure what the phrase, responsible disclosure, means.

The Freedom of Information Act is a key component in the public's right to have access to such information, but it has traditionally been primarily a reactive component. The 1996 EFOIA amendments were in part intended by Congress as a step toward changing the passive stance of Federal agencies when it comes to disclosing records and information about records. These required, these amendments required among other provisions, that a new category of records which we have already heard discussed today, repeatedly requested records be made available to the public online. Importantly, it is not up to the agency to decide if it is interested in disseminating the information. It depends solely on whether outsiders submit multiple requests for the information or the agency anticipates those requests.

In my written testimony, I note studies done between 1997 and 2002, including the GAO studies, indicating that while agencies were making progress and making material required by EFOIA available online, not all the required materials were yet available. According to the GAO, the situation "appears to reflect a lack of adequate attention and continuing review by agency officials to ensure that these materials are available."

Turning to the narrative commentary provided by our reviewers on affirmative disclosure and proactive dissemination, what is most striking to me is the future-oriented language used to describe what most of the agencies plan to do in these areas. Bear in mind that we are almost 10 years out from the passage of the 1996 amendments and over 9 years beyond the point at which most of

the requirements set out therein were supposed to have been met, and yet repeatedly in the narratives, we find that the agencies will meet these statutory requirements with a promise date often being mid-2007. The lack of serious implementation of the 10 year old amendments to FOIA is indicative of one of the serious problems with any procedural reforms to FOIA. There is no enforcement mechanism provided and no repercussions for ignoring these requirements.

In my estimation, given the responses in these two areas of even the agencies with some responsibility for the implementation of FOIA, which would be the Department of Justice and OMB, the Executive order will likely have minimal effect on the Federal Government's approach to providing information under FOIA. Similar conclusions can be drawn from the table attached to our report.

What can Congress do? The easy and hard answer is to appropriate funds specifically targeted for prompting, for promoting prompt disclosure of Government information that is appropriate for such disclosure. Many ideas have been floated in our access community as to how to do that, and we would be pleased to meet with you and your staff to discuss them.

A second opportunity for Congress is to pass the bipartisan Open Government Act. While it is not a panacea for all of our concerns with the implementation of FOIA, it is a large step in the direction of meaningful and accountable procedural reforms. H.R. 1620 in the House and H.R. 2331 are examples of other legislation that advances the public's right to know.

The third thing Congress can do is conduct frequent oversight and hold agencies and those with oversight responsibility in the executive branch accountable. We appreciate the intention of the House Government Reform Committee and this Congress and this subcommittee in particular to FOIA and the difficulties encountered by the public in attempting to exercise its right to know and to gain access held by and for the Federal Government. Indeed, Mr. Chairman, this hearing you held in this committee in May of last year identified and documented many of those difficulties.

More is needed, however. Until there is a clear, tangible reason to pay attention and meet obligations, it is a logical, if regrettable, use of resources to ignore those mandates that have no repercussions. There is no followup, no meaningful followup built into the Executive order. It is up to Congress, and it is appropriately your responsibility. The staff and partners of OpenTheGovernment.Org look forward to continuing to work with you to improve and strengthen the public's access to Federal Government information.

I will be happy to answer any questions you may have. Thank you.

[The prepared statement of Ms. McDermott follows:]

Statement of
Patrice McDermott
Director, OpenTheGovernment.org

Before the
Subcommittee on Government Management, Finance, and Accountability
of the House Committee on Government Reform
On
The Implementation of Executive Order 13392, *Improving Agency Disclosure of Information*
July 26, 2006

Thank you, Mr. Chairman and Representative Towns, for the opportunity to speak today on the agencies' responses to Executive Order 13392 and to the broader issues you raised in your letter of invitation to participate in this hearing.

My name is Patrice McDermott. I am the Director of OpenTheGovernment.org, a coalition of journalists, consumer and good government groups, environmentalists, labor and others united to make the federal government a more open place in order to make us safer, strengthen public trust in government, and support our democratic principles.

As you and the members of the subcommittee are aware, July 4th was the fortieth anniversary of the Freedom of Information Act. The Act was created to "ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption, and to hold the governors accountable to the governed."

In recognition of this important milestone in the history of disclosure of agency information, OpenTheGovernment.org, in collaboration with Access Reports, American Association of Law Libraries, Center for American Progress, Center for Financial Privacy and Human Rights, Center for Democracy and Technology, Coalition of Journalists for Open Government and the National Newspaper Association, Federation of American Scientists Project on Government Secrecy, National Security Archive, OMB Watch, Project on Government Oversight, Public Citizen, Sunshine in Government Initiative undertook a collaborative look at a sample of the plans submitted by 22 federal agencies in response to E.O. 13392, "Improving Agency Disclosure of Information," issued on December 14, 2005. That report is titled, "*FOIA's 40th Anniversary: Agencies Respond to the President's Call for Improved Disclosure of Information.*"

The ratings (Table) and evaluations on which our report is based looked only at the plans submitted by the agencies. In some cases, the reviewer may have had ongoing knowledge of the agency's FOIA efforts; in others, not. The ratings and evaluations are, necessarily, subjective as there was no objective benchmark against which to measure the responses. Due this inherent subjectivity, comparisons among agencies should be drawn with caution.

Having said that, it is still surprising how many of the improvement areas were either not addressed or rated as poorly addressed, especially for the non-Cabinet agencies. Those of us collaborating in this report were particularly interested in improvement area # 21 – In-house

training on "safeguarding label"/FOIA exemption distinctions (e.g., FOUO, SBU). Out of the 22 government entities reviewed, only 4 *responded* to an issue that is, avowedly, of great and deep concern to the federal government. Of those, 1 received a "Poor" rating.

For the purposes of this hearing, I want to focus on two of the "Improvement Areas" listed by the Department of Justice in its Implementation Guidance. These two are 1) **Affirmative Disclosure: Posting frequently requested records, policies, manuals and FAQs on website;** and 2) **Proactive Disclosure on Web of publicly available information.**
These Improvement Areas seem to me to be the ones that have the most impact on the ability of the general public to understand what an agency does and what kind of information it creates. They give us some opportunities to discuss the questions you raised in your letter:

- How important is the public's right to information about activities of the Federal agencies?
- Do you think the Federal government is currently providing requesters with the most responsible disclosure possible under FOIA?
- What impact do you believe the Executive Order will have on the Federal government's approach to providing information under FOIA?
- What other opportunities, if any, do you see for Congress to improve FOIA to fulfill its basic purpose to ensure an informed citizenry?

The Improvement Areas on Affirmative Disclosure and Proactive Disclosure also are very illustrative of an ongoing problem confounding efforts to institute procedural reforms to FOIA – the lack of enforcement and, thus, of ramifications for agency heads when the reforms are ignored.

My professional life for most of the last 16 years – at the National Archives, OMB Watch, the American Library Association and now at OpenTheGovernment.org – has been engaged in working to ensure and to strengthen public access to government information. So, in response to your first question, I would say that the public's right to know what it's federal government is doing – and what is being done in the name of the public through the government and those to whom it delegates authority and responsibility – are fundamental to the proper functioning of our form of government. I agree with James Madison's famous statement that a people who intend to govern themselves must arm themselves with the power that knowledge gives. I fear that the public is being disarmed by actions in the Executive Branch, some of them sanctioned by the Congress, that serve to restrict and diminish the public's access to information by and about our government. In response, then, to your second question, whether I think the Federal government is currently providing requesters with the most responsible disclosure possible under FOIA, I would say no, although I am not entirely sure what the phrase "responsible disclosure" means.

For a more positive view, I would refer you to "40 Noteworthy Headlines Made Possible by FOIA, 2004-2006," compiled by the National Security Archives (a founding partner of OpenTheGovernment.org). It can be found at http://www.gwu.edu/~nsarchiv/nsa/foia/stories.htm and is included with my submitted testimony. These illustrate disclosures that were used to uncover important stories across a variety of topics.

Lack of Compliance with the 1996 E-FOIA Amendments
The Freedom of Information Act is a key component in the public's right to have access to such information, but it has traditionally been primarily a reactive component. The 1996 E-FOIA

Amendments were, in part, intended by Congress as step toward changing the passive stance of federal agencies when it comes to disclosing records – and information about records. These Amendments required – among other provisions – that a new category of records be made available to the public online. "Repeatedly Requested" records (created on or after November 1, 1996) that have been processed and released in response to a FOIA request that "the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records" must be made available online.

This requirement represented a significant expansion of the responsibilities of federal agencies to make information available online. Importantly, it is not up to the agency to decide if it is interested in disseminating the information; it depends solely on whether outsiders submit multiple requests for this information. The "repeatedly requested" records need not be formal or authoritative agency pronouncements: any memoranda, reports, studies, lists, tables, correspondence and other information that is of sufficient interest to the public to spark two or more request must be placed in the agency's reading room and, if created since November 1, 1996, must be made available electronically and in such a way that anyone with online access will enjoy the same informational access.

Agencies are also required by the 1996 Amendments to make an index of all previously released records -- both those recently created that are available electronically and those that may be only in paper format -- that have been or are likely to be the subject of additional requests. This index was to be available online by December 31, 1999.

The 1996 amendments created a further new set of agency requirements to aid the public in accessing federal government information. By March 31, 1997, each agency was to provide, in its reading room and through an electronic site, reference material or a guide on how to request records from the agency. This reference guide must include: an index of all major information systems of the agency; a description of major information and record locator systems maintained by the agency; and a handbook for obtaining various types and categories of public information from the agency, both through FOIA requests and through non-FOIA means.

In June 1998 and 2000, I testified Before the subcommittee on Government Management, Information and Technology of the House Committee on Government Reform and Oversight on the Implementation of the Electronic Freedom of Information Amendments of 1996. In late 1997 (and again in 1999), OMB Watch had conducted a study of agencies' implementation of some of the requirements of the E-FOIA Amendments. OMB Watch found then that, while agencies were putting up all sorts of information, it was mostly not information required by the 1996 Amendments and that information was disorganized and hard to find. At that time, OMB Watch recommended that

- **The goal of EFOIA should be to make so much information publicly available online that Freedom of Information Act requests become an avenue of last resort.** In this same vein, the goal should be to provide the information directly online to as great an extent as feasible.
- **Congress must allocate appropriate levels of funding for ongoing implementation of the EFOIA amendments.** It is difficult for agencies to make EFOIA a priority when monies must be diverted from other important projects.
- **Congress must search for new ways to ensure implementation of these amendments**

through an enforcement mechanism. Currently, agencies that are not in compliance are not penalized.

