AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

THE STATE OF THE FOIA: ASSESSING AGENCY EFFORTS TO MEET FOIA REQUIREMENTS

HEARING

BEFORE THE

SUBCOMMITTEE ON INFORMATION POLICY, CENSUS, AND NATIONAL ARCHIVES

OF THE

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HOUSE OF REPRESENTATIVES

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

FEBRUARY 14, 2007

Serial No. 110–56

Printed for the use of the Committee on Oversight and Government Reform

Available via the World Wide Web: http://www.gpoaccess.gov/congress/index.html
http://www.oversight.house.gov

U.S. GOVERNMENT PRINTING OFFICE

43–029 PDF WASHINGTON : 2008

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2104 Mail: Stop IDCC, Washington, DC 20402–0001

COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HENRY A. WAXMAN, California, *Chairman*

TOM LANTOS, California
EDOLPHUS TOWNS, New York
PAUL E. KANJORSKI, Pennsylvania
CAROLYN B. MALONEY, New York
ELIJAH E. CUMMINGS, Maryland
DENNIS J. KUCINICH, Ohio
DANNY K. DAVIS, Illinois
JOHN F. TIERNEY, Massachusetts
WM. LACY CLAY, Missouri
DIANE E. WATSON, California
STEPHEN F. LYNCH, Massachusetts
BRIAN HIGGINS, New York
JOHN A. YARMUTH, Kentucky
BRUCE L. BRALEY, Iowa
ELEANOR HOLMES NORTON, District of Columbia
BETTY McCOLLUM, Minnesota
JIM COOPER, Tennessee
CHRIS VAN HOLLEN, Maryland
PAUL W. HODES, New Hampshire
CHRISTOPHER S. MURPHY, Connecticut
JOHN P. SARBANES, Maryland
PETER WELCH, Vermont

TOM DAVIS, Virginia
DAN BURTON, Indiana
CHRISTOPHER SHAYS, Connecticut
JOHN M. McHUGH, New York
JOHN L. MICA, Florida
MARK E. SOUDER, Indiana
TODD RUSSELL PLATTS, Pennsylvania
CHRIS CANNON, Utah
JOHN J. DUNCAN, Jr., Tennessee
MICHAEL R. TURNER, Ohio
DARRELL E. ISSA, California
KENNY MARCHANT, Texas
LYNN A. WESTMORELAND, Georgia
PATRICK T. McHENRY, North Carolina
VIRGINIA FOXX, North Carolina
BRIAN P. BILBRAY, California
BILL SALI, Idaho

PHIL SCHILIRO, *Chief of Staff*
PHIL BARNETT, *Staff Director*
EARLEY GREEN, *Chief Clerk*
DAVID MARIN, *Minority Staff Director*

SUBCOMMITTEE ON INFORMATION POLICY, CENSUS, AND NATIONAL ARCHIVES

WM. LACY CLAY, Missouri, *Chairman*

PAUL E. KANJORSKI, Pennsylvania
CAROLYN B. MALONEY, New York
JOHN A. YARMUTH, Kentucky
PAUL W. HODES, New Hampshire

MICHAEL R. TURNER, Ohio
CHRIS CANNON, Utah
BILL SALI, Idaho

TONY HAYWOOD, *Staff Director*

CONTENTS

	Page
Hearing held on February 14, 2007	1
Statement of:	
Hoyt, Clark, McClatchy Newspapers, on behalf of the Sunshine in Government Initiative; Caroline Fredrickson, director, Washington Legislative Office, American Civil Liberties Union; and Meredith Fuchs, general counsel, National Security Archive at George Washington University	80
Fredrickson, Caroline	93
Fuchs, Meredith	115
Hoyt, Clark	80
Koontz, Linda, Director, Information Management, Government Accountability Office; and Melanie Ann Pustay, Acting Director, Office of Information and Privacy, U.S. Department of Justice	7
Koontz, Linda	7
Pustay, Melanie Ann	58
Letters, statements, etc., submitted for the record by:	
Clay, Hon. Wm. Lacy, a Representative in Congress from the State of Missouri, prepared statement of	3
Fuchs, Meredith, general counsel, National Security Archive at George Washington University, prepared statement of	118
Hoyt, Clark, McClatchy Newspapers, on behalf of the Sunshine in Government Initiative:	
Followup questions and responses	149
Prepared statement of	83
Koontz, Linda, Director, Information Management, Government Accountability Office, prepared statement of	10
Pustay, Melanie Ann, Acting Director, Office of Information and Privacy, U.S. Department of Justice, prepared statement of	60
Romero, Anthony D., executive director, American Civil Liberties Union, prepared statement of	96
Yarmuth, Hon. John A., a Representative in Congress from the State of Kentucky, prepared statement of	191

THE STATE OF THE FOIA: ASSESSING AGENCY EFFORTS TO MEET FOIA REQUIREMENTS

WEDNESDAY, FEBRUARY 14, 2007

HOUSE OF REPRESENTATIVES,
SUBCOMMITTEE ON INFORMATION POLICY, CENSUS, AND NATIONAL ARCHIVES,
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:35 p.m. in room 2154, Rayburn House Office Building, Hon. Wm. Lacy Clay (chairman of the subcommittee) presiding.

Present: Representatives Clay, Maloney, Yarmuth, Hodes, Turner, and Sali.

Staff present: Tony Haywood, staff director/counsel; Alissa Bonner, Adam C. Bordes, and Anna Laitin, professional staff members; Jean Gosa, clerk; Leneal Scott, information systems manager; Chas Phillips, minority counsel; and Benjamin Chance, minority clerk.

Mr. CLAY. The Subcommittee on Information Policy, Census, and National Archives of the Committee on Oversight and Government Reform will now come to order.

Today's hearing, our first of the 110th Congress, will examine issues relating to executive branch agency compliance with the Freedom of Information Act.

Without objection, the Chair and ranking minority member will have 5 minutes to make opening statements, followed by opening statements not to exceed 3 minutes by any other committee member who seeks recognition.

Without objection, Members and witnesses may have five legislative days to submit a written statement or extraneous materials for the record.

Let me start by saying good afternoon and welcome to the first hearing of the 110th Congress before the Subcommittee on Information Policy, Census, and National Archives. It is my honor and pleasure to be here as chairman. I look forward to continuing my working relationship with the subcommittee's distinguished ranking minority member, Mr. Turner, and let me also extend a warm welcome to our returning members and new members, as well.

One of the cornerstones of our democracy is the ability of citizens to have timely access to Government information and records of all kinds. Enacted over four decades ago, the Freedom of Information Act [FOIA], strengthened this ability. Under FOIA, any person has

a right, enforceable in court, to obtain access to Federal agency records, except in very limited circumstances.

Regrettably, we have witnessed a recent decline in the accessibility and transparency of Government information. In particular, we have seen the Bush administration establish policies that encourage executive branch agencies to withhold information that might otherwise become available to the public by way of the FOIA request. Thus, I am deeply concerned that this administration appears to be shielding information that ought to be accessible to the public.

In 2005, President Bush issued Executive Order 13392 in order to reduce the backlog of requests and improve the overall management of FOIA activity. While this was a good first step, the Executive order has not addressed a number of significant barriers to open government. These barriers include the administration's own application of restrictive standards for disclosure and increased use of FOIA exemptions to withhold non-sensitive information and the application of pseudo classifications for many agency reports.

Last fall this subcommittee approved bipartisan legislation to improve the FOIA process in several key areas. This bill, the Open Government Act of 2005, H.R. 867, proposed to reduce the number of disputed FOIA requests through mediation and improve the information that agencies report to Congress concerning their FOIA activities.

In my view, this legislation provided a practical and measured approach to remedying the problems identified by the requestor community, and I believe it is an excellent starting point for legislation in this Congress.

Today's hearing offers an opportunity to learn where the FOIA process is failing, what benefits are being realized from the recent Executive order, and whether legislation to remedy the aforementioned problem is required.

I am pleased that we have a very distinguished and expert group of witnesses to help us sort through these issues.

Appearing on our first panel will be Linda Koontz, Director of Informational Policy at GAO and Melanie Ann Pustay, Acting Director of the Justice Department's Office of Investigation and Privacy.

Our second panel will feature three private sector witnesses: Clark Hoyt, on behalf of the Sunshine in Government Initiative; Caroline Fredrickson, director of the Washington Legislative Office of the American Civil Liberties Union; and Meredith Fuchs, general counsel for the National Security Archive at G.W. University.

I thank all of our witnesses for joining us today and we look forward to your testimony.

[The prepared statement of Hon. Wm. Lacy Clay follows:]

STATEMENT OF CONGRESSMAN WM. LACY CLAY, CHAIRMAN

SUBCOMMITTEE ON INFORMATION POLICY, CENSUS, AND NATIONAL ARCHIVES

HOUSE COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM

HEARING ON "THE STATE OF FOIA: ASSESSING AGENCY EFFORTS TO MEET FOIA REQUIREMENTS"

FEBRUARY 14, 2007

Good afternoon and welcome to the first hearing of the 110th Congress before the Subcommittee on Information Policy, Census, and National Archives.

It is my honor and pleasure to be here as chairman. I look forward to continuing my working relationship with the Subcommittee's distinguished Ranking Minority Member, Mr. Turner. Let me also extend a warm welcome to our returning Members and new Members as well.

One of the cornerstones of our democracy is the ability of citizens to have timely access to government information and records of all kinds. Enacted over four decades ago, the Freedom of Information Act, commonly known as "FOIA," strengthened this ability. Under FOIA, any person has a right, enforceable in court, to obtain access to federal agency records except in very limited circumstances.

Regrettably, we have witnessed a recent decline in the accessibility and transparency of government information. In particular, we have seen the Bush Administration

establish policies that encourage executive branch agencies to withhold information that might otherwise become available to the public by way of FOIA requests. Thus, I am deeply concerned that this Administration appears to be shielding information that ought to be accessible to the public.