In December 2000, the General Accounting Office (GAO) briefed Senators Fred Thompson and Patrick Leahy and Representative Stephen Horn on its review of the progress made at 25 major federal departments and agencies in implementing the 1996 Electronic Freedom of Information Act Amendments. GAO found that all 25 agencies reviewed had established electronic reading rooms, but agencies had not made all required documents electronically available.
A 2002 follow-on by GAO found that although agencies were continuing to make progress in making material required by e-FOIA available on line, not all of the required materials were yet available. They found that materials were sometimes difficult to find, and Web site links were not always functioning properly. According to GAO, the situation "appears to reflect a lack of adequate attention and continuing review by agency officials to ensure that these materials are available."

We can see from this brief history that implementation of the *statutory* mandate to improve public disclosure has been an ongoing concern. Having this background at hand, I want to turn to the responses of the reviewed agencies to the Affirmative Disclosure and the Proactive Dissemination improvement areas. You can see the ratings that the agencies received by the reviewers in the table at the end of this testimony. I am going to focus on the narrative commentary the reviewers provided from the agency responses. It is, I believe, more revelatory of the attitudes and intentions of the agencies.

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1) Affirmative Disclosure: Posting frequently requested records, policies, manuals and FAQs on website.
USDA - will link to all of its agencies from the departmental website by December. It will create reading rooms on agency sites where there are none and establish new guidelines for posting additional information by next June.
ED - The Department will develop protocols to determine, in advance, what information would be of interest to the public. Increase use of electronic info technology to make it more readily accessible to the public.
HHS - FDA to make its FOI Handbook available to requestor community through it's website; FDA to assess posting frequently requested records; SAMHSA to update its FOIA Guide Book and post on its webpage; HRSA to assess possibility of releasing electronic copies of grant documents (most frequently requested); HRSA to identify most frequently requested documents and provide them in the Electronic Reading Room.
DOJ - Hard to evaluate this early. While many components reviewed their website content and chose this area for improvement, it is unclear how much more information is going to be available affirmatively.
DOL - They post the policies and contact information as well as a FOIA guide. They will make a review of the additional steps needed at each agency website and draft a plan by the middle of 2007.
DOS - Agency recognizes need for improvement and updates and has targeted this as one of the areas for improvement.
DOT - No immediate problems identified. Most of steps involve conducting initial reviews, preparing memoranda, and posting memoranda to agency's website, with implementation as far as 18 months away.
Treasury - Good; completed goal, straightforward web site.

CEQ - The improvements needed suggest that they are currently deficient in 1 - accurate contact information on website; 2 - instruction on submitting FOIA requests; 3 - scope of CEQ records; 4 - CEQ handbook on FOIA; 5 - Records Management for CEQ staff.
CIA - Difficult to monitor.
EPA - FOIA site does the legal minimum in this regard. Very little in area of "frequently requested records."
OMB - Plans to post top 2 requested databases online. Mentioned a vague commitment (under simple requests section) to identify additional requested documents that are likely to be requested and post them – no detail to the process.
NARA - Posting of frequently requested FOIA records. Posted links to various holdings of staff offices.
NSF - This improvement area is somewhat difficult to assess. Although the NSF Management Plan and Report for Improving Agency Disclosure of Information Under E.O. 13392 (the "Report") identifies "review and revise NSF's FOIA web page" as an area for review and proposes to implement the improvement by December 31, 2006, the Report does not mention adding an electronic reading room to the website. Reviewing the "web posting of policy statements and copies of frequently requested documents" is an area for review as a general part of the agency's FOIA Improvement Processes. This area needs to be more specifically addressed by NSF. [More detail can be found in the report.]
NRC - Doesn't mention data about frequently requested materials, but it does have a lot of that information on its web site and library.
SEC - The SEC plans to increase uploading of filing correspondence. These efforts seem very limited. Posting more correspondence is also listed as an improvement to reduce backlog, and it seems more consonant with that goal than a goal of actively making useful information available.
SBA - Plans to review frequently requested materials, develop an update schedule, and post them on website. Implementation schedule is relatively proactive, with periodic reviews through 12.31.07. Lack of specifics makes this section only adequate. Thorough review would have been more useful prior to submission of plan.

2) Proactive Disclosure on Web of publicly available information.
USDA - Will link to all of its agencies from the departmental website by December. It will create reading rooms on agency sites where there are none and establish new guidelines for posting additional information by next June.
ED - List several ideas for being proactive: identify grants/contract awards that are likely to be requested, identify records that the media would want and release them through public affairs channels, increase intra-agency communication, and track records requests and trends to know what to post in Reading Room.
HHS - FDA to assess proactive posting.
DOJ - Many components mentioned the need to comply with affirmative disclosure requirements & planned to conduct minimal reviews, such as reviewing the reading room section of the website on a quarterly or semi-annual basis. So much could be done in this area that it is hard to evaluate whether this is a minimalist approach or something more substantial.
DOL - They do not post frequently requested materials. They request that agencies identify frequently requested document types, draft a plan by the end of 2006 to make these documents publicly available and implement the plan in 2007.
DOS - Agency recognizes need for improvement and updates and has targeted this as one of the areas for improvement.
DOT - No immediate problems identified. Most of steps involve conducting initial reviews,

preparing memoranda, and posting memoranda to agency's website, with implementation as far as 18 months away.
CEQ - Said they need to increase reliance on the dissemination of records that can be made available to the public through website or other means so public doesn't have to FOIA, and have better instruction on available information, contact information on website.
EPA - EPA satisfied with its Web disclosure -- with some reason. In recent years, however, its achievements as a fed-wide leader in electronic disclosure have been degraded.
OMB - While getting more information available on the web is explored, it is all info that either qualifies as frequently requested (above) or FOIA process and guides (below). No plan to quickly put up electronic copies of new data as it comes in, even before requests are made.
NARA - Besides posting recently requested federal and Presidential records, NARA makes available "finding aids" and access to various databases.
NSF - This area is not directly addressed as an area for improvement. The NSF online FOIA page states that: "Most NSF documents are readily available to the public... Please check our link to Documents Online to browse, search, and retrieve electronic copies of available NSF publications. ..." It is not clear from searching the database what the dates of coverage are for each type of document, but it is very easy to search. However, "publicly available information" and "frequently requested FOIA documents" are not the same thing. According to a close reading of the Handbook and the web page, NSF tries to make everything publicly available except the full text of funded grant applications. These would appear to be the bulk of FOIA requests, according to the Handbook. The database could easily be expanded to include a field for "frequently requested documents." Although the NSF Management Plan and Report for Improving Agency Disclosure of Information Under E.O. 13392 (the "Report") identifies "review and revise NSF's FOIA web page" as an area for review and proposes to implement the improvement by December 31, 2006, the Report does not mention making access to FOIA documents (versus access to non-FOIA documents) a part of the new web page.
NRC - NRC brags that it provides "millions" of record available without a FOIA, although 70% of FOIAs are for non-public information, which seems to be a high number.
SBA - Plans to review frequently requested materials, develop an update schedule, and post them on website. Implementation schedule is relatively proactive, with periodic reviews through12.31.07. Lack of specifics makes this section only adequate. Thorough review would have been more useful prior to submission of plan.

Agency Plans Indicate Continued Failure to Comply
What is most striking to me is the future-oriented language used to describe what most of the agencies *plan* to do in these areas. Bear in mind that we are almost 10 years out from the passage of the 1996 Amendments and over 9 years beyond the point at which most of the requirements set out therein were supposed to have been met. And yet, repeatedly, in the narratives we find that said agency *will* meet these statutory requirements – with the promised date often being mid-*2007.*

Indeed, the two entities one would hope would provide exemplary models for others – the Department of Justice and the Office of Management and Budget – fail to do so. As for Affirmative Disclosure in the Justice Department, our reviewer noted: "Hard to evaluate this early. While many components reviewed their website content and chose this area for improvement, it is unclear how much more information is going to be available affirmatively." And OMB? Our reviewer said: " OMB plans to post top two requested databases online.

Mentioned a vague commitment (under simple requests section) to identify additional requested documents that are likely to be requested and post them – no detail to the process."
Proactive Dissemination – Our reviewer for the Justice Department found that "Many components mentioned the need to comply with affirmative disclosure requirements & planned to conduct minimal reviews, such as reviewing the reading room section of the website on a quarterly or semi-annual basis. So much could be done in this area that it is hard to evaluate whether this is a minimalist approach or something more substantial." Our OMB reviewer noted, "While getting more information available on the web is explored, it is all information that either qualifies as frequently requested or FOIA process and guides. No plan to quickly put up electronic copies of new data as it comes in, even before requests are made."

The lack of serious implementation of 10-year-old amendments to FOIA exemplified here is indicative of one of the serious problems with any procedural reforms to FOIA: there is no enforcement mechanism provided and no repercussions for ignoring these requirements. Even the Department of Justice, which Congress arguably intended to have oversight responsibility in the Executive Branch for the implementation of these amendments, has not fully implemented them (according to their own report). Nor has the Office of Management and Budget which has oversight responsibilities for information policy across the Executive Branch. What hope is there that other agencies – given other pressing mandates for which they *are* held responsible (at least in some budget negotiations and sometimes in the pages of the Washington Post) – are going to devote much attention to such things as improving the public's access to the information and, especially, the records of their agencies?

Impact of the Executive Order
These responses from Justice and OMB, taken with the other reviewed plans and the background provided above, inform my estimation that Executive Order will have minimal effect on the federal government's approach to providing information under FOIA. Similar conclusions can be drawn from the table.

A colleague, analyzing the table that was created from the reviewers' grades of the original 17 (five reports have been added in the interim) agency responses to the 27 Improvement Areas identified by DOJ in its guidance, notes that of the 459 possible scores assigned by the reviewers, only 14 were "good." In only one of the 27 Improvement Areas ("Overall FOIA Web site improvement") did a majority (14 of 27) of sampled agencies receive at least an "adequate" rating. "Adequate" ratings were concentrated in the following areas (listed in alphabetical order):

- Acknowledgment letters
- Additional training needed
- Automated tracking capabilities
- Backlog reduction /elimination
- Communications with requesters
- Electronic FOIA – automated processing
- Overall FOIA Web site improvement

He further noted areas more likely to *not* be addressed by agencies:

- Case-by-case problem identification
- Electronic FOIA /responding to receiving and responding to requests electronically
- Expedited processing

- Increased staffing
- In-house training on distinctions between "safeguarding label" and FOIA exemptions (e.g., "Sensitive But Unclassified," "For Official Use Only")
- Politeness /courtesy
- Recycling of improvement information gleaned from FOIA Requester Service Centers/FOIA Public Liaisons
- Troubleshooting of existing problems with existing tracking

We do get a sense from many of the agency plans that, despite a Chief FOIA Officer having been appointed in response to the Executive Order, the FOIA programs (and I would add the records management programs) are often treated like the proverbial step-child. Agencies tell in these plans of not having money for scanners or copiers. Some of this may be excuse-making, but from the work I have done over the years with FOIA officials through the American Society of Access Professionals (ASAP), I know that most of them are dedicated public servants who believe in public access and are proud of the role they play in our society. So, I am willing to take them at their word in these documents. The other thing that is striking is that only 2 agencies (DOD and DOJ) – out of 22 – are concerned about the grade level of their FOIA staff. Again, from my work with ASAP, I know this to be of concern to FOIA personnel across the government.

The Role for Congress

What can Congress do? The easy – and hard – answer is to appropriate funds specifically targeted for promoting prompt public disclosure of government information that is appropriate for such disclosure. Many ideas have been floated in the access community as to how to do that and we would be pleased to meet to with you and your staffs to discuss them.

The second opportunity for Congress is to pass the bipartisan OPEN Government Act – H.R. 867, introduced by Rep. Lamar Smith, with 31 co-sponsors to date (S. 394 in the Senate). While it is not a panacea for all our concerns with the implementation of the Freedom of Information Act, it is a large step in the direction of meaningful and accountable procedural reforms. H.R. 1620 in the House (S. 589 in the Senate) and H.R. 2331 are examples of other legislation to advance the public's right to know.

The third thing Congress can do is to conduct frequent oversight and to hold agencies – and those with oversight responsibility in the Executive Branch – accountable. We appreciate the attention of the House Government Reform Committee's in this Congress – and this Subcommittee in particular – to FOIA and the difficulties encountered by the public in attempting to exercise its right to know and to gain access to information held by and for the federal government. Indeed, Mr. Chairman, the hearing you held in this committee in May of last year identified and documented many of those difficulties. More is needed, however. Until there is a clear, tangible reason to pay attention and meet obligations, it is a logical, if regrettable, use of resources to ignore those mandates that have no repercussions. There is no follow-up built into the Executive Order. It is up to Congress and it is appropriately your responsibility.

The staff and partners of OpenTheGovernment.org look forward to continuing to work with you to improve and strengthen the public's access to federal government information.

Thank you. I will be happy to answer any questions you may have.

Attachments:
OpenTheGovernment.org, "FOIA's 40th Anniversary: Agencies Respond to the President's Call for Improved Disclosure of Information." Also at http://www.openthegovernment.org/otg/FOIAplans.pdf
National Security Archive, "40 Noteworthy Headlines Made Possible by FOIA, 2004-2006." Also at http://www.gwu.edu/~nsarchiv/nsa/foia/stories.htm
National Security Archive, "FOIA Legislative History." Also at http://www.gwu.edu/~nsarchiv/nsa/foialeghistory/legistfoia.htm

Mr. PLATTS. Thank you, Ms. McDermott. Again, our thanks for both your written testimonies and your oral testimonies here.

I want to maybe start the questions again with just a broad issue. Clearly, the support of both of you here and who you represent for the legislative proposals and going further. But looking at specifically the Executive order and where we have come in now the last 7 months since it was signed, what would you highlight as the most significant improvement or change you have seen in response to the Executive order, and are there any specific examples of a FOIA request that you are aware of through your own efforts or those you work with that you think has been improved because of the Executive order having been issued?

Ms. MCDERMOTT. I will defer to Ms. Rush because I don't have any information.

Ms. RUSH. I think the fact that the Executive order created sunlight on the process was by itself important.

There are two important components of making the FOIA work right. One is the efficient management of it, which is the purview of the executive branch, and the other is the legislative mandate which is the purview of the Congress.

I think you can't really omit either of those and expect the law to work properly. The fact that the Executive order asked the agencies to look at their processes and come up with specific milestones was a positive step. Some of the plans were very, very specific. The Defense Department, for example, issued, in a manner that I have come to expect from that agency in compliance with FOIA, very specific dates, very specific and measurable objectives, filed the plan on time, and suggested some things that ran from as simply as moving the office to a place where it could be seen to trying to make the software work better. Several of the agencies did that sort of thing.

I have noticed over the years that the agencies have gone from learning how to redact documents, for example, from putting a magic marker over the words, where you could hold the sheet of paper up and read through them, to putting a magic marker on first and then photocopying, so that you couldn't read through them. Now the agencies are talking about doing training on scanning documents in and trying to do redaction through text editors.

The process itself is great, and I think it was important. It was very welcome, given the climate we have been dealing with. I don't think it will, it can come close to substituting for the work of the subcommittee, however, and I have not seen any concrete results yet. I think it is probably a little to soon.

Mr. PLATTS. OK.

Ms. MCDERMOTT. I agree that the process itself is very important, and I think that one of the facts that it did is to raise FOIA within the agencies, raise the visibility of it within the agencies. As I stated in my written testimony, I think FOIA officers and records officers as well are often the stepchildren in Government agencies. Their work is not respected until the agency gets sued. So I think it has done that very important service of raising the visibility.

And I think it has highlighted, for many of us outside of the agencies, some of the real and very concrete problems that the agencies face. Not being able to afford a scanner or photocopier,

those sorts of things are really pretty appalling. But in terms of actual real life impacts on requestors, I can't speak to any.

Mr. PLATTS. Ms. Rush, you referenced both in your written testimony and in your answer to the question, DOD as an example of a plan that seems to be well thought out and with timeframes and goals that they are going to pursue. Given that DHS, in essence, has not really submitted a plan and they are acknowledging they don't have a plan that they are going to act—they are going to revise it and resubmit it—would the DOD plan be a good example, especially given that DHS and DOD have similar sensitivities with some of the issues they deal with and the operations they are engaged in, that DHS should be looking at DOD as an example of what you think is a good approach to the FOIA plan?

Ms. RUSH. That is an interesting question, Mr. Chairman. I think the response of DHS underlines one of the key seams, I think, of our beliefs here, and that is it is the oversight of Congress that makes things happen. To the extent that you got a plan was because you were having a hearing. So we welcome that part of it.

Over the 25 or so years that I have worked on access in Washington, I have learned to appreciate the culture in the Defense Department for compliance. Sometimes they don't tell you much, but they don't tell you on time. For the most part, most of the agencies within the Defense Department, and there is some inconsistency within the Pentagon, do try to meet the deadlines. They do try to comply. They do try to follow the orders. They do listen very carefully to what Mr. Metcalfe gives them as guidance. To the extent that the culture believes in efficient operation of the statute, I think it has set a model for the agencies, and I would commend it to the extent that the culture works hard at making information available in the public interest.

I think we might have some disagreements with policy interpretations, but again as far as the Executive order, it is the President's responsibility to make the trains run on time, and I think the Executive order tried to do that.

Mr. PLATTS. Mr. Towns.

Mr. TOWNS. Thank you very much, Mr. Chairman. Let me begin by first thanking both of you for your testimony.

I guess I want to start with you, Ms. Rush, in reference to you indicated that legislation is still needed. Are there specific kinds of things that you think we should try and put into a bill?

Ms. RUSH. There certainly are, Mr. Town, and I appreciate that question. We have been very supportive of H.R. 867. We know that there are some parts of it probably needs some fleshing out still, and I think the bill sponsors agree with that.

If I were picking two that I would ask you to focus on, the two I would choose would be to pursue the ombudsman concept. Particularly for the reporters of the newspapers I represent, who can be small staffs, going to Federal Court is never going to be a good answer. It is too long. It is too time consuming. There is lost opportunity while they spend time on it themselves. Even if they get their attorneys' fees back, it is not practical. We have seen the States come up with some good models that I think the Federal Government could explore and should explore at this point, particu-

larly since we have had some experience with how this, with how the enforcement part of this act works.

The second one is the issue about the (b)(3) exemptions. I know this subcommittee has looked at a number of them that have been proposed in this Congress. We have worked with many of you and your staffs on those.

Congress needs to present a solution to have some way to have these proposals vetted before the committee that oversees the Freedom of Information Act. It has been a problem for years. It has been one that never quite been solved. Frankly, I think as you have experienced in some of the work that you have done and the chairman has done, often when you find the bill sponsors willing to sit down and talk to you about how the Freedom of Information Act really works, they find to their great surprise that there are already exemptions and a process to deal with the concerns that they were raising. I think that trying to make that process work right is the role of the subcommittee, and we would really support some continued dialog on a solution here.

Mr. TOWNS. Thank you very much.

Ms. McDermott, you mentioned the lack of enforcement. Do you have some specific kinds of things that you think should be considered that are not being considered?

Ms. MCDERMOTT. Well, yes.

Mr. TOWNS. I know you mentioned prompt disclosure.

Ms. MCDERMOTT. I think the problem has been that, while the Department of Justice is given certain responsibilities and they do meet them very well, as Mr. Metcalfe said, they don't have, they are not given statutory responsibility for enforcing FOIA, nor is the Office of Management and Budget. In my testimony, I use their responses on the first, those two disclosure items as exemplary or non-exemplary.

I think that the approach perhaps that is taken in 867, the Office of Government Information Service, there needs to some entity in the executive branch. Certainly, Congress needs to do oversight, and that is a given, ongoing and firm oversight, but there needs to be some entity in the executive branch that has, outside of the agencies themselves, responsibility for ensuring compliance.

I think the best model that we have seen so far is this one in 867 and in 394 in the Senate, this office in the Administrative Office of the United States that would be a body that could do audits, that could ensure compliance, could issue reports. You know, we would hope it would have some subpoena authority and a way to actually force agencies to comply with timely disclosure, with getting information up on their Web sites, with all of the things that required by the law. But there has to be some entity whose sole responsibility that is.

Mr. TOWNS. Let me thank both of you for your testimony.

Mr. Chairman, on that note, I yield back.

Mr. PLATTS. Thank you, Mr. Towns.

Apparently, our series of votes will be, they think, in about the next 10 minutes. So let me try to get in a couple more questions here before we break.