In 2005, President Bush issued Executive Order 13392 in order to reduce the backlog of requests and improve the overall management of FOIA activities. While this was a good first step, the Executive Order has not addressed a number of significant barriers to open government. These barriers include the Administration's own application of restrictive standards for disclosure, an increased use of FOIA exemptions to withhold non-sensitive information, and the application of pseudo-classifications for many agency reports.

Last fall, this Subcommittee approved bipartisan legislation to improve the FOIA process in several key areas. This bill, the "OPEN Government Act of 2005," H.R. 867, proposed to reduce the number of disputed FOIA requests through mediation and improve the information that agencies report to Congress concerning their FOIA activities.

In my view, this legislation provided a practical and measured approach to remedying the problems identified by the requestor community; and I believe it is an excellent starting point for legislation in this Congress. Today's hearing offers an opportunity to learn where the FOIA

process is failing, what benefits are being realized from the recent Executive Order, and whether legislation to remedy the aforementioned problems is required.

I am pleased that we have a very distinguished and expert group of witnesses to help us sort through these issues. Appearing on our first panel will be Linda Koontz, Director of Information Policy at GAO, and Melanie Ann Pustay, Acting Director of the Justice Department's Office of Information and Privacy. Our second panel will feature three private sector witnesses: Clark Hoyt, on behalf of the Sunshine in Government Initiative; Carolyn Fredrickson, Director of the Washington Legislative Office of the American Civil Liberties Union; and Meredith Fuchs, General Counsel for the National Security Archive at George Washington University.

I thank all of our witnesses for joining us today and look forward to their testimony.

Mr. CLAY. I now yield to the minority member here—from Idaho?

Mr. SALI. From Idaho, Mr. Chairman.

Mr. CLAY. Thank you. I yield 5 minutes to the gentleman if you have an opening statement.

Mr. SALI. Mr. Chairman, I don't really have an opening statement, just to say that I am happy to be a member of the subcommittee and am looking forward to working with you the next 2 years.

Mr. CLAY. Thank you, and welcome to the committee.

Are there any other members of the committee with an opening statement? The gentlelady from California.

Mrs. MALONEY. From New York.

Mr. CLAY. From New York. I am sorry.

Mrs. MALONEY. The information capital of the world.

Mr. CLAY. You are right. I yield three.

Mrs. MALONEY. I want to thank Chairman Clay and Ranking Member Turner—I am sure he is on his way—for holding this very important hearing on FOIA. I would say that the issue of openness in our Government is absolutely critical to our democracy, and it is important that the press and others and citizens and everyone have access to this information.

I have been pushing for more openness and Government transparency since I came to Congress in 1992, and was pleased to be a lead sponsor on the Electronic Freedom of Information Act of 1996. That is a very important piece of legislation that was intended to provide the Government, the public, and press greater access and efficiency to information through the electronic format, and it was intended to bring FOIA from the technological Stone Age into the Information Age. I am very interested in hearing how is this working, can people really access it through the Electronic Freedom of Information Act, and how it is moving forward.

I look forward to the report from GAO. They did report in 2005 that the percentage of FOIA requests processed varied greatly from agency to agency, and at the same year the President realized this also and issued an Executive order which requires agencies to review their FOIA requirements and develop an agency-specific plan to report to the AG and Director of OMB. As I understand, GAO is currently reviewing these plans.

I have cosponsored several bills in prior Congresses. What I am really concerned about is, when you finally get the FOIA request, sometimes a year later, half of it is redacted and you don't know why it is redacted. I am interested in whatever the standards are for an agency or anyone to determine that they can just block out whole periods of information. I would like to know is there an appeal process where the public or the press or other members of Government can appeal to a higher-up on whether or not the information that they are redacting can be accessible to the public. I think that is very important.

It is important to have a FOIA process, but I had one constituent who came in and said, "I did this FOIA request." He comes in with reams of paper where they are writing back and forth about what day they can meet, and then the information on the day they met was excluded. So you have reams of, "Can we meet on Monday, Tuesday, February, January," but then the meat of whatever was

supposed to happen was totally excluded and redacted. That is a ridiculous law if all you are getting is meeting appointments and not what is actually taking place.

I think this is really, really very important to our democracy, and I have heard many complaints from members of the press that they can't get access to documents, they are stonewalled and can't get access to it, so I think it is important that we are having this hearing. I support it.

I yield back the balance of my time.

Mr. CLAY. I thank the gentlelady from New York for her comments.

Are there any other opening statements? The gentleman from New Hampshire?

Mr. HODES. Thank you, Mr. Chairman.

I look forward to this hearing and I look forward to your leadership on this subcommittee.

I come from New Hampshire, where citizen privacy and open government are hallmarks of what we care about in terms of good government, and we are now in the 21st century where we are transitioning from an industrial economy to the Information Age. We have also seen in recent years an administration which has taken Government secrecy to new levels. In that context, I think our examination of FOIA and what needs to be done with it takes on special importance. I look forward to the hearing.

I thank you and I yield back the balance of my time.

Mr. CLAY. I thank the gentleman for his comments.

If there are no additional opening statements, the subcommittee will now receive testimony from the witnesses before us today. Our first panel of witnesses will be: Ms. Linda Koontz, who is the Director of Information Management Issues at the Government Accountability Office, as well as Ms. Melanie Ann Pustay, who is Acting Director of the Office of Information and Privacy at the Department of Justice.

It is the policy of the Committee on Oversight and Government Reform to swear in all witnesses before they testify.

[Witnesses sworn.]

Mr. CLAY. Let the record show that both have answered in the affirmative.

We will now ask that each witness give a brief summary of their testimony, and to keep the summary under 5 minutes in duration. Bear in mind your complete written statement will be included in the hearing record.

Ms. Koontz, let's begin with you.

STATEMENTS OF LINDA KOONTZ, DIRECTOR, INFORMATION MANAGEMENT, GOVERNMENT ACCOUNTABILITY OFFICE; AND MELANIE ANN PUSTAY, ACTING DIRECTOR, OFFICE OF INFORMATION AND PRIVACY, U.S. DEPARTMENT OF JUSTICE

STATEMENT OF LINDA KOONTZ

Ms. KOONTZ. Mr. Chairman and members of the subcommittee, I appreciate the opportunity to participate in today's hearing on the Freedom of Information Act. This important statute establishes that Federal agencies must provide access to Government informa-

tion so that the public can learn about Government operations and decisions.

As you know, under the act agencies report annually on 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 and to increase communication with requestors and the public.

My statement today is based on work for which the subcommittee is a co-requestor with Representative Platts, the former chairman of the Subcommittee on Government Management, Finance, and Accountability. Our draft report on this work is currently out for comment with the agencies. For this study we focused on 25 of the largest departments and agencies to determine trends in FOIA processing, as reflected in agency annual reports, and whether agency plans address the improvement areas emphasized in the Executive order.

In terms of trends, 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 requests from the year before. Including these numbers would obscure year-to-year Government-wide comparisons. In addition, I am excluding statistics from the Department of Agriculture because we determined that one of its major components could not provide reliable data.

Also, according to annual reports, agencies provided records in full about 87 percent of the time, which is about the same as in previous years. At the same time, the number of pending requests at the end of the year has been steadily increasing, and the rate of increase has been greater every year since 2002.

Agency reports also show great variations in the median times to process requests: less than 10 days for some agency components to more than 100 at others. However, because processing times are reported as median business days, generalizations are limited. Medians are good for providing representative numbers and are not skewed by a few extreme outliers, but, unlike averages, medians cannot be added together. This means that we cannot provide median statistics from several agencies to develop a number representing overall processing across Government, for example, or across major departments or across similar agencies. Being able to aggregate data in this way could be useful in monitoring efforts to improve processing and reduce the increasing backlog of requests.

In our draft report we suggest that the Congress consider improving the usefulness of the agency annual FOIA reports by requiring agencies to report averages and ranges, in addition to median numbers. We are also recommending that Justice provide aggregated statistics and summaries of the annual reports, which Justice officials have told us that they plan to do.

I would like to turn for a minute to the Executive order. In the order, agencies were directed to review their FOIA operations and develop improvement plans. The order emphasized four areas: reducing backlog, increasing proactive dissemination of records, im-

proving communications with requestors on the status of their requests, and increasing public awareness of FOIA processing.

Our review showed that the 25 agency plans generally included goals and timetables addressing the four areas. The plans describe numerous improvement activities, such as improving automation and increasing staff training, that are expected to contribute to achieving the goals of the order. Reducing backlog was a major focus, and almost all agencies set measurable goals and timeframes.

Agencies also generally set milestones for the other areas of improvement emphasized by the order. For example, to increase public awareness, agencies generally plan to insure that their public FOIA reference guides were comprehensive and up to date. In our draft report, we are making recommendations to strengthen specific agency plans.

In summary, Mr. Chairman, the annual FOIA reports continue to provide valuable information about citizens' use of this important tool for obtaining information about Government operation and decisions. Increasing requirements for annual reporting would further improve the public visibility of the Government's implementation of FOIA. In addition, the Executive order provided a useful impetus for agencies to review their FOIA operations and ensure that they are appropriately responsive to the public. However, it will be important for Justice and the agencies to continue to refine their plans and monitor progress and implementation.

Mr. Chairman, that concludes my statement. I would 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 Information Policy, Census, and National Archives, House Committee on Oversight and Government Reform

For Release on Delivery
Expected at 2:00 p.m. EST
Wednesday, February 14, 2007

FREEDOM OF INFORMATION ACT

Processing Trends Show Importance of Improvement Plans

GAO-07-491T

February 14, 2007

GAO
Accountability · Integrity · Reliability

Highlights

Highlights of GAO-07-491T, a testimony before the Subcommittee on Information Policy, Census, and National Archives, House Committee on Oversight and Government Reform

FREEDOM OF INFORMATION ACT

Processing Trends Show Importance of Improvement Plans

Why GAO Did This Study

The Freedom of Information Act (FOIA) establishes that federal agencies must provide the public with access to government information, enabling them to learn about government operations and decisions. To help ensure proper implementation, the act requires that agencies annually report specific information about their FOIA operations, such as numbers of requests received and processed and median processing times. In addition, a recent Executive Order directs agencies to develop plans to improve their FOIA operations, including decreasing backlogs.