I guess I want to followup first. It is really an extension of what Mr. Towns just asked. Ms. Rush, you really focused on as far as

priority, and the ombudsman clearly won. I think that kind of goes in line with Senator Cornyn when he talked about ensuring compliance, that we don't have to go to court, that we have a better compliance and that results in more timeliness and addresses some of the other issues.

On the other ones, the issue of broadening exceptions to the policy, the fact that there is often not a timely response or it varies from sometimes very good but sometimes very bad, the very extreme example of 1999 still being an open case, the fact that aren't really incentives or consequences in place, the attorneys' fees issue because of the 2001 court case of those, if you are going to have to compromise to move legislation, whether it is at the community level or the floor level, which of those would be least important, meaning you would see—really, Ms. McDermott, both of you—that you would be most willing to say, well, that is something we could work on another day if we had to, to get these other aspects of the bill or bills through the House and considered by the Senate and ultimately to the President?

What do you think is least important in that give and take?

Ms. RUSH. It is hard to give anything away in that process because there are so many things.

Mr. PLATTS. I understand.

Ms. RUSH. There are so many things that we need to think about.

Mr. PLATTS. I share the belief. I never want to give away, but sometimes you have to.

Ms. RUSH. Let me just say this. I think a number of the things that the bill tries to get at in terms of efficiency and efficiency in a cost-conscious way also for the Federal Government through the tracking numbers and the report processes and some of the things that the bill contemplates. I think if there were a more effective alternative dispute process, some of those things might melt away, frankly.

It is tempting to see this ombudsman as somebody that kind of jumps into the agencies and finds the records and makes the agency respond, but when you see this happen as a practical matter, at the State level particularly, very often the person that functions there works just as much with the requestor to try to get the request to some more concrete, manageable terms, so that the agency can really put its hands on the records, review them promptly, and get an answer. I think sometimes with the complex requests, that may be one of the problems. As counsel to news media organizations, I have often suggested to reporters when they want to write a letter that says please send me all your files on fill in the blank, that I may be on Medicare before they ever get an answer, and that is not practical.

Not all requestors have access to offices like ours. Certainly, the Reporters Committee for Freedom of the Press does dozens and dozens of these in a week. But what happens to the member of the general public? Who talks to them? Who helps them how to figure out how to find their way through this labyrinth that is our Government?

I would start there, frankly, Mr. Chairman, and I would give that process a chance to work a little bit and see what we learn from it. I think it has some real fertile ground for progress.

Mr. PLATTS. Ms. McDermott.

Ms. MCDERMOTT. I would agree. I think, you know, there are two tracks to take, and this bill takes both of them. One is a punitive track that imposes costs on the agencies, taking exemptions, for instance, if they don't get their disclosure made on a timely basis.

And then there is this assistive track, both for the public and for the agencies. Although I firmly believe that there is greater need for enforcement because the agencies do fail to comply with many aspects of this, I think that probably in the near term, the assistive track is more likely to bear fruit for the public and for the agencies themselves and therefore for our Government than the punitive track, and it is more likely, I think, to be able to move forward.

So if I had to jettison something, it would probably be the more punitive aspects, although I am, I think that the attorneys' fees is really a problem that needs to be addressed very seriously because it is a perverse incentive to the agencies.

Mr. PLATTS. If you combine the two, the ombudsman and the facilitating of the alternative dispute approach, and you reverse the consequences of that 2001 decision on attorneys' fees, the hope is then that you don't need to have the punitive.

Ms. MCDERMOTT. One hopes.

Mr. PLATTS. Do this or else this happens. You really get to that timeliness, that compliance.

Ms. RUSH. That would be the hope.

Mr. PLATTS. Maybe you need to come back and do something more, but the hope is that would do it.

Ms. RUSH. I think it would be worth giving that kind of a process a chance to work and see what impact it has. Clearly, the Federal Court process has been frustrating. Congress, when it passed the law, didn't realize how long it would take to get through Federal Courts, and in 1974, made these cases, put these cases on the expedited track. Unfortunately, Congress came along later and put some other things on expedited track. Now everything is expedited, and so nothing is expedited. So that hasn't worked all that well.

I don't want to suggest, however, that we think that Federal Appeals Court processes shouldn't continue to also be available. There will be those cases where there are questions of law that need to be tested, and that there will be requestors who have the means and the interest and the time to get a response to that.

I think that is not, certainly, it is not the typical news media request. The typical news media request, I think, would happen more frequently. I think we would have better quality reporting in your local media, which I know most Members of Congress would welcome on issues that deal with Washington, if there was a process that worked faster and got a more concrete result.

Ms. MCDERMOTT. The one thing that I would caution is that in instituting something like this at a Federal level, the volume that this office would be likely to have to deal with could be staggering.

Mr. PLATTS. That was my followup. What would you envision from a percentage of requests made, even a guesstimate you would

want to make of how many would end up with an ombudsman involved?

Ms. RUSH. I would, if I were designing it, and I have to tell you we have thought about this a long time, and we don't have a process even fixed in our own minds that we are perfectly confident of, but I think that I wouldn't have the mediator or the ombudsman, whatever you chose to call it, into the process until there had been at least an agency denial or a flagrant disregard for the time limits. I think that would cutoff some of them. It could be that some of the cases that are purely Privacy Act type requests would never get to that point. A lot of these are I would like my records, please, to the VA or whoever.

I think there are some ways to design it, certainly in the early years, so that you could try to sort of stem the flow a little bit and give it a fair chance to see how it works.

Ms. MCDERMOTT. I think the corollary to this is the issue that I raised in my written testimony, and that is the failure of the agencies to implement some of the aspects of the EFOIA amendments. I think that if agencies were to comply, which they are still not doing as far as I know, with the requirements to put their record schedules up online, so that the public can learn what kinds of records an agency creates and what offices are likely to have them, that would cut down on the over-requesting and help people to hone in their request. It might also increase requests because people would realize what kinds of records there are, but I think that with this move toward a mediator or ombudsman or arbitrator, there has to be some further work with the agencies to make their own information more transparent and more accessible to the public.

Mr. PLATTS. The final question I have before we break is we have talked about a number of States, and our colleagues in the first panel referenced some. Again, I am putting you on the spot. If you had to pick one State's approach—Connecticut, New York, whatever it may be—which would it be of those that you are familiar with?

Ms. MCDERMOTT. I don't have enough information.

Ms. RUSH. So far from what I have seen, Virginia's process seems to be working well. The process is New York has worked well. The one issue, I think——

Mr. PLATTS. You are starting to sound like a politician here.

Ms. RUSH. Yes, I know.

Mr. PLATTS. Virginia and New York, get Connecticut in there.

Ms. RUSH. Like my clients say, I want an attorney with one hand, so I don't get on the first hand and then on the second hand.

None of them are perfect. None of them are perfect, and I think New York probably is the one I am most familiar with. The thing that is imperfect about that is that individual serves at the pleasure of the Governor, and he has said many times that he only gets along doing what he is doing because he has irritated everyone almost equally. I am not sure that in an environment like Washington that you would want to make that open flank, so that you had an ombudsman that had to please the executive branch. The whole idea of this is to have a check and balance.

So I would look at trying to set up something that worked more like the Virginia, I think model, if I could, and I would try to create it in such a way that there was some direct feedback to Congress.

Mr. PLATTS. Mr. Towns, did you have anything else?

Mr. TOWNS. I have no further questions.

Mr. PLATTS. I want to thank both of you for your presentations. Your written presentations certainly gave us a wealth of information and issues to think about as we move forward and in your participation here in the panel as well.

We certainly want to continue moving forward in the oversight role and as we look at actually trying to see how we can advance the cause of some legislative efforts to tighten up the wise efforts of our predecessors 40 years ago. So we appreciate your testimony and will continue to work with you and your organizations as well as the other presenters today as we go forward.

We will keep the record open for 2 weeks for any additional information and, again, my thanks to you for participation.

This hearing stands adjourned.

[Whereupon, at 4:25 p.m., the subcommittee was adjourned.]

[Additional information submitted for the hearing record follows:]

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THE SUBCOMMITTEE ON GOVERNMENT MANAGEMENT, FINANCE AND ACCOUNTABILITY

Will Hold an Oversight Hearing on

Implementing FOIA – Does the Bush Administration's Executive Order Improve Processing?

Wednesday, July 26, 2006, 2:00 p.m.
Room 2247 Rayburn House Office Building

Witness List

Panel I

The Honorable John Cornyn
United States Senator from Texas

The Honorable Patrick Leahy
United States Senator from Vermont

The Honorable Brad Sherman
Member of Congress
27th District of California

Panel II

Mr. Dan Metcalfe, Director
Office of Information and Privacy
U.S. Department of Justice

Ms. Linda Koontz, Director
Information Management Issues
Government Accountability Office

Panel III

Ms. Tonda Rush, Public Policy Director
National Newspaper Association

Ms. Patrice McDermott, Director
Open The Government.Org

Congressman Ed Towns
Committee on Government Reform
Freedom of Information Act
July 26, 2006

Thank you, Mr. Chairman, for holding today's hearing on legislative proposals to improve our current FOIA laws and increase government transparency for all citizens. I welcome our witnesses, and especially appreciate the efforts of our distinguished colleagues from both chambers who are joining us.

The cornerstone to a free and democratic society, I believe, is reliant upon the principle of public access to governmental activities. As I've said at other hearings, open access to government information and records serves as a counterweight to ill timed or uninformed government decisions, and ensures that decision makers are held accountable for their actions.

As FOIA celebrates its 40th birthday, new challenges concerning the protection of national security information, limited agency resources, and high volumes of FOIA requests are increasing the amount of time taken by agencies to comply. These factors contributed to a near 25% increase in the number of backlogged FOIA requests government wide in 2005 when compared to the previous year.

Although the Bush Administration issued *Executive Order 13392* in order to improve upon current results, it

remains unclear if it will strengthen agency compliance or reduce the number of requests resulting in litigation or administrative challenges. This outcome, I believe, is symptomatic of the overzealous safeguarding of information that has no implication on our government's national security or law enforcement activities. In short, extensive backlogs and protracted litigation is not a model for open or transparent government, and remedies must be put in place to reverse these trends.

It is my hope that our witnesses today can bring clarity to these issues and offer us an efficient blueprint to improve the FOIA process. Mr. Chairman, this concludes my statement.

Statement of Rep. Henry A. Waxman, Ranking Minority Member
Committee on Government Reform
Before the
Subcommittee on Government Management,
Finance, and Accountability
Hearing on
"Implementing FOIA — Does the Bush Administration's Executive Order Improve Processing?"