GAO was asked to testify on the results of its study on FOIA processing and agencies' improvement plans. The draft report on the study is currently out for comment at the agencies involved (and is thus subject to change). For the study, GAO reviewed status and trends of FOIA processing at 25 major agencies as reflected in annual reports, as well as the extent to which improvement plans contain the elements emphasized by the Executive Order. To do so, GAO analyzed the 25 agencies' annual reports and improvement plans.

What GAO Recommends

In its draft report, GAO suggests that the Congress consider additions to the annual reporting requirements and makes recommendations to enhance selected agency improvement plans, among other things.

www.gao.gov/cgi-bin/getrpt?GAO-07-491T.

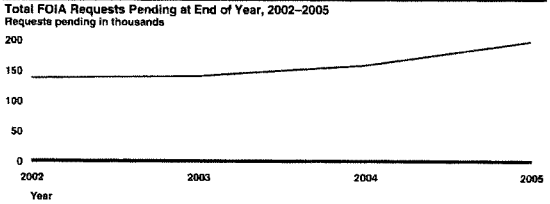
To view the full product, including the scope and methodology, click on the link above. For more information, contact Linda Koontz at (202) 512-6240 or koontzl@gao.gov.

What GAO Found

Based on data in annual reports from 2002 to 2005, the public continued to submit more requests for information from the federal government through FOIA. Despite increasing the numbers of requests processed, many agencies did not keep pace with the volume of requests that they received. As a result, the number of pending requests carried over from year to year has been steadily increasing (see figure). Agency reports also show great variations in the median times to process requests (less than 10 days for some agency components to more than 100 days at others). However, the ability to determine trends in processing times is limited by the form in which these times are reported: that is, in medians only, without averages (that is, arithmetical means) or ranges. Although medians have the advantage of providing representative numbers that are not skewed by a few outliers, it is not statistically possible to combine several medians to develop broader generalizations (as can he done with arithmetical means). This limitation on aggregating data impedes the development of broader pictures of FOIA operations, which could be useful in monitoring efforts to improve processing and reduce the increasing backlog of requests, as intended by the Executive Order.

The improvement plans submitted by the 25 agencies mostly included goals and timetables addressing the four areas of improvement emphasized by the Executive Order: eliminating or reducing any backlog of FOIA requests; increasing reliance on dissemination of records that can be made available to the public without the need for a FOIA request, such as through posting on Web sites; improving communications with requesters about the status of their requests; and increasing public awareness of FOIA processing. Most of the plans (20 of 25) provided goals and timetables in all four areas; some agencies omitted goals in areas where they considered they were already strong. Although details of a few plans could be improved (for example, one agency did not explicitly address areas of improvement other than backlog), all the plans focus on making measurable improvements and form a reasonable basis for carrying out the goals of the Executive Order.

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



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

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) and agency efforts to comply with this important legislation. Generally speaking, FOIA[1] 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; these reports include information as specified in the act, such as how many requests were received and processed in the previous fiscal year, how many requests were pending at the end of the year, and the median times that agencies or their components took to process requests.[2] In addition, the President issued an Executive Order in December 2005 that is aimed at improving agencies' disclosure of information consistent with FOIA.[3] Among other things, this order required each agency to review its FOIA operations and develop improvement plans;[4] 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) summarizing the results of the agency's review and including a copy of its improvement plan. These plans were 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 directs agencies in their FOIA improvement plans to focus on ways to

[1] 5 U.S.C. § 552.
[2] In an ordered set of values, the median is a value below and above which there is an equal number of values; if there is no one middle number, it is the arithmetic mean (average) of the two middle values.
[3] Executive Order 13392, *Improving Agency Disclosure of Information* (Washington, D.C.: Dec. 14, 2005).
[4] More information on the Executive Order's requirements is provided in the section on Background.

- eliminate or reduce any backlog of requests;
- increase reliance on public dissemination of records including through Web sites;
- improve communications with requesters about the status of their requests; and
- increase public awareness of FOIA processing.

As requested, in my remarks today, I will discuss two topics: (1) the status of agencies' processing of FOIA requests as reflected in their annual reports for fiscal years 2002 through 2005, highlighting any trends in these reports since 2002, and (2) to what extent the agency FOIA improvement plans contain the elements emphasized by the Executive Order.

My discussion is based on ongoing work that we performed in response to a request from the former chairman of the Subcommittee on Government Management, Finance, and Accountability (House Committee on Government Reform), for which you are now a co-requester. The draft report on this work is currently out for comment; accordingly, some of the information may be revised before the report is finalized.

For the review described in the draft report, we described statistics on the processing of FOIA requests based on our analysis of annual report data for fiscal years 2002 through 2005 from 25 major agencies (herein we refer to this scope as governmentwide). We examined data from the 24 agencies covered by the Chief Financial Officers Act, plus the Central Intelligence Agency. However, we eliminated one of the 25 agencies—the Department of Agriculture—from our analysis because one of its major components reported that not all its data were reliable. As a result, our statistical analysis for this report was based on data from a total of 24 agencies' annual reports.[5]

To determine to what extent the agency plans contain the elements emphasized by the order, we analyzed the plans for all 25 agencies to determine whether they addressed each area of improvement that

[5] We assessed the reliability of the information contained in the annual reports of selected agencies. See attachment I for more discussion of data reliability.

was emphasized and contained goals and timetables for each.[6] We evaluated the versions of plans submitted as of December 15, 2006. 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. A more detailed description of our scope and methodology is provided in attachment 1.

All work on which this testimony was based was conducted in accordance with generally accepted government auditing standards.

Results in Brief

Based on data reported by 24 major agencies in annual FOIA reports from 2002 to 2005,[7] the public continued to submit more requests for information from the federal government through FOIA. Despite increasing the numbers of requests processed, many agencies did not keep pace with the volume of requests that they received. As a result, the number of pending requests carried over from year to year has been steadily increasing; further, the rate of increase is growing. Agency reports also show great variations in the median times to process requests (less than 10 days for some agency components to more than 100 days at others). However, the ability to determine trends in processing times is limited by the form in which these times are reported: that is, in medians only, without averages (that is, arithmetical means)[8] or ranges. Although medians have the advantage of providing representative numbers that are not skewed by a few outliers, it is not statistically possible to combine several medians to develop broader generalizations (as can be done

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

[7] Data from the Department of Agriculture were omitted because data from a major component were not reliable.

[8] The arithmetic mean is the sum of all the members of a list of numbers divided by the number of items in the list. In contrast, a median is a number dividing the higher half of a population from the lower half. (The median of a finite list of numbers can be found by arranging all the values from lowest to highest and finding the middle one.)

with arithmetical means).[9] This limitation on aggregating data impedes the development of broader pictures of FOIA operations, which could be useful in monitoring efforts to improve processing and reduce the increasing backlog of requests, as intended by the Executive Order. Finally, in the absence of a requirement that data from the annual reports be summarized or aggregated (a function that the Department of Justice, in its FOIA oversight role, has performed in the past), the public and the Congress have no consistent means of obtaining a governmentwide picture of FOIA processing.

The 25 agencies submitted improvement plans that mostly included goals and timetables addressing the four areas of improvement emphasized by the Executive Order. Based on the results of agencies' reviews of their FOIA operations, the plans also included other improvement activities (such as improving automation and increasing staff training) that are expected to contribute to achieving the goals of the Executive Order. Out of 25 plans, 20 provided goals and timetables in all four areas. In some cases, agencies did not set goals for a given area because they determined that they were already strong in that area. For the first area of improvement, reducing backlog, all agencies with reported backlog planned activities aimed at such reduction, and (with minor exceptions)[10] all included both measurable goals and milestones. Except for one department, agencies also generally set milestones for the other areas of improvement emphasized by the Executive Order (that is, increasing public dissemination, improving status communications, and increasing public awareness of FOIA processing); for example, to increase public awareness, agencies generally planned to ensure that their FOIA reference guides were comprehensive and up to date. The exception was the Department of the Treasury, whose review and plan addressed only activities to reduce backlog, omitting the other three areas of improvement.

[9] Unlike means, medians cannot be added and averaged. Deriving a median for two sets of numbers, for example, requires knowing each number in both sets. The medians of the original sets are not relevant, as only the source data can be used to derive a new median.

[10] One agency had minimal backlog; another set no target date for its goal, but it met the goal the end of 2006.

In our draft report, we suggest that the Congress consider improving the usefulness of the agency annual FOIA reports by requiring agencies to report additional statistics. We are also recommending that Justice provide aggregated statistics and summaries of the annual reports and that selected agencies enhance their improvement plans.

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), 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.

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 II 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.

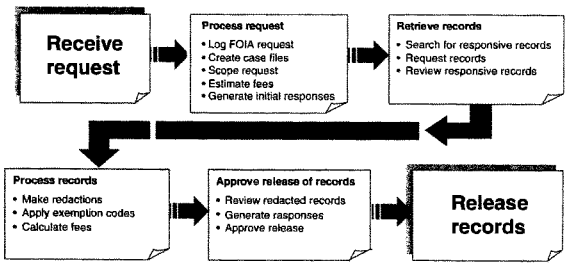
In addition, agencies are required to meet certain time frames for making key determinations: whether to comply with requests (20

business days from receipt of the request), responses to appeals of adverse determinations (20 business days from receipt of the appeal), and whether to provide expedited processing of requests (10 calendar 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).[11]

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

[11] Fees may be waived when disclosure of the information requested is determined to be in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

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, 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[12] 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

[12] 5 U.S.C. § 552a.

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, these may not always be processed in the same way as described earlier for FOIA requests. In some cases, little review and redaction (see fig. 1) is required, for example, for a request for one's own Social Security benefits records. In contrast, various degrees of review and redaction could be required for other types of first-party requests: for example, files on security background checks would need review and redaction before being provided to the person who was the subject of the investigation.