July 26, 2006

Thank you, Chairman Platts, for holding today's hearing. This is our second hearing on the Freedom of Information Act. I am pleased that the subcommittee is continuing its oversight of this vital law that ensures public access to government information.

Open government is a bedrock of our democracy. 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.

Administration officials have 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.

In December 2005, President Bush took a promising step by signing an executive order calling on agencies to improve the operations of the Freedom of Information Act and to develop a "citizen centered" approach that will speed up response times and reduce backlogs. This executive order is certainly a step in the right direction. If implemented properly, it could address some of the problems faced by FOIA requesters.

But even if it is fully implemented, the executive order will not address all of FOIA's problems.

Our first panel today is composed of a bipartisan group of Senators and Representatives who have taken important steps to improve the operations of the Freedom of Information Act. They have introduced legislation that aims to speed up agency responses to FOIA requests and to fix weaknesses in the Act. I hope that we will be able to work as a Committee to consider their legislation.

But the Bush Administration's wholesale assault on open government demands that Congress pass a comprehensive response. That's why I introduced the Restore Open Government Act.

This 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, it eliminates unnecessary "pseudo-classifications" that restrict public disclosure of government records.

Government secrecy has a high cost. It breeds arrogance and abuse of power, while sunshine fosters scrutiny and responsible government. That is why it's so important that this Committee act on the Restore Open Government Act.

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

40 NOTEWORTHY HEADLINES MADE POSSIBLE BY FOIA, 2004-2006

1. **"Salmonella rates high at state plants; Tests at turkey processors in Minnesota have found levels close to failing federal standards," Star Tribune (Minneapolis, MN), April 14, 2006, at 1A, by David Shaffer.**

Using the Freedom of Information Act, the Minneapolis *Star Tribune* reviewed safety testing results for 22 plants where the Jennie-O Turkey Store produces ground turkey. At the largest Jennie-O plant, in Willmar, MN, federal inspectors found that half of the ground turkey contained salmonella bacteria—more than twice the national average for all samples. This level, dangerously close to the permissible federal maximum of 55 percent, has led food safety advocates to challenge federal oversight of ground turkey processing. Although no illnesses have been reported from the Jennie-O plants, more than 40,000 Americans are infected each year and as many as 500 die from salmonella infection.

2. **"Illegal crops growing at Prime Hook, lawsuit says; Genetically modified strains at refuge are harmful, three nature groups contend," The News Journal (Wilmington, Delaware), April 6, 2006, at 1B, by Molly Murray.**

The non-profit organization Public Employees for Environmental Responsibility obtained documents under the Freedom of Information act which revealed that as many as 100,000 acres of federal refuge lands have been cultivated with genetically-modified crops. Using this information, the non-profit, along with the Center for Food Safety and the Delaware Chapter of the Audubon Society, filed a lawsuit alleging that farming practices at the Prime Hook National Wildlife Refuge in Sussex County, DE violate federal law and threaten the well-being of wildlife in the refuge.

3. **"FBI Keeps Watch on Activists; Antiwar, other groups are monitored to curb violence, not because of ideology, agency says," *Los Angeles Times*, March 27, 2006, at A1, by Nicholas Riccardi.**

The American Civil Liberties Union obtained hundreds of pages of documents under the Freedom of Information Act, exposing FBI efforts to gather information about antiwar and environmental protestors and other activists in Colorado and elsewhere. The ACLU pursued the documents after FBI agents visited several activists who protested at political conventions; however, the internal FBI memos show a broad net encompassing a wide range of different types of activist groups. In one case, the FBI had opened an inquiry into a lumber industry protest held by an environmental group in 2002 because the group was planning a training camp on "nonviolent methods of forest defense . . . security culture, street theater and banner making." Since the documents were released, members of the activist community in Denver have reported a chill in protest participation, as some fear the consequences of FBI surveillance of their activities.

4. **"Planted Articles May Be Violation; A 2003 Pentagon directive appears to bar a military program that pays Iraqi media to print favorable stories," *Los Angeles Times*, January 27, 2006, at A3, by Mark Mazzetti.**

According to a newly declassified document, obtained by the National Security Archive under the Freedom of Information Act, a secret U.S. military campaign to fund publication of favorable articles in Iraqi media may violate Pentagon policy. A preliminary investigation into the program in December 2005 concluded that it did not violate U.S. law or Department of Defense regulations. However, the newly-released document, a secret directive on information operations policy dated October 30, 2003 and signed by Secretary Rumsfeld, states that "Psy-op is restricted by both DoD [Department of Defense]

policy and executive order from targeting American audiences, our military personnel and news agencies or outlets."

5. "Study: Many Incorrectly Identified As Immigration Law Violators," *The New York Sun*, December 9, 2005, at 2, by Daniela Gerson.

The Migration Policy Institute at New York University Law School conducted a study of federal immigration law enforcement based on data disclosed under the Freedom of Information Act, following a lawsuit filed by the Institute against the Department of Homeland Security. The study found that thousands of people have been wrongly identified as immigration violators, and concluded that 42% of the people identified as violators were later determined to be "false-positives," meaning that DHS was subsequently unable to confirm that they had broken immigration laws. The study suggests that the problem of improper immigration arrests may stem from a recent policy change at the Department of Justice that shifts substantial responsibility for immigration enforcement to local law enforcement authorities.

6. "Vietnam War Intelligence 'Deliberately Skewed,' Secret Study Says," *The New York Times*, December 2, 2005, December 2, 2005, at A11, by Scott Shane.

In 2001, a historian at the National Security Agency concluded that NSA intelligence officers "deliberately skewed" the evidence given to policy makers and the public, falsely suggesting that North Vietnamese ships had attacked Americans destroyers in the Gulf of Tonkin in 1964. On the basis of these erroneous intelligence reports, President Johnson ordered air strikes on North Vietnam and Congress broadly authorized military action supporting the South Vietnamese. The key documents were released by the NSA after press coverage publicizing the agency's reluctance to declassify the information and several Freedom of Information Act requests filed by the National Security Archive and others put significant pressure on the Agency to give the public access to the information. The documents were released along with hundreds of others from secret files about the Gulf of Tonkin incident and the beginning of formal involvement by the United States in Vietnam.

7. "Investigation raises questions about birth-control patch," *Ventura County Star* (California), July 17, 2005, at 1, by Martha Mendoza.

At least a dozen women died during 2004 from blood clots apparently caused by use of a new birth control patch, Ortho Evra, according to federal drug safety reports released to the Associated Press under the Freedom of Information Act. Dozens more women, most in their late teens and early 20s, suffered strokes and other clot-related problems after using the patch. Several of the victims' families have filed lawsuits since the documents were released, alleging that both the Food and Drug Administration and the company that makes the patch, Ortho McNeil, knew of possible problems with the patch before it came on the market. Despite claims by the FDA and Ortho McNeil that the patch was as safe as using birth control pills, the reports appear to indicate that the risk of dying or suffering a blood clot was about three times higher than with birth control pills.

8. "Many who got Sept. 11 loans didn't need them; some loan recipients had no idea their funds came from terror-relief program," *Richmond Times Dispatch* (Virginia), September 9, 2005, at A-1.

Analyzing loan records obtained under the Freedom of Information Act, the Associated Press found that a significant portion of the $5 billion designated for a post-September 11 recovery program to help small businesses was used to give low-interest loans to companies that did not need terrorism relief; in fact,

only 11 percent of the 19,000 loans were to companies in New York City and Washington. Some of the companies that received the funds—including a South Dakota country radio station, a dog boutique in Utah, an Oregon winery, and a variety of Dunkin' Donuts and Subway franchises—did not even know that they were receiving funds supposedly dedicated to terrorism recovery when they were awarded loans by the Small Business Administration.

9. "On Range, deadly illness went unreported; Mesothelioma strikes years after victims' exposure to asbestos," *Star Tribune* (Minneapolis, MN), August 21, 2005, at 9B, by Greg Gordon.

Because of a loophole in report requirements, the LTV Steel Mining Company did not report a trend of mesothelioma and other debilitating asbestos-related illnesses among workers in its Minnesota taconite mines dating from1980, according to records obtained from the Mine Safety and Health Administration under the Freedom of Information Act. A 1977 agency rule requires companies to report work-related illnesses among active workers, but because mesothelioma usually does not appear for more than 20 years after exposure to asbestos, LTV did not report illnesses and deaths among its retirees, and so no action was taken to improve safety of other workers at the mine. The gross failure of companies to report lung disease cases among mine workers was evident from the documents, after reporters spoke with families of dozens of affected workers in the Iron Range region alone. According to MSHA, the maximum penalty for companies that fail to report an illness is $60.

10. "Prewar Memo Warned of Gaps in Iraq Plans; State Dept. Officials Voiced Concerns About Post-Invasion Security, Humanitarian Aid," *The Washington Post*, August 18, 2005, at A13, by Bradley Graham.

In a formerly secret memo released to the National Security Archive in response to a Freedom of Information Act request, three senior State Department officials warned of "serious planning gaps for post-conflict public security and humanitarian assistance" in Iraq before the U.S. invasion. The memo, written February 7, 2003 to Paula J. Dobriansky, undersecretary for democracy and global affairs, challenged increasing Pentagon control over planning for the post-invasion occupation and argued that lack of attention to security and humanitarian concerns in Iraq could undermine the military campaign and harm the U.S. reputation in the world.

11. "Fighter jet's brake failures elicit urgent safety alerts," *The Virginian-Pilot* (Norfolk, VA), August 5, 2005, at A14, by Ted Bridis.

Brake problems with a front-line fighter jet used by the Navy and the Marines poses "a severe hazard to Naval aviation" and has prompted urgent warnings from military commanders, according to documents obtained by the Associated Press under the Freedom of Information Act. The brake problem in the F/A-18 Hornet jet, apparently related to a $535 electrical cable, has caused a significant number of accidents since 1990 but went unnoticed until a series of failures last year drew attention to the trend. In 20 years of flight of this model of jet, military documents show, there have been 17 malfunctions of the anti-skid braking system.

12. "Inefficient Spending Plagues Medicare; Quality Often Loses Out as 40-Year-Old Program Struggles to Monitor Hospitals, Oversee Payments," *The Washington Post*, July 24, 2005, at A1, by Gilbert M. Gaul.