Roles of OMB and Justice in FOIA Implementation

OMB and the Department of Justice both have roles in the implementation of FOIA. Under various statutes, including the Paperwork Reduction Act,[13] OMB exercises broad authority for coordinating and administering various aspects of governmentwide information policy. FOIA specifically requires OMB to issue guidelines to "provide for a uniform schedule of fees for all agencies."[14] OMB issued this guidance in April 1987.[15]

[13] 44 U.S.C. §§ 3501–3521.

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

[15] 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.

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 litigation 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 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 (available at www.usdoj.gov/oip/index.html).

Annual FOIA Reports Were Established by 1996 Amendments

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.[16] 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;

[16] 5 U.S.C.§ 552(e).

- 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. (This electronic access point is www.usdoj.gov/oip/04_6.html.)

In 2001, in response to a congressional request, we prepared the first in a series of reports on the implementation of the 1996 amendments to FOIA, starting from fiscal year 1999.[17] In these reviews, we examined the contents of the annual reports for 25 major agencies (shown in table 2).[18] 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.

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

[18] 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[a]	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[b]	DHS
Federal Emergency Management Agency[b]	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.

[a] USDA was not included in our statistical analysis for this report because data from one of its major components were found to be unreliable.

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

Our previous reports included descriptions of the status of reported FOIA implementation, including any trends revealed by comparison with earlier years. We noted general increases in requests received

and processed, as well as growing numbers of pending requests carried over from year to year.

In addition, our 2001 report disclosed that data quality issues limited the usefulness of agencies' annual FOIA reports and that agencies had not provided online access to all the information required by the act as amended in 1996. We therefore recommended that the Attorney General direct the Department of Justice to improve the reliability of data in the agencies' annual reports by providing guidance addressing the data quality issues we identified and by reviewing agencies' report data for completeness and consistency. We further recommended that the Attorney General direct the department to enhance the public's access to government records and information by encouraging agencies to make all required materials available electronically. In response, the Department of Justice issued supplemental guidance, addressed reporting requirements in its training programs, and continued reviewing agencies' annual reports for data quality. Justice also worked with agencies to improve the quality of data in FOIA annual reports.

Executive Order Required Agencies to Take Several Actions to Improve FOIA Operations

On December 14, 2005, the President issued an Executive Order setting forth a policy of citizen-centered and results-oriented FOIA administration.[19] Briefly, FOIA requesters are to receive courteous and appropriate services, including ways to learn about the status of their requests and the agency's response, and agencies are to provide ways for requesters and the public to learn about the FOIA process and publicly available agency records (such as those on Web sites). In addition, agency FOIA operations are to be results oriented: agencies are to process requests efficiently, achieve measurable improvements in FOIA processing, and reform programs that do not produce appropriate results.

To carry out this policy, the order required, among other things, that agency heads designate Chief FOIA Officers to oversee their FOIA programs, and that agencies establish Requester Service Centers

[19] Executive Order 13392.

and Public Liaisons to ensure appropriate communication with requesters. The Chief FOIA Officers were directed to conduct reviews of the agencies' FOIA operations and develop improvement plans to ensure that FOIA administration was in accordance with applicable law as well as with the policy set forth in the order. By June 2006, agencies were to submit reports that included the results of their reviews and copies of their improvement plans. The order also instructed the Attorney General to issue guidance on implementation of the order's requirements for agencies to conduct reviews and develop plans. Finally, the order instructed agencies to report on their progress in implementing their plans and meeting milestones as part of their annual reports for fiscal years 2006 and 2007, and required agencies to account for any milestones missed.

In April 2006, the Department of Justice posted guidance on implementation of the order's requirements for FOIA reviews and improvement plans.[20] This guidance suggested a number of areas of FOIA administration that agencies might consider in conducting their reviews and developing improvement plans. (Examples of some of these areas are automated tracking capabilities, automated processing, receiving/responding to requests electronically, forms of communication with requesters, and systems for handling referrals to other agencies.) To encourage consistency, the guidance also included a template for agencies to use to structure the plans and to report on their reviews and plans.[21] The improvement plans are posted on the Justice Web site at www.usdoj.gov/oip/agency_improvement.html.

In a July 2006 testimony, we provided preliminary results of our analyses of the improvement plans for the 25 agencies in our review that were submitted as of the end of June; in our testimony we focused on how the plans addressed reducing or eliminating

[20] Department of Justice, *Executive Order 13,392 Implementation Guidance* (posted Apr. 27, 2006). www.usdoj.gov/oip/foiapost/2006foiapost6.htm

[21] Also included in this guidance was a set of questions and answers on implementing the order, as well as supplemental guidance on preparing the annual FOIA reports for fiscal years 2006 and 2007. These are to include reports on agencies' progress in implementing their plans and improving their FOIA activities.

backlog.[22] We testified that a substantial number of plans did not include measurable goals and timetables that would allow agencies to measure and evaluate the success of their plans. Several of the plans were revised in light of our testimony, as well as in response to feedback to agencies from the Department of Justice in its FOIA oversight role.

Status of FOIA Processing Appears Similar to Previous Years, but Limitations in Annual Report Data Present Challenges

The data reported by 24 major agencies in annual FOIA reports from 2002 to 2005 reveal a number of general trends. (Data from USDA are omitted from our statistical analysis, because we determined that data from a major USDA component were not reliable.)[23] For example, the public continued to submit more requests for information from the federal government through FOIA, but many agencies, despite increasing the numbers of requests processed, did not keep pace with this increased volume. As a result, the number of pending requests carried over from year to year has been steadily increasing. However, our ability to make generalizations about processing time is limited by the type of statistic reported (that is, the median). Taking steps to improve the accuracy and form of annual report data could provide more insight into FOIA processing.

Not All Data from USDA's Farm Service Agency Are Reliable, but Its Improvement Plan Provides Opportunity to Address This Weakness

We omitted data from USDA's annual FOIA report because we determined that not all these data were reliable. Although some USDA components expressed confidence in their data, one component, the Farm Service Agency, did not. According to this agency's FOIA Officer, portions of the agency's data in annual reports were not accurate or complete. This is a significant

[22] GAO, *Freedom of Information Act: Preliminary Analysis of Processing Trends Shows Importance of Improvement Plans*, GAO-06-1022T (Washington, D.C.: July 26, 2006).
[23] These data were presented in our testimony on our preliminary analysis, GAO-06-1022T.

deficiency, because the Farm Service Agency reportedly processes over 80 percent of the department's total FOIA requests. Currently, FOIA processing for the Farm Service Agency is highly decentralized, taking place in staff offices in Washington, D.C., and Kansas City, 50 state offices, and about 2,350 county offices. The agency FOIA officer told us that she questioned the completeness and accuracy of data supplied by the county offices. This official stated that some of the field office data supplied for the annual report were clearly wrong, leading her to question the systems used to record workload data at field offices and the field office staff's understanding of FOIA requirements. She attributed this condition to the agency's decentralized organization and to lack of management attention, resources, and training. Lacking accurate data hinders the Farm Service Agency from effectively monitoring and managing its FOIA program.

The Executive Order's requirement to develop an improvement plan provides an opportunity for the Farm Service Agency to address its data reliability problems. More specifically, Justice's guidance on implementing the Executive Order refers to the need for agencies to explore improvements in their monitoring and tracking systems and staff training. USDA has developed an improvement plan that includes activities to improve FOIA processing at the Farm Service Agency that are relevant to the issues raised by the Farm Service Agency's FOIA Officer, including both automation and training. The plan sets goals for ensuring that all agency employees who process or retrieve responsive records are trained in the necessary FOIA duties, as well as for determining the type of automated tracking to be implemented. According to the plan, an electronic tracking system is needed to track requests, handle public inquiries regarding request status, and prepare a more accurate annual FOIA report. In addition, the Farm Service Agency plans to determine the benefit of increased centralization of FOIA request processing.

However, the plan does not directly address improvements to data reliability. If USDA does not also plan for activities, measures, and milestones to improve data reliability, it increases the risk that the Farm Service Agency will not produce reliable FOIA statistics, which are important for program oversight and meeting the act's goal of providing visibility into government FOIA operations.

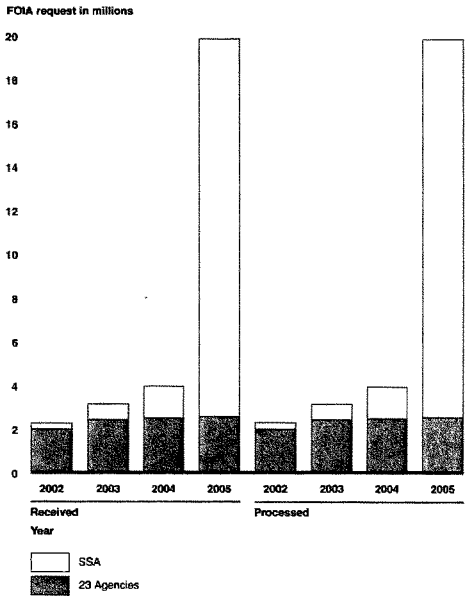
Except for SSA, Increases in Requests Received and Processed Are Generally Slowing

The numbers of FOIA requests received and processed continue to rise, but except for one case—SSA—the rate of increase has flattened in recent years. For SSA, we present 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 and stated that in previous years, these requests were undercounted. Further, all but about 38,000 of SSA's over 17 million requests are simple requests for personal information by or on behalf of individuals.

Figure 2 shows total requests reported governmentwide for fiscal years 2002 through 2005, with SSA's share shown separately.[24] 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.

[24] Because of the undercount in previous years, including SSA's statistics in governmentwide data obscures year-to-year comparisons.

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

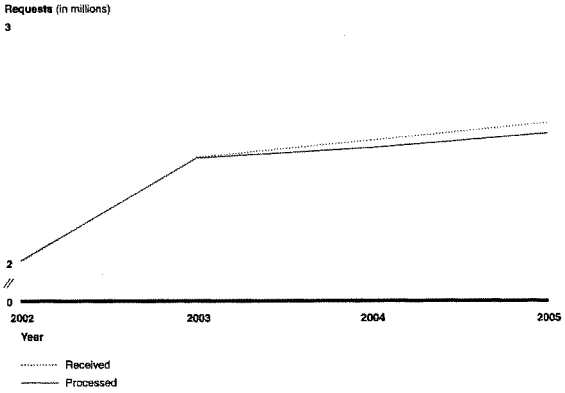


Source: GAO analysis, FOIA annual reports for fiscal years 2002-2005 (self-reported data).