As part of a large-scale investigation into the quality and monitoring of Medicare services, the Washington Post obtained records of hospital visits by Medicare patients under the Freedom of Information Act. The records, along with further investigatory work, revealed that Medicare officials knew of a number of health care facilities that were out of compliance and that conditions at some

facilities put patients in jeopardy. At one Florida hospital that handles many Medicare patients, a high rate of recurring infections in heart patients actually served to benefit the hospital, which is reimbursed equally for new cases and for patients readmitted with complications from medical errors or poor care. Critics of Medicare cite as problems the incentive for health care providers to charge for additional services and to focus on receiving greater payments rather than on patient needs and prevention.

13. "Jail's Broken Locks are Widespread; Reports Detail Incidents of City Inmates Regularly Breaking Out of Their Cells," *Richmond Times Dispatch* (Virginia), June 7, 2005, at A-1, by Jim Nolan, David Ress and Jeremy Redmon.

According to reports released under the Freedom of Information Act, up to 75 percent of the cells in the Richmond City Jail may have faulty locks. The *Times-Dispatch* obtained disciplinary reports for at least 15 incidents of inmates breaking out of their cells in 2004 and more than two dozen other reports of inmates found wandering in unauthorized areas of the jail. Jail officials acknowledge that inmates may be able to jam paper and other debris into the locks on their cell doors, and then later simply shake the jammed locks to release them. The ongoing problem came to light last year, when one young inmate got out of his cell in the felony lockdown area of the jail and attacked and beat to death another inmate, who had been arrested on charges of sexually assaulting the young man's mother. After the reports were published, the Richmond Sheriff's office announced that it would hire a locksmith to repair inoperable locks in the jail, at an estimated cost of $120,000. City officials claim that the sorely needed full renovations to the jail will cost upwards of $25 million.

14. "Broader definition of terror; The U.S. Justice Department's silence regarding specific cases has sparked a controversy," *Des Moines Register* (Iowa), May 16, 2005, at 1B, by Dalmer Bert.

Department of Justice documents obtained under the Freedom of Information Act show that the Justice Department has greatly broadened the definition of terrorism since 2001 for purposes of counting terrorism-related cases and seeking congressional funding and authorization for greater police power, as under the Patriot Act. Justice Department memoranda show that officials broadened record-keeping practices so that they could increase the reported number of "terrorism-related cases." Under the new practices, the Department of Justice could count an investigation into drug charges against several American contractors working at airport runway jobs as well as cases in which terrorism-related tips were received and immediately disregarded before investigations were opened. In the year prior to September 11, 2001, only 29 terrorism-related convictions were reported; in the two years after the new policy changes took effect, the Justice Department claims that it has won convictions in 1,065 terrorism-related cases, in addition to hundreds of arrests and investigations. Few of the defendants in the reported cases have been identified, however, even at the request of Congress.

15. "City rarely prosecutes civil rights complaints; A report shows officers seldom are taken to court over alleged offenses, here or elsewhere," *The Houston Chronicle*, December 1, 2004, at A1, by John Frank.

The Transactional Records Access Clearinghouse (TRAC) analyzed hundreds of Department of Justice records it obtained under the Freedom of Information Act and concluded that federal prosecutors around the country decline to prosecute about 98 percent of all civil rights violations alleged against police officers, prison guards, and other government officials. According to the report, the prosecution rates are among the lowest in Houston, with less than 1 percent of all cases actually being pursued by the U.S. Attorney's Office there, although the Southern District of Texas has the highest number of FBI investigations of police abuse and civil rights violations. One co-author of the report suggests that one contributing factor may by the FBI's failure to follow through fully with civil rights investigations.

16. "Amid Strife, Abramoff Had Pal at White House," ***Los Angeles Times*****, May 11, 2006, by Peter Wallsten, James Gerstenzang, and Tom Hamburger.**

Lobbyist Jack Abramoff, who has recently pled guilty to fraud and tax evasion in connection with secret kickbacks from Indian tribe activities, had regular contact with a high-ranking official at the White House, according to documents released under the Freedom of Information Act. The Office of Management and Budget released a series of friendly e-mails between Abramoff and David H. Safavian, the former White House chief of federal procurement policy who was charged with perjury in conjunction with the federal investigation into Abramoff's lobbying activities last year. Safavian offered sympathy to Abramoff after the scandal over his improper lobbying tactics broke, and at one point offered to help Abramoff with "damage control" and told him that "you're in our thoughts." It appears, however, that Safavian was not Abramoff's only connection in the White House. Documents released by the Secret Service recently show that Abramoff made at least two official visits to the White House, and it is believed that he was there on a number of other occasions, including when he is shown in a photo with President Bush.

17. "Did Daley make him the fall guy? Water department's boss OK'd probe of scam, then lost job," ***Chicago Tribune*****, May 5, 2006, by Gary Washburn.**

Chicago Water Management Commissioner Richard Rice was fired after a probe uncovered a timesheet scam by nine employees in Rice's department. According to a confidential document obtained under the Freedom of Information Act, however, it was Rice himself who approved the probe, tracking payroll irregularities involving nine workers. Some have suggested that Rice may have served as a scapegoat, who was fired to demonstrate that the mayor is living up to his promises of being tough on corruption.

18. "Yellowstone considers wireless tower expansion," ***Centre Daily Times*** **(State College, PA), May 4, 2006, by Rita Beamish, The Associated Press.**

Officials of Yellowstone National Park are preparing to expand the availability of cellular phone service inside the park, according to records of a meeting last year with telecommunications companies who would like to operate in the park, which were released under the Freedom of Information Act. The AP, which obtained the documents pursuant to a Freedom of Information Act request, said that park officials asked them to identify sites where wireless towers or other equipment would have the least visible impact on visitors after vigilant watchdog groups alleged that cell phone service in the park would mar the quiet of the landscape there. Because the park attracts more than 2.8 million visitors annually, the companies have pressured park officials to allow them to provide service there in order to get an edge in the competitive market.

19. "Few Punished in Abuse Cases," ***The New York Times*****, April 27, 2006, by Eric Schmitt.**

A report compiled by several human rights groups, based on tens of thousands of documents released under the Freedom of Information Act, finds significant failures in government efforts to investigate and punish military and civilian personnel engaged in abuse of detainees in Iraq, Afghanistan, and Guantanamo Bay. According to the documents reviewed for the report, 410 individuals have been investigated, but only about one-third have faced any disciplinary action. The report recommends, among other actions, that the Senate should deny promotion to any officer who has been implicated in an abuse case.

20. "Washington owed billions of dollars: Fraction of fines actually get paid; Penalties get axed, ignored, forgotten," *Kansas City Star*, March 19, 2006, by Martha Mendoza and Christopher Sullivan, the Associated Press.

An investigation by the Associated Press using records obtained under the Freedom of Information Act uncovered a huge increase in the amount of unpaid federal fines owed by individuals and corporations. In some cases, large penalty fines have been avoided or reduced through negotiations, because companies go bankrupt before the fines are paid, or because federal officials often fail to keep track of who owes what in the highly-decentralized collection system. According to the AP analysis of financial penalty enforcement figures across the federal government, the government is owed billions of dollars including, for instance, more than $35 billion in fines owed to the Justice Department from criminal and civil cases as well as billions of dollars in penalties charged against energy and mining companies for safety and environmental violations. In addition to unpaid fines, AP found countless fines that were paid, but in a significantly reduced amount. For example, the government sought to assess a fine in the amount of $60 million for "commercial fraud" against one large corporation, but the case ended with only a $15,000 collection by Customs after the company challenged the government's claim.

21. "IRS audited group after criticism," *Fort Worth Star-Telegram*, February 27, 2006, by R. Jeffrey Smith, The Washington Post.

The Internal Revenue Service conducted an audit of the nonprofit group Texans for Public Justice, which had openly criticized the campaign spending of former House Majority Leader Tom DeLay. The audit was requested by Rep. Sam Johnson, a member of the Ways and Means Committee and an ally of DeLay. The group's founder, Craig McDonald, used the Freedom of Information Act to determine the circumstances that prompted the audit; the released materials included a letter from Johnson to IRS Commissioner Mark Everson, asking him to report the results of the audit directly to the congressman. The IRS auditors, however, found no tax violations by the group.

22. "Report Slams UCI's Kidney Transplant Care," *Los Angeles Times*, February 16, 2006, by Charles Ornstein.

An investigation into the kidney transplant program at UCI Medical Center in Orange County in December 2005 aided by documents released under the Freedom of Information Act found that the hospital failed to ensure that all staff completed required training, and did not institute federally-mandated patient care reviews and oversight, including monitoring the diets of organ donor recipients. UCI hospital shut down its liver transplant program last year, after an investigation by *The Times* revealed that more than 30 patients had died waiting for organs, although the hospital turned down numerous donors.

23. "Pentagon accused of ignoring waste allegations; At issue is a program that lets vendors set their own prices; Defense said the program worked," *Philadelphia Inquirer*, January 24, 2006, by Seth Borenstein.

Documents acquired by Knight Ridder under the Freedom of Information Act show that a retired Army Reserve officer, Paul Fellencer Sr., tried to expose as much as $200 million in wasteful spending, but Pentagon officials casually dismissed his claim and claims of several others. The whistleblower alleged that a multibillion-dollar Pentagon prime vendor program used middlemen who set their own prices to purchase certain equipment for use by the Defense Department. DOD apparently bought kitchen equipment through the program, spending as much as $20 each for ice cube trays that retail for less than a dollar, $1000 for toasters and popcorn-makers, and $5,500 for a deep-fryer (which other government agencies bought for only $1,919). Fellencer documented the prime vendor program spending in detailed spreadsheets, and provided the data to officials at a Pentagon fraud hotline. After an eight-hour

investigation, officials declared the tip "unsubstantiated," and dismissed it, according to the recently released documents.

24. "Data: Navy tried to tilt Vieques vote," *Orlando Sentinel*, July 23, 2005, by John J. Lumpkin, the Associated Press.

According to records obtained by Judicial Watch under the Freedom of Information Act, the Navy paid $1.6 million to a communications firm in 2001 for a public relations campaign seeking to influence the results of a referendum on whether the military could continue to use the Puerto Rican island of Vieques as a bombing range for training. The Rendon Group was under contract to "conduct public outreach to build grass-roots support" in favor of continued Navy training at Vieques. The vote never took place, however, because in January 2002 President Bush announced that the Navy would stop conducting bombing practice on the island, and the range closed in 2003.