Figure 3 presents statistics omitting SSA 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: For the whole period (fiscal years 2002 to 2005), requests received increased by about 29 percent, and requests processed increased by about 27 percent. Most of this rise occurred from fiscal years 2002 to 2003: about 28 percent for requests received, and about 27 percent for requests processed. In contrast,

from fiscal year 2004 to 2005, the rise was much less: about 3 percent for requests received, and about 2 percent for requests processed.

Figure 3: Total FOIA Requests and FOIA Requests Processed, Omitting SSA, 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." From fiscal year 2002 to 2005, 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, as well as 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.[25] 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.[26] Such requests are almost always granted,[27] 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). However, officials say that these are typically processed in a day or less.

According to SSA officials, they included information on these requests in their annual reports because Justice guidance instructs agencies to treat Privacy Act requests (requests for records concerning oneself) as FOIA requests and report them in their

[25] 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.
[26] 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.
[27] Denials can occur in the case of discrepancies in the requests, such as incorrect Social Security numbers, for example.

annual reports.[28] In addition, SSA officials said that their automated systems make it straightforward to capture and report on these simple requests. 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.

Besides SSA, agencies reporting large numbers of requests received were the Departments of Defense, Health and Human Services, Homeland Security, Justice, the Treasury, and Veterans Affairs, as shown in table 4. The rest of agencies combined account for only about 5 percent of the total requests received (if SSA's simple requests handled by non-FOIA staff are 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 on simple requests handled by non-FOIA staff).

[28] Justice's guidance defines the requests covered by the annual FOIA reports as follows: "FOIA/PA request—Freedom of Information Act/Privacy Act request. A FOIA request is generally a request for access to records concerning a third party, an organization, or a particular topic of interest. 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.)"

Table 4: Requests Received, Fiscal Year 2005

Agency	Total	Percentage of total including SSA line 1	Percentage of total including SSA line 2
SSA (all)	17,257,886	87.00	—
SSA (excluding simple requests handled by non-FOIA staff)	38,602	—	1.48
VA	1,914,395	9.65	73.17
HHS	222,372	1.12	8.50
DHS	163,016	0.82	6.23
DOD	81,304	0.41	3.11
Treas	53,330	0.27	2.04
DOJ	52,010	0.26	1.99
DOL	23,505	0.12	0.90
EPA	12,201	0.06	0.47
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 including SSA line 1	**19,835,560**	—	—
Total including SSA line 2	**2,616,276**	—	—

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

Note: Abbreviations are as in table 2. USDA data have been omitted, as data from a major USDA component were determined to be unreliable.

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. The percentage of requests granted in full was about 87 percent, which is about the same as in previous years. However, if SSA's numbers are included, the proportion of grants dominates 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[a]		Statistics including SSA	
Disposition	**Number**	**Percentage**	**Number**	**Percentage**
Full grants	2,206,515	87.1	19,466,907	98.3
Partial grants	102,079	4.0	102,354	0.5
Denial	19,864	0.8	20,318	0.1
Not disclosed for other reasons	204,491	8.1	205,685	1.0
Total	**2,532,949**		**19,795,264**	

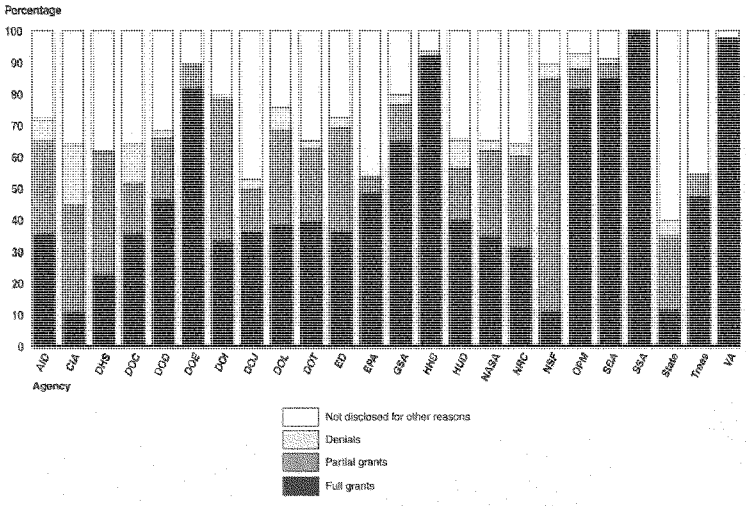
Source: FOIA annual reports for 2005 (self-reported data).

[a]We exclude all SSA statistics for this comparison rather than omitting only simple requests handled by non-FOIA staff, because SSA's report does not break out this category in its statistics on disposition.

Note: USDA data have been omitted, as data from a major USDA component were determined to be unreliable. Percentages do not add up to 100 percent because of rounding.

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

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. USDA data have been omitted, as data from a major USDA component were determined to be unreliable.

As the figure shows, the numbers of fully granted requests varied widely among agencies in fiscal year 2005. Six agencies made full grants of requested records in over 80 percent of the cases they processed (besides the three already mentioned, these include Energy, OPM, and SBA). In contrast, 13 of 24 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.[29] 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, and HHS also handles large numbers of Privacy Act requests. Such requests are generally granted in full. Other agencies, on the other hand, receive numerous requests whose responses must routinely be redacted. For example, NSF reported in its annual report that most of its requests (an estimated 90 percent) are for copies of funded grant proposals. The responsive documents are routinely redacted to remove personal information on individual principal investigators (such as salaries, home addresses, and so on), which results in high numbers of "partial grants" compared to "full grants."

Processing Times Vary, but Broad Generalizations Are Limited

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.

[29] 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
VA	—	1–60	—	1–10

Source: FOIA annual reports for fiscal year 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. USDA data have been omitted, as data from a major USDA component were determined to be unreliable.

As the table shows, seven agencies had components that reported processing simple requests in less than 10 days (these components are parts of the CIA, Energy, the Interior, Justice, Labor, Transportation, and the Treasury); 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 Energy and Justice, 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, and the Treasury) 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).

Our ability to make further generalizations about FOIA processing times is limited by the fact that, as required by the act, agencies report median processing times only and not, for example, arithmetic means (the usual meaning of "average" in everyday language). To find an arithmetic mean, one adds all the members of a list of numbers and divides the result by the number of items in the list. To find the median, one arranges all the values in the list from lowest to highest and finds the middle one (or the average of the middle two if there is no one middle number). Thus, although using medians provides representative numbers that are not skewed by a few outliers, they cannot be summed. Deriving a median for two sets of numbers, for example, requires knowing all numbers in both sets. Only the source data for the medians can be used to derive a new median, not the medians themselves.

As a result, with only medians it is not statistically possible to combine results from different agencies to develop broader generalizations, such as a governmentwide statistic based on all agency reports, statistics from sets of comparable agencies, or an agencywide statistic based on separate reports from all components of the agency.

In rewriting the FOIA reporting requirements in 1996, legislators declared an interest in making them "more useful to the public and to Congress, and [making] the information in them more

accessible."[30] However, the limitation on aggregating data imposed by the use of medians alone impedes the development of broader pictures of FOIA operations. A more complete picture would be given by the inclusion of other statistics based on the same data that are used to derive medians, such as means and ranges. Providing means along with the median would allow more generalizations to be drawn, and providing ranges would complete the picture by adding information on the outliers in agency statistics. More complete information would be useful for public accountability and for effectively managing agency FOIA programs, as well as for meeting the act's goal of providing visibility into government FOIA operations.

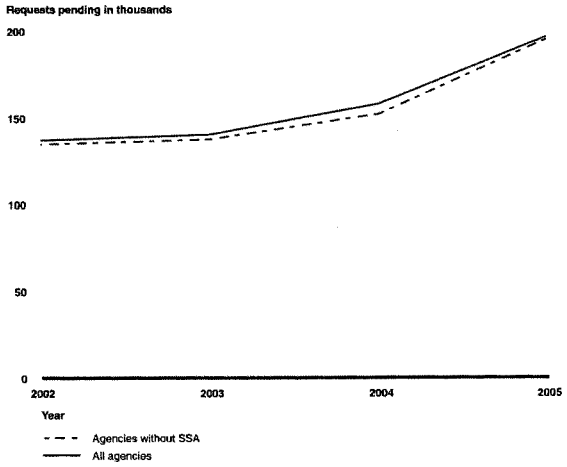
Agency Pending Cases Continue to Increase

In addition to processing greater numbers of requests, many agencies (10 of 24) 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 138,000, whereas in 2005, about 200,000—45 percent more—were reported. In addition, the rate of increase grew in fiscal year 2005, rising 24 percent from fiscal year 2004, compared to 13 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 SSA's pending cases do not include simple requests handled by non-FOIA staff (for which SSA does not track pending cases). As the figure shows, these pending cases do not change the governmentwide picture significantly.

[30] Committee on Government Reform and Oversight, House of Representatives, *Report to accompany H.R. 3802, Electronic Freedom of Information Amendments of 1996*, H.R. 104-795 (Washington, D.C.: Sept. 17, 1996).

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



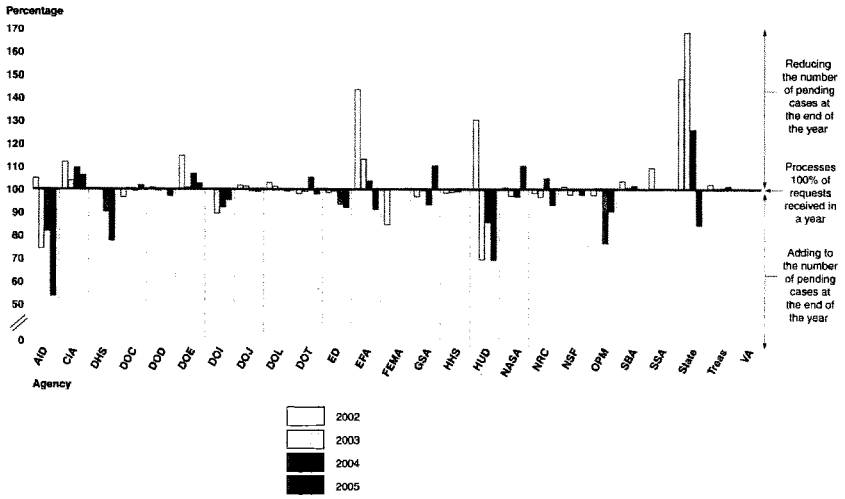
Source: GAO analysis, FOIA annual reports for fiscal years 2002-2005 (self-reported data).

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 24 agencies (that is, the number of requests that an agency processes relative to the number it receives). Eight of the 24 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 (Defense, Justice, Transportation, GSA, NASA, NRC, SSA, and VA).

In contrast, two agencies (CIA and Energy) had processing rates above 100 percent in all 3 years, meaning that each made continued progress in reducing their numbers of pending cases. Fourteen 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.

No Regular Mechanism Is in Place for Aggregating Annual Report Data

Legislators noted in 1996 that the FOIA reporting requirements were rewritten "to make them more useful to the public and to Congress, and to make the information in them more accessible." The Congress also gave the Department of Justice the responsibility to

provide policy guidance and oversee agencies' compliance with FOIA.

In its oversight and guidance role, Justice's Office of Information and Privacy (OIP) created summaries of the annual FOIA reports and made these available through its FOIA Post Web page (www.usdoj.gov/oip/foiapost/mainpage.htm). In 2003, Justice described its summary as "a major guidance tool."[31] It pointed out that although it was not required to do so under the law, the office had initiated the practice of compiling aggregate summaries of all agencies' annual FOIA report data as soon as these were filed by all agencies. These summaries did not contain aggregated statistical tables, but they did provide prose descriptions that included statistics on major governmentwide results. However, the most recent of these summaries is for fiscal year 2003.[32] According to the Acting Director of OIP, she was not certain why such summaries had not been made available since then. According to this official, internally the agency found the summaries useful and was considering making them available again. She also stated that these summaries gave a good overall picture of governmentwide processing.

Aggregating and summarizing the information in the annual reports serves to maximize their usefulness and accessibility, in accordance with congressional intent, as well as potentially providing Justice with insight into FOIA implementation governmentwide and valuable benchmarks for use in overseeing the FOIA program. Such information would also be valuable for others interested in gauging governmentwide performance. The absence of such summaries reduces the ability of the public and the Congress to consistently obtain a governmentwide picture of FOIA processing.

In providing agency views for this testimony, the Acting Director of OIP told us that the department would resume providing summaries, and that these would generally be available by the summer following the issuance of the annual reports.

[31] Department of Justice, 2003 Litigation and Compliance Report, www.usdoj.gov/oip/03introduction.htm.
[32] *Summary of Annual FOIA Reports for Fiscal Year 2003*, www.usdoj.gov/oip/foiapost/2004foiapost22.htm.

Agency Improvement Plans Generally Included Areas of Improvement Emphasized by the Executive Order

As required by the Executive Order, all the 25 agencies submitted improvement plans based on the results of reviews of their respective FOIA operations, as well as on the areas emphasized by the order. The plans generally addressed these four areas, with 20 of 25 plans addressing all four. In particular, for all but 2 agencies with reported backlog, plans included both measurable goals and timetables for backlog reduction. Further, to increase reliance on dissemination, improve communications on the status of requests, and increase public awareness of FOIA processing, agencies generally set milestones to accomplish activities promoting these aims. In some cases, agencies did not set goals for a given area because they determined that they were already strong in that area.

All Agencies Addressed Reducing Backlog, and Most Set Measurable Goals and Milestones

The Executive Order states that improvement plans shall include "specific activities that the agency will implement to eliminate or reduce the agency's FOIA backlog, including (as applicable) changes that will make the processing of FOIA requests more streamlined and effective." It further states that plans were to include "concrete milestones, with specific timetables and outcomes to be achieved," to allow the plan's success to be measured and evaluated. In addition, the Justice guidance suggested a number of process improvement areas for agencies to consider, such as receiving or responding to requests electronically, automated FOIA processing, automated tracking capabilities, and multitrack processing. It also gave agencies considerable leeway in choosing "means of

measurement of success" for improving timeliness and thus reducing backlog.[33]

All agency plans discussed avoiding or reducing backlog, and most (22 out of 25) established measurable goals and timetables for this area of focus. One agency, SBA, reported that it had no backlog, so it set no goals. A second agency, NSF, set no specific numerical goals for backlog reduction, but in fiscal year 2005 its backlog was minimal,[34] and its median processing time was 14.26 days.[35] In addition, its plan includes activities to increase efficiency and to monitor and analyze backlogged requests to determine whether systemic changes are warranted in its processes. A third agency, HUD, set a measurable goal for reducing backlog, but did not include a date by which it planned to achieve this goal. However, it

[33] For example, Justice's guidance states that "Agencies should consider a number of measures of timeliness, including number of peuding 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."

[34] In fiscal year 2005, NSF reported 273 requests received and 17 pending at the end of the reporting period. Note that pending cases are not technically the same as the "backlog" referred to in the Executive Order, which refers to "requests ... that have not been responded to within the statutory time limit." Pending cases reported in the annual reports are those FOIA cases open at the end of the reporting period. Although in previous reports, we have used the term "backlog" to refer to these pending cases, they may or may not constitute backlog in the sense of the Executive Order, primarily because some requests may have arrived in the last 20 days of the reporting period. If so, they would not exceed the statutory limit. Thus, backlogged cases in the sense of the Executive Order are a subset of pending cases.

[35] NSF's plan stated that the vast majority of its FOIA requests are answered within 20 working days, which is consistent with the median processing time it reported.

achieved this goal, according to agency officials, by November 2006.[36]

The goals chosen by the 22 remaining agencies varied considerably (which is consistent with the flexibility in choosing measures that Justice provided in its implementation guidance). Some agencies linked backlog reduction to various different measures. For example, EPA's goal was to reduce its response backlog to less than 10 percent of the number of new FOIA requests received each year. Energy set a goal of achieving a 50 percent reduction by June 2007 in the number of pending FOIA cases that were over 1 year old. NRC chose to focus on improving processing times, setting percentage goals for completion of different types of requests (for example, completing 75 percent of simple requests within 20 days). Labor's plan sets goals that aim for larger percentages of reduction for the oldest categories of pending requests (75 percent reduction for the oldest, 50 percent reduction for the next oldest, and so on). A number of agencies included goals to close their oldest 5 to 10 requests (Justice, the Treasury, Education, Commerce, Defense, GSA, NASA, SSA, and VA).

Other agencies planned to eliminate their backlogs (for example, OPM and DHS) or to eliminate fiscal year 2005 backlog (Transportation), and several agencies chose goals based on a percentage of reduction of existing backlog (for example, CIA, Commerce, Education, Defense, the Interior, Justice, SSA, the Treasury, and USDA). Some agencies also described plans to perform analyses that would measure their backlogs so that they could then establish the necessary baselines against which to measure progress.

In addition to setting backlog targets, agencies also describe activities that contribute to reducing backlog. For example, the

[36] HUD set a goal of fewer than 400 pending requests at its Headquarters FOIA Division, at which HUD states it typically has a backlog of between 400 and 500. The HUD plan did not set backlog reduction goals for its field operations, stating that "the field offices appear to process FOIA requests more efficiently" than the headquarters, based on median processing times. HUD officials also told us that HUD field offices (which number about 80) typically receive routine requests that can be processed quickly, such as requests for information on grants and mortgages.

Treasury plan, which states that backlog reduction is the main challenge facing the department and the focus of its plan, includes such activities (with associated milestones) as reengineering its multitrack FOIA process, monitoring monthly reports, and establishing a FOIA council.

The agency plans thus provide a variety of activities and measures of improvement that should permit agency heads, the Congress, and the public to assess the agencies' success in implementing their plans to reduce backlog.

Most Agencies Plan to Increase Public Dissemination of Records through Web Sites

The Executive Order calls for "increased reliance on the dissemination of records that can be made available to the public" without the necessity of a FOIA request, such as through posting on Web sites. In its guidance, Justice notes that agencies are required by FOIA to post frequently requested records, policy statements, staff manuals and instructions to staff, and final agency opinions. It encourages agencies not only to review their activities to meet this requirement, but also to make other public information available that might reduce the need to make FOIA requests. It also suggests that agencies consider improving FOIA Web sites to ensure that they are user friendly and up to date.

Agency plans generally established goals and timetables for increasing reliance on public dissemination of records, including through Web sites. Of 25 agencies, 24 included plans to revise agency Web sites and add information to them, and 12 of these are making additional efforts to ensure that frequently requested documents are posted on their Web sites. For example, Defense is planning to increase the number of its components that have Web sites as well as posting frequently requested documents. Interior is planning to facilitate the posting of frequently requested documents by using scanning and redaction equipment to make electronic versions readily available.

Agencies planned other related activities, such as making posted documents easier to find, improving navigation, and adding other helpful information. For example, AID plans to establish an "information/searching decision tree" to assist Web site visitors by directing them to agency public affairs staff who may be able to

locate information and avoid the need for visitors to file FOIA requests. HUD plans activities to anticipate topics that may produce numerous FOIA requests ("hot button" issues) and post relevant documents. Education is planning to use its automated tracking technology to determine when it is receiving multiple requests for similar information and then post such information on its Web site.[37]

The Treasury plan does not address increasing public dissemination of records. The Treasury's plan, as mentioned earlier, is focused on backlog reduction. It does not mention the other areas emphasized in the Executive Order, list them among the areas it selected for review, or explain the decision to omit them from the review and plan. Treasury officials told us that they concentrated in their plan on areas where they determined the department had a deficiency: namely, a backlog consisting of numerous requests, some of which were very old (dating as far back as 1991). By comparison, they did not consider they had deficiencies in the other areas. They also stated that neither Justice nor OMB had suggested that they revise the plan to include these areas. With regard to dissemination, they told us that they did not consider increasing dissemination to be mandatory, and they noted that their Web sites currently provide frequently requested records and other public documents, as required by the act. However, without a careful review of the department's current dissemination practices or a plan to take actions to increase dissemination, the Treasury does not have assurance that it has identified and exploited available opportunities to increase dissemination of records in such a way as to reduce the need for the public to make FOIA requests, as stressed by the Executive Order.