25. "A breach of the truth," *Chattanooga Times Free Press* (Tennessee), March 4, 2006, at B6.
Despite President Bush's statement after Hurricane Katrina hit New Orleans last August, claiming, "I don't think anyone anticipated the breach of the levees," new video released to the Associated Press under the Freedom of Information Act shows Bush being briefed about potential weaknesses in the levees. The tape shows FEMA director Michael Brown giving a briefing, including that the storm was "a big one" and that experts, including Max Mayfield, director of the National Hurricane Center, feared that it could submerge New Orleans and result in a high death toll. On the tape, however, President Bush appears unconcerned; he asked no questions and replied only that "We are fully prepared."

26. "That Wild Taxi Ride Is Safer Than You Think, a Study Says," *New York Times*, April 28, 2006, by Thomas J. Lueck and Janon Fisher.

A study, based on state accident records obtained under the Freedom of Information Act, finds that contrary to popular belief New York taxis are relatively safe—in fact, taxi and livery-cab drivers have accident rates overall that are one-third lower than other private vehicle drivers. The study also found, however, that passengers in taxicabs are twice as likely to suffer serious injuries than passengers in private cars, largely because taxi riders rarely wear seatbelts and can be injured by cab partitions. Bruce Schaller, an independent transportation consultant for cities and transit agencies, was not paid by New York City Transit officials or the Taxi and Limousine Commission, but rather conducted the study to satisfy his own curiosity.

27. "PETA urges AF to stop Taser testing on animals," *San Antonio Express-News*, April 6, 2006.

Video footage obtained by People for the Ethical Treatment of Animals shows Air Force testing of Taser guns on animals at Brooks City-Base. The video showed animals writhing in apparent pain as they were hit with electric shocks from the guns. PETA called on air force to stop such testing, but an Air Force spokesman said that the research on nonlethal methods of incapacitating individuals is vital to national defense and the military will not comply with the request. PETA says that stun guns have already been tested extensively, and these additional tests, which "cause excruciating pain and suffering to the animals involved," are unnecessary.

28. "System Error: The NSA has spent six years and hundreds of millions of dollars trying to kick-start a program, intended to help protect the United States against terrorism, that many experts say was doomed from the start," *Baltimore Sun*, January 29, 2006, by Siobhan Gorman.

A classified program, launched in 1999 to help the National Security Agency sift through electronic communications data and enable analysts to pick out the tidbits of information that are most important for

national security, is still not fully functional. After more than six years and $1.2 billion in development costs, the project has resulted in only a few technical and analytical tools and suffers from a lack of clearly defined goals and direction. An NSA inspector general report, obtained through a Freedom of Information Act request by the *Baltimore Sun*, found "inadequate management and oversight" of private contractors and overpayment for the work on the project.

29. "Librarians would shelve Patriot Act," *San Antonio Express-News*, January 25, 2006, by Amy Dorsett.

A series of Freedom of Information Act requests filed with the FBI by the Electronic Privacy Information Center uncovered a series of e-mails between agents complaining about public backlash over the Patriot Act, including by "radical, militant librarians." Members of the American Library Association last year debuted a button, one of the biggest sellers at the organization's annual convention, declaring "Radical Militant Librarians." This group's anger over the Patriot Act largely stems from provisions in the law that allow government agents to inspect reading lists and reference materials used at libraries and bookstores by individuals under investigation; librarians are prohibited from telling patrons that material about them has been requested.

30. "U.S. Saw Spread of Nuclear Arms as 'Inevitable'; 1975 CIA Outlook Bleak; Progress has Been Made," *Boston Globe*, August 6, 2005, by Bryan Bender.

A CIA estimate, sent to Secretary of Defense Donald H. Rumsfeld in 1975, offered a bleak outlook of the spread of nuclear weapons: "The future is likely to be characterized not only by an increased number but also an increased diversity of nuclear actors." The estimate was declassified and released under the Freedom of Information Act to the National Security Archive, along with a series of other Cold War nuclear intelligence documents, all of which demonstrate a belief by the U.S. government that significant increases in the number of nuclear actors was "inevitable." In the 30 years since the estimate, however, only one country—Pakistan—is known to have developed nuclear weapons and joined the existing seven nuclear states (U.S.A, Russia, U.K., France, China, India, Israel).

31. "A haven for handouts; Records: Funds for a drug program run by council candidate Thomas White went to him and employees," *Newsday*, July 18, 2005, by William Murphy.

Documents obtained through the Freedom of Information Act (FOIA) by Newsday reveal rampant misappropriation of funds by the J-CAP Foundation that were intended to provide money for drug treatment programs, including the Queens Village Committee for Mental Health for Jamaica Community Adolescent Program. Investigative reports show that benefits from the Foundation, run by current City Council candidate Thomas White during the 1990s, went primarily to J-CAP executives and employees. White and other employees used SUVs leased by the foundation and used funds to make personal loans to employees and to pay $4,196 in New York City parking tickets.

32. "Social Security Opened Its Files For 9/11 Inquiry," *New York Times*, June 22, 2005, by Eric Lichtblau.

The Social Security Administration has relaxed its privacy restrictions since the September 11 attacks and searched thousands of its files at the request of the FBI, according to memos obtained under the Freedom of Information Act by the Electronic Privacy Information Center. Despite strict privacy policies that prohibit access by other agencies to personal information about individuals, senior officials at the Social Security Administration agreed to an "ad hoc" policy which permitted FBI searches pursuant to claims of a "life-threatening" emergency. The Internal Revenue Service also assisted the FBI, providing income information about individual taxpayers for terrorism inquiries.

33. "State pols jump ahead in line for Illini tickets; For ordinary fans, it's scalpers or TV," *Chicago Sun Times*, February 27, 2005, by Dave McKinney.

Tickets for the top-ranked Fighting Illini basketball games are difficult to come by, but not for state politicians and others with high-level connections, according to lists of ticket recipients obtained through a Freedom of Information Act request to the University of Illinois. The records show that the university has given more than 2,000 tickets to its trustees as well as state lawmakers, congressmen, and lobbyists, among others. And while the face value of the tickets can be as much as $30, with ticket brokers and scalpers sometimes selling them for up to 13 times face value, the VIPs have all received their tickets for free.

34. "White House paid commentator to promote law; Pundit got $240,000 to pitch education reform," *USA Today*, January 7, 2005, by Greg Toppo.

The Bush administration paid a well-known political pundit to promote its reform of the No Child Left Behind Act on his television show geared to black audiences, according to documents released to USA TODAY under the Freedom of Information Act. The documents include a contract between the Education Department and commentator Armstrong Williams, which required Williams "to regularly comment on NCLB during the course of his broadcasts" and to interview Education Secretary Rod Paige. The government also asked Williams to use his contacts with other black broadcast journalists to encourage wide supportive coverage of President Bush's NCLB reform plan.

35. "Many FDA Scientists had Drug Concerns, 2002 Survey Shows," *Washington Post*, December 16, 2004, at A1, by Marc Kaufman.

A survey conducted by the inspector general of the Department of Health and Human Services support some critics argument that the FDA is ineffective at keeping unsafe drugs off the market, according to records obtained by the Union of Concerned Scientists and Public Employees for Environmental Responsibility under the Freedom of Information Act. Almost one-fifth of the FDA scientists surveyed in 2002 said they had been pressured or intimidated into recommending approval a drug, despite their own misgivings about the drug's safety or effectiveness. Moreover, more than one-third of the scientists were not confident in the FDA's ability to assess the safety of a drug.

36. "Anthrax slip-ups raise fears about planned biolabs," *USA Today*, October 14, 2004, by Dan Vergano and Steve Sternberg.

A 361-page report by Army investigators, obtained recently under the Freedom of Information Act, described a number of incidents of anthrax contamination at the nation's premiere biodefense laboratory, the U.S. Army Medical Research Institute of Infectious Diseases at Fort Detrick, MD. In 2001 and 2002, anthrax spores apparently leaked from secure labs into scientists' office, and 88 people were tested for anthrax exposure but no one was injured and no contamination was found in the residential area surrounding Fort Detrick. Nonetheless, the report alarmed critics who have challenged military plans to build additional biodefense research facilities at some major research institutions across the country, including Boston College, citing the danger of research on live bacteria in populated areas.

37. "Policy on Gays Seen Hurting Military; Others with Same Skills are Recalled," *Boston Globe*, July 9, 2004, by Bryan Bender.

The "Don't Ask, Don't Tell" policy, which prohibits gays from serving openly in the U.S. military, has contributed to serious skills shortfalls, including in intelligence, military police, and infantry operations,

according to new military statistics released under the Freedom of Information Act. The statistics suggest that reserve forces are being called up to fulfill gaps in many functions that had previously been performed by soldiers dismissed on the basis of their sexual orientation—nearly 10,000 since 1994. Critics argue that the policy is outdated and undermines military readiness at a time when demands on forces are high.

38. "Feds fault Chiron for lax cleanup of flu shot plant," *San Francisco Chronicle,* June 21, 2006, by Sabin Russell.

The British pharmaceutical company Chiron Corp.'s Liverpool plant, which produces half of the United States' supply of the influenza vaccine, failed to meet FDA regulations as late as the end of last summer, according to FDA documents released under the Freedom of Information Act. The year before, in 2004, the plant's entire production run—over 48 million doses—was condemned and destroyed by the FDA, causing a severe shortage of the vaccine for the winter. However, despite the company's expectations of resuming production and shipments for the end of 2005, the FDA found that the plant was not doing an adequate job of testing for the presence of the bacteria that had led to the previous year's shutdown. Chiron was only cleared to ship out the vaccine as late at the end of October, 2005, causing a great deal of concern for many awaiting the vaccine and several spot shortages over the fall.

39. "More Army recruits have records: Number allowed in with misdemeanors more than doubles," *Chicago Sun-Times,* June 19, 2006, by Frank Main.

Documents released by the Army to the Chicago Sun-Times under the Freedom of Information Act show that, even as the Army is screening applicants more carefully than ever, the percentage of recruits entering the Army with waivers for misdemeanors and medical issues have doubled since 2001. Although studies have shown the recruits with so-called "moral waivers," who have been convicted of a misdemeanor in the past, are more likely to be separated from the service, the Army has increased the number of waivers it has granted as recruitments levels continue to fall.

40. "Pentagon videos of 9/11 released; Defense Dept. makes security tapes public after Moussaoui trial, lawsuit," *USA Today,* May 17, 2006, by Tom Vanden Brook.