Most Agency Plans Included Improving Status Communications with FOIA Requesters

The Executive Order sets as policy that agencies shall provide FOIA requesters ways to learn about the status of their FOIA requests and states that agency improvement plans shall ensure that FOIA administration is in accordance with this policy. In its implementation guidance, Justice reiterated the order's emphasis on

[37] This is distinct from multiple requests for the same document, which is already covered by the FOIA provision that directs agencies to post frequently requested documents.

providing status information to requesters and discussed the need for agencies to examine, among other things, their capabilities for tracking status and the forms of communication used with requesters.

Most agencies (22 of 25) established goals and timetables for improving communications with FOIA requesters about the status of their requests. Goals set by these agencies included planned changes to communications, including sending acknowledgement letters, standardizing letters to requesters, including information on elements of a proper FOIA request in response letters, and posting contact information on Web pages. Other activities included establishing toll free numbers for requesters to obtain status information, acquiring software to allow requesters to track the status of their requests, and holding public forums.

Three agencies did not include improvement goals because they considered them unnecessary. In two cases (Defense and EPA), agencies considered that status communications were already an area of strength.

- Defense considered that it was strong in both customer responsiveness and communications.[38] Defense's Web site provides instructions for requesters on how to get information about the status of requests, as well as information on Requester Service Centers and Public Liaisons. Officials also told us that this information is included in acknowledgement letters to requesters, and that the department is working to implement an Interactive Customer Collection tool that would enable requesters to provide feedback.
- Similarly, EPA officials told us that they considered the agency's activities to communicate with requesters on the status of their requests to be already effective, noting that many of the improvements planned by other agencies were already in effect

[38] Defense performed extensive surveys of the opinions and practices of its FOIA staff and Public Liaisons and concluded that "FOIA personnel routinely contact requesters to try to resolve problems and to better define requests." Department officials also told us that Defense is in the process of collecting feedback from the requester community.

at EPA.[39] Officials also stated that EPA holds regular FOIA requester forums (the last in November 2006), and that EPA's requester community had expressed satisfaction with EPA's responsiveness. EPA's response to the Executive Order describes its FOIA hotline for requesters and its enterprise FOIA management system, deployed in 2005, that provides "cradle to grave" tracking of incoming requests and responses.

The third agency, the Treasury, did not address improving status communications, as its plan is focused on backlog reduction. As required by the Executive Order, the Treasury did set up Requester Service Centers and Public Liaisons, which are among the mechanisms envisioned to improve status communications. However, because the Treasury omitted status communications from the areas of improvement that it selected for review, it is not clear that this area received attention commensurate with the emphasis it was given in the Executive Order. Without attention to communication with requesters, the Treasury increases the risk that its FOIA operations will not be responsive and citizen centered, as envisioned by the Executive Order.

Agencies Generally Plan to Rely on FOIA Reference Guides to Increase Public Awareness of FOIA Processing

The Executive Order states that improvement plans shall include activities to increase public awareness of FOIA processing, including (as appropriate) expanded use of Requester Service Centers and FOIA Public Liaisons, which agencies were required to establish by the order. In Justice's guidance, it linked this requirement to the FOIA Reference Guide that agencies are required to maintain as an aid to potential FOIA requesters, because such guides can be an effective means for increasing public awareness. Accordingly, the Justice guidance advised agencies to double-check these guides to ensure that they remain comprehensive and up to date.

[39] For example, EPA sends out an acknowledgment letter within a day of the request that includes a tracking number, the department that will be involved, and a contact name and telephone number.

Most agencies (23 of 25) defined goals and timetables for increasing public awareness of FOIA processing, generally including ensuring that FOIA reference guides were up to date. In addition, all 25 agencies established requester service centers and public liaisons as required by the Executive Order. Besides these activities, certain agencies planned other types of outreach: for example, the Department of State reported taking steps to obtain feedback from the public on how to improve FOIA processes; the Department of the Interior plans to initiate feedback surveys on requesters' FOIA experience; and the Department of Labor is planning to hold public forums and solicit suggestions from the requester community. Defense did not set specific goals and milestones in this area; according to Defense, it did not do so because its FOIA handbook had already been updated in the fall of 2005. Department officials told us that in meeting their goals and milestones for revising FOIA Web sites, they expect to improve awareness of Defense's FOIA process, as well as improving public access and other objectives.

As mentioned earlier, the Treasury did not address this area in its review or plan. However, Treasury has established Requester Service Centers and FOIA Public Liaisons, as required. The Treasury's Director of Disclosure Services[40] also told us that the Treasury provides on its Web site a FOIA handbook, a Privacy Act handbook, and a citizen's guide for requesters. In addition, this official told us that the Treasury had updated its FOIA handbook in 2005 and conducted staff training based on the update. However, at the time of our review, the FOIA handbook on the Web site was a version dated January 2000. When we pointed out that this earlier version was posted, the official indicated that he would arrange for the most recent version to be posted.

Because the Treasury did not review its efforts to increase public awareness, it missed an opportunity to discover that the handbook on the Web site was outdated and thus had reduced effectiveness as a tool to explain the agency's FOIA processing to the public. Without further attention to increasing public awareness, the Treasury lacks assurance that it has taken all appropriate steps to

[40] This official is also the FOIA public liaison for all Treasury components except the Office of Thrift Supervision, the Inspector General for Tax Administration, and the Internal Revenue Service.

ensure that the public has the means of understanding the agency's FOIA processing.

Annual Reporting and Selected Improvement Plans Could Be Further Enhanced

The annual FOIA reports continue to provide valuable information about citizens' use of this important tool for obtaining information about government operation and decisions. The value of this information is enhanced when it can be used to reveal trends and support generalizations, but our ability to generalize about processing times—whether from agency to agency or year to year—is limited because only median times are reported. Given that processing times are an important gauge of government responsiveness to citizen inquiries, this limitation impedes the development of broader pictures of FOIA operations, which could be useful in monitoring efforts to improve processing and reduce the increasing backlog of requests, as intended by the Executive Order. Finally, having aggregated statistics and summaries could increase the value of the annual reporting process for assessing the performance of the FOIA program as a whole.

In the draft report on which my statement today is based, we suggest that the Congress consider amending the act to require agencies to report additional statistics on processing time, which at a minimum should include average times and ranges. We also recommend that Justice provide aggregated statistics and summaries of the annual reports.

The Executive Order provided a useful impetus for agencies to review on their FOIA operations and ensure that they are appropriately responsive to the public generally and requesters specifically. Our draft report makes recommendations aimed at improving selected agency improvement plans. Nonetheless, all the plans show a commendable focus on making measurable improvements and form a reasonable basis for carrying out the order's goals.

In summary, increasing the requirements for annual reporting would further improve the public visibility of the government's implementation of FOIA. In addition, implementing the improvement plans and reporting on their progress should serve to keep management attention on FOIA and its role in keeping citizens well informed about the operations of their government. However, to realize the goals of the Executive Order, it will be important for Justice and the agencies to continue to refine the improvement plans and monitor progress in their implementation.

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

Contact and Acknowledgments

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

Attachment I: Scope and Methodology

For the draft report on which this testimony is based, we gauged agencies' progress in processing requests by analyzing the workload data (from fiscal year 2002 through 2005) included in the 25 agencies' annual FOIA reports to assess trends in volume of requests received and processed, median processing times, and the number of pending cases. All agency workload data were self-reported in annual reports submitted to the Attorney General.

To assess the reliability of the information contained in agency annual reports, we interviewed officials from selected agencies and assessed quality control processes agencies had in place. We selected 10 agencies to assess data reliability: the Departments of Agriculture (USDA), Defense, Education, the Interior, Labor, and Veterans Affairs, as well as the National Aeronautics and Space Administration, National Science Foundation, Small Business Administration, and Social Security Administration. We chose the Social Security Administration and Veterans Affairs because they processed a majority of the requests. To ensure that we selected agencies of varying size, we chose the remaining 8 agencies by ordering them according to the number of requests they received, from smallest to largest, and choosing every third agency. These 10 agencies account for 97 percent of the received requests that were reported in the 25 agencies' annual reports.

Of the 10 agencies that were assessed for data reliability, we determined that the data for USDA's Farm Service Agency were not reliable; these data account for over 80 percent of the reported USDA data. We therefore eliminated USDA's data from our analysis. Because of this elimination, our analysis was of 24 major agencies[41] (herein we refer to this scope as governmentwide). Table 7 shows the 25 agencies and their reliability assessment status.

[41] 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.

Table 7: Agencies Reviewed

Agency	Abbreviation	Data reliability assessment
Agency for International Development	AID	Not assessed
Central Intelligence Agency	CIA	Not assessed
Department of Agriculture	USDA	Not reliable
Department of Commerce	DOC	Not assessed
Department of Defense	DOD	Reliable
Department of Education	ED	Reliable
Department of Energy	DOE	Not assessed
Department of Health and Human Services	HHS	Not assessed
Department of Homeland Security[a]	DHS	Not assessed
Federal Emergency Management Agency[a]	FEMA	Not applicable
Department of Housing and Urban Development	HUD	Not assessed
Department of the Interior	DOI	Reliable
Department of Justice	DOJ	Not assessed
Department of Labor	DOL	Reliable
Department of State	State	Not assessed
Department of the Treasury	Treas	Not assessed
Department of Transportation	DOT	Not assessed
Department of Veterans Affairs	VA	Reliable
Environmental Protection Agency	EPA	Not assessed
General Services Administration	GSA	Not assessed
National Aeronautics and Space Administration	NASA	Reliable
National Science Foundation	NSF	Reliable
Nuclear Regulatory Commission	NRC	Not assessed
Office of Personnel Management	OPM	Not assessed
Small Business Administration	SBA	Reliable
Social Security Administration	SSA	Reliable

Source: GAO.