Videos of the September 11. 2001 attack on the Pentagon were released for the first time by the Department of Defense in response to a Freedom of Information Act request made by Judicial Watch, a public interest group. The lack of video confirmation of the attack led some to develop a variety of theories about the crash; Judicial Watch hoped that the release of the video would set things straight. The Pentagon withheld the videos until the completion of the trial of Zacarias Moussaoui, who plead guilty to conspiring with Al-Qaeda to plan the attacks, and was sentenced in early May.

Department/Agency	DOJ*	HHS*	DOL	DOI	DOD	USDA	DOC	DOT	TREAS*	ED	DOE	DOS	CIA	SEC	NASA	SBA	NSF	NRC	OMB	CEQ	SSA	NARA	EPA	
Improvement Area																								
1	A	G	A	A	A	A	NA	P	NA	A	U	A	A	NA	NA	A**	A	A	A	A	U	A	A	1
2	P	A	A	NA	A	A	NA	P	NA	A	U	A	A	P	NA	A**	NA	P	P	A	U	A	G	2
3	A	A	NA	A	A	A	G	P	A	A	U	A	A	NA	A	A**	A	A	A	A	U	A	A	3
4	A	A	NA	G	NA	G	P	P	P	NA	U	A	NA	NA	A	A**	A	A	A	A	U	A	NA	4
5	A	A	A	A	A	A	NA	A	P	NA	U	A	A	NA	A	A**	A	NA	NA	NA	U	NA	G	5
6	A	A	P	A	A	A	NA	A	P	A	U	A	NA	G	NA	A**	A	P	NA	A	U	A	G	6
7	A	A	P	A	NA	A	NA	A	P	NA	U	A	NA	NA	NA	A**	A	P	NA	NA	U	NA	G	7
8	A	A	A	A	NA	A	G	P	A	A	U	A	NA	NA	NA	A**	NA	P	P	P	U	A	A	8
9	G	A	NA	NA	NA	A	NA	NA	P	NA	U	A	A	NA	NA	A**	NA	P	NA	NA	U	NA	NA	9
10	NA	A	NA	NA	NA	P	NA	NA	A	NA	U	NA	NA	NA	NA	A**	NA	NA	NA	NA	U	NA	NA	10
11	P	NA	NA	NA	NA	P	G	A	A	NA	U	A	NA	NA	NA	A**	NA	P	NA	P	U	P	P	11
12	A	A	A	G	A	A	G	P	A	P	U	A	A	G	A	A**	NA	A	A	P	U	P	A	12
13	G	NA	NA	A	A	P	NA	NA	P	NA	U	A	NA	NA	NA	A**	NA	NA	NA	A	U	NA	NA	13
14	A	NA	A	NA	A	A	A	P	P	NA	U	A	A	NA	A	A**	A	P	NA	A	U	A	NA	14
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16	P	A	NA	NA	P	A	NA	P	A	NA	U	NA	NA	NA	NA	A**	P	NA	NA	NA	U	A	A	16
17	P	NA	NA	NA	P	A	NA	G	A	NA	U	NA	A	NA	NA	A**	P	NA	NA	NA	U	NA	A	17
18	P	A	NA	U	NA	A	NA	A	A	NA	U	NA	NA	NA	A	A**	NA	NA	A	A	U	NA	NA	18
19	NA	A	NA	NA	A	NA	NA	NA	A	P	U	NA	NA	NA	A	A**	NA	NA	NA	P	U	NA	NA	19
20	A	A	A	G	A	A	A	NA	A	A	U	A	NA	A	A	A	NA	P	NA	A	U	A	G	20
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22	P	A	A	U	A	A	NA	NA	A	NA	U	P	NA	NA	A	A**	NA	A	NA	P	U	NA	NA	22
23	A	NA	NA	A	A	NA	NA	NA	A	NA	U	NA	NA	NA	A	A**	NA	NA	NA	A	U	NA	NA	23
24	NA	NA	NA	NA	A	NA	G	NA	A	NA	U	A	NA	NA	NA	A**	NA	A	NA	NA	U	NA	NA	24
25	G	A	NA	NA	A	A	P	NA	P	NA	U	A	NA	NA	A	A**	A	NA	NA	NA	U	NA	NA	25
26	A	A	P	U	A	NA	NA	P	A	NA	U	NA	NA	NA	A	A**	NA	A	P	A	U	NA	NA	26
27	A	NA	NA	A	NA	A	NA	A	P	NA	U	A	NA	NA	A	A**	NA	NA	NA	A	U	NA	NA	27

A=Adequate, P=Poor
NA=Not addressed
*=Multiple components sampled
G=Good, A**=Claims no improvement needed
U=Too little information to grade

FOIA Legislative History

1966 Passage – The FOIA was enacted in 1966 despite the opposition of President Johnson to the legislation. Prior to enactment, there were several years of congressional hearings about the need for a disclosure law. The FOIA went into effect in 1967. To learn more about the enactment of the FOIA, click here.

Congressional Reports

S. Rep. No. 1219, 88th Congress, 2nd Session (S. 1666)

S. Rep. No. 813, 89th Congress, 1st Session, Senate Committee on the Judiciary (Oct. 4, 1965) (S. 1160)

H. Rep. No. 1497, 89th Congress, 2nd Session, House Committee on Government Operations (May 9, 1966) (S. 1160)

Floor Consideration of S. 1160

Considered and passed Senate, October 13, 1965, 111 Cong. Rec. 26820

Considered and passed House, June 20, 1966, 112 Cong. Rec. 13007. Excerpt from Congressional Record of June 20, 1966, "Clarifying and Protecting the Public's Right to Know", (Debate and Vote of the US House of Representatives on Senate Bill 1160, Featuring a Statement by US Rep. John Moss)

Presidential Signing Statement

President Lyndon Johnson's Statement upon Signing the FOIA (Press Release, Office of the White House Press Secretary, "Statement by the President upon Signing S.1160", dated July 4, 1966

1974 Amendment – In the wake of the Watergate scandal and several court decisions, Congress sought to amend the FOIA. After negotiations between Congress and the Ford Administration broke down, Congress passed significant amendments to the FOIA. President Ford vetoed the amendments and Congress swiftly voted to override the veto. To learn more about the 1974 Amendments to the FOIA, click here.

Congressional Reports

H. Rep. No. 93-876 (H.R. 12471) (Comm. on Gov't Op.)

S. Rep. No. 93-854 (S. 2543) (Comm. on the Judiciary)

H. Rep. No. 93-1380 and S. Rep. 93-1200 (Comm. of Conference)

Floor Consideration:

March 14, considered and passed House, 120 Cong. Rec. H1787-H1803 (1974)

May 30, considered and passed Senate, amendment in lieu of S. 2543, 120 Cong. Rec. S9310-S9343 (1974)

October 1, Senate agreed to conference report, 120 Cong. Rec. S17828-S17830, S17971-S17972 (1974)

October 7, House agreed to conference report, 120 Cong. Rec. H10001-H10009 (1974)

President Ford's Veto Message

October 17, vetoed; Presidential message, H. Doc. 93-383 (Nov. 18, 1974)

Floor Discussion of Veto:

November 18, Preliminary House action on Presidential Veto, 120 Cong. Rec. H10705-H10706 (1974)

November 20, House Action and Vote on Presidential Veto, 120 Cong. Rec. H10864-H10875 (1974)

November 21, Senate Action and Vote on Presidential Veto, 120 Cong. Rec. S19806-S19823 (1974)

1976 Amendment –In 1976, as part of the Government in Sunshine Act, Exemption 3 of the FOIA was amended.

Congressional Reports:

H. Rep. No. 94-880, Part I (Comm. on Gov't Op.) (selected pages)

H. Rep. No. 94-880, Part II (Comm. on the Judiciary) (selected pages)

H. Rep. No. 94-1441 (Comm. of Conference)

Presidential Signing Statement:

Sept. 13, 1976, signed; Presidential statements.

1986 Amendment – In 1986 Congress amended FOIA to address the fees charged by different categories of requesters and the scope of access to law enforcement and

national security records. The FOIA amendments were a small part of the bipartisan Anti-Drug Abuse Act of 1986. The amendments are not referenced in the congressional reports on the Act, so the floor statements provide an indication of Congressional intent.

Congressional Consideration:

September 25, Senate bill introduced, 132 Cong. Rec. S13648, 13660-61 (1986)

September 27, Senator Leahy Amendment and Statement, 132 Cong. Rec. S14033 (1986)

September 27, Senator Hatch Statement, 132 Cong. Rec. S14038-40 (1986)

September 30, Senator Denton Statement, 132 Cong. Rec. S14252 (1986)

September 30, Senator Leahy Statement, 132 Cong. Rec. S14295-300 (1986)

September 30, Senate Technical Amendments, 132 Cong. Rec. S14277-78 (1986)

October 8, Reps. English and Kindness Statements, 132 Cong. Rec. H9462-68 (1986)

October 8, House approves amendments, 132 Cong. Rec. H9497-98 (1986)

October 10, Senate Amendment to House Amendment, 132 Cong. Rec. S15956 (1986)

October 10, Senator Leahy-Kerry Colloquy, 132 Cong. Rec. S16496-97 (1986)

October 15, Senate approves amendments, 132 Cong. Rec. S16502 (1986)

October 15, Senator Hatch Statement, 132 Cong. Rec. S16504-05 (1986)

October 17, House Amendment to Senate Amendment, 132 Cong. Rec. SH11233-34 (1986)

October 17, House approves amendments, 132 Cong. Rec. H10787 (1986)

October 17, Senate concurs in House amendments, 132 Cong. Rec. S16921 (1986)

1996 Amendment – The FOIA was significantly amended in 1996 with the Electronic Freedom of Information Act Amendments of 1996. There were separate Senate and House bills that were reconciled by their sponsors. The public law

includes a "Findings and Purposes" section that was not codified into the FOIA's text.

Congressional Reports:

H. Rep. No.104-175 (H.R.3802) (Committee on Government Reform and Oversight)

S. Rep. No. 104-272 (S. 1090) (Committee on the Judiciary)

Presidential Signing Statement

President Clinton's Statement Upon Signing the EFOIA Amendments (Press Release, Office of the Press Secretary, The White House, "Statement of the President", dated October 2, 1996)

2002 Amendment – In 2002, in the wake of the 9/11 attacks, the FOIA was amended to limit the ability of foreign agents to request records from U.S. intelligence agencies.

Congressional Reports:

H. Rep. No. 107-592

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