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

To determine to what extent the agency improvement plans contain the elements emphasized by the order, we first analyzed the Executive Order to determine how it described the contents of the

improvement plans. We determined that the order emphasized the following areas to be addressed by the plans: (1) reducing the backlog of FOIA requests, (2) increasing reliance on public dissemination of records (affirmative and proactive) including through Web sites, (3) improving communications with FOIA requesters about the status of their requests, and (4) increasing public awareness of FOIA processing including updating an agency's FOIA Reference Guide. We also analyzed the improvement plans to determine if they contained specific outcome-oriented goals and timetables for each of the criteria. We then analyzed the 25 agencies' (including USDA) plans to determine whether they contained goals and timetables for each of these four elements.[42] We evaluated the versions of agency plans available as of December 15, 2006.

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.

We conducted our review in accordance with generally accepted government auditing standards. We performed our work from May 2006 to February 2007 in Washington, D.C.

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

Attachment II: 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).

Mr. CLAY. Thank you so much for that testimony, Ms. Koontz.

Ms. Pustay, please?

STATEMENT OF MELANIE ANN PUSTAY

Ms. PUSTAY. Thank you, Mr. Chairman and members of the subcommittee.

My name is Melanie Pustay, and I am the Acting Director of the Department'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 and the status of the implementation of Executive Order 13392.

The Department of Justice is the lead Federal agency for implementation of the FOIA, and it works through OIP to encourage uniform and proper compliance with the act by all agencies.

Currently, the Federal agencies that are subject to the FOIA face a major challenge in processing several million requests per year at a cost exceeding $300 million annually. This large amount of FOIA activity represents a steady increase in the number of requests received by the Federal Government since 2001, and agencies have worked diligently to keep up with this activity.

This does not mean that there is not room for improvement. On December 14th the President issued Executive Order 13392, which established a citizen-centered and result-oriented approach to administration of the FOIA. The Executive order required each agency to conduct a review of its FOIA operations, to develop an agency-specific plan to improve its administration of the FOIA, and to include in its annual FOIA reports for the next 2 fiscal years a description of its progress in meeting the goals and milestones established in the implementation plan.

To ensure Government-wide compliance, the Executive order charged both the Department of Justice and OMB with coordinating efforts.

Soon after the President issued his order, each agency appointed a chief FOIA officer and then established FOIA requestor service centers and designated FOIA public liaisons. As agencies worked to develop their FOIA improvement plans, the Department of Justice and OMB convened a conference for the newly designated chief FOIA officers. The conference was keynoted by the associate attorney general and OMB's deputy director for management, whose very presence and remarks illustrated the importance of this Presidential initiative.

Importantly, the Department also provided extensive written guidance to all agencies that contained discussions of more than two dozen potential improvement areas and included supplemental guidelines on the new reporting requirements for agency annual FOIA reports.

In the summer of 2006, after completion of agency plans, the Department held a second conference for approximately 150 FOIA public liaisons that emphasized the important roles of these liaisons play. In accordance with the Executive order, the attorney general then reviewed the agencies' implementation plans, and on October 16th, in coordination with OMB, submitted to the President a report on agency FOIA implementation activities. In that report, the attorney general recommended holding a followup meet-

ing of chief FOIA officers, and, significantly, recommended exploring the increased use of information technology to improve agency FOIA operations.

That followup meeting was held on November 9th of last year, and included remarks by the acting associate attorney general, who is the Department's chief FOIA officer. At that conference, the Department also announced the formation of a technology working group that is going to explore options and share information regarding the use of technology.

The most recent activity under the Executive order concerns the requirement that each agency submit with its annual FOIA report a description of the agency's progress in meeting its milestones under the plan. The Department of Justice, as the lead implementation agency, completed its annual FOIA report on January 19th, 2 weeks in advance of the February deadline, and we posted it on our Web site in order for it to serve as a model for all other agencies.

To date, virtually all agencies have submitted their FOIA annual reports to our Department for review. After submission, we work with the agencies to ensure that their reports meet the technical requirements of the FOIA and the Executive order, and then, once that process is complete, we post the report on the Web site.

The next major step under the Executive order will be a review by the attorney general of the agencies' progress in implementing their FOIA improvement plans. The attorney general will report on that progress to the president on June 1, 2007, and a second such review will be made June 1, 2008.

In conclusion, you can be assured that the Department of Justice looks forward to working with the subcommittee on this matter. I am pleased to answer any questions that you or your staff might have.

Thank you.

[The prepared statement of Ms. Pustay follows:]

Department of Justice

STATEMENT OF
MELANIE ANN PUSTAY
ACTING DIRECTOR
OFFICE OF INFORMATION AND PRIVACY
DEPARTMENT OF JUSTICE

BEFORE THE
SUBCOMMITTEE ON INFORMATION POLICY, CENSUS,
AND NATIONAL ARCHIVES
COMMITTEE ON OVERSIGHT AND GOVERNMENT REFORM
UNITED STATES HOUSE OF REPRESENTATIVES

HEARING ON

"IMPLEMENTING FOIA [FREEDOM OF INFORMATION ACT] – ASSESSING AGENCY EFFORTS TO MEET FOIA REQUIREMENTS"

FEBRUARY 15, 2007

Statement of
Melanie Ann Pustay
Acting Director
Office of Information and Privacy
Department of Justice

Before the
Subcommittee on Information Policy, Census, and National Archives
Committee on Oversight and Government Reform
U.S. House of Representatives

Hearing on

The State of FOIA [Freedom of Information Act]: Assessing Agency Efforts to Meet FOIA Requirements

February 15, 2007

Mr. Chairman and Members of the Subcommittee:

I am the Acting 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. IV 2004) and the status of the implementation of Executive Order 13,392 (Improving Agency Disclosure of Information). The Department of Justice is the lead Federal agency for implementation of the FOIA and it works through OIP to encourage uniform and proper compliance with the Act by all agencies.

The Freedom of Information Act and its Governmentwide administration have evolved greatly since the time of its enactment four decades ago. For example, the rapid growth of the Internet and its increasing role in the administration of the FOIA is something that was entirely unforeseen in 1966 and could barely be envisioned even as recently as ten years ago. Currently, the Federal agencies that are subject to the FOIA face a major challenge in processing millions of

requests per year, at a cost exceeding 300 million dollars annually. This large amount of FOIA activity represents an increase of more than 35% in the number of requests received by the Federal government since fiscal year 2001, and agencies have worked diligently to keep up with the increased activity.

This does not mean that there is not room for improvement. On December 14, 2005, the President issued Executive Order 13,392, entitled "Improving Agency Disclosure of Information," which established a "citizen-centered" and "results-oriented" approach to administration of the FOIA. The Executive Order required each agency to conduct a review of its FOIA operations, to develop an agency-specific plan to improve its administration of the FOIA, and to include in its annual FOIA reports for fiscal years 2006 and 2007 a description of its progress in meeting the milestones and goals established in its improvement plan. To ensure Governmentwide compliance, the Executive Order charged the Department of Justice and the Office of Management and Budget with coordinating efforts to help agencies meet the requirements of the President's Order. I appreciate having this opportunity to describe to the Subcommittee these efforts.

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 attention to its most immediate requirement -- its

mandate for the appointment of a Chief FOIA Officer at each agency by January 13, 2006.[1] This requirement was met widely across the Executive branch, and shortly thereafter, the Justice Department posted a comprehensive list of all agency Chief FOIA Officers on its FOIA Web site.[2]

In accordance with section 2(c) of the Executive Order, agencies then established FOIA Requester Service Centers and designated FOIA Public Liaisons in order to provide information to the public about the status of their FOIA requests and to ensure that agencies use a "service-oriented" approach in responding to FOIA-related inquiries.

The Executive Order also required each agency to "conduct a review of [its] FOIA operations" and to develop "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" the Executive Order. See Exec. Order No. 13,392 at Sec. 3(a)-(b). The Executive Order required each plan to be submitted by June 14, 2006, with one of the required elements being the inclusion of "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).

On March 8, 2006, to best facilitate these critical agency reviews, and the subsequent development of individual agency improvement plans, the Department of Justice and OMB

---

[1]See OMB Memorandum M-06-04, available at: http://www.whitehouse.gov/omb/memoranda/fy2006/m06-04.pdf.

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

convened a conference for the newly designated Chief FOIA Officers and accompanying key FOIA personnel. The conference was keynoted by the Associate Attorney General and OMB's Deputy Director for Management, whose presence and remarks strongly emphasized the importance of this Presidential initiative. Their remarks were followed by detailed discussions of the Executive Order's provisions and implementation requirements to ensure that chief FOIA officers would understand fully their responsibilities.

On April 13, 2006, 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.""'[3] This memorandum emphasized the importance of "ensuring the success of this important Presidential initiative" and reminded agencies that their plans must include "specific activities" to reduce their FOIA backlog and must detail "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 until the June 14, 2006 deadline. The Department provided to all agencies formatting guidance, which was ultimately reflected in the Department's own plan,[4] as a model. Also, the Department

---

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

[4] *See* "U.S. Department of Justice Freedom of Information Act Improvement Plan Under Executive Order 13,392," which can be found at: http://www.usdoj.gov/oip/ourplan.htm.

established a special Executive Order implementation team that it made available to assist all agencies regarding implementation and related questions.[5]

Importantly, the Department also provided extensive written guidance to all agencies concerning a wide range of issues connected with the Executive Order's implementation. This guidance, which was issued on April 26, 2006 in coordination with OMB, was distributed to all agencies at the first of the follow-up sessions, and also was made available through the Department's FOIA Web site.[6] It contained discussions of more than two dozen potential improvement areas that were identified for possible inclusion in agency plans; established a template for the uniform development and presentation of all plans; included supplemental guidelines on the use of agency annual FOIA reports for reporting the results of Executive Order 13,392's implementation; and addressed a breadth of questions and guidance points in further aid of the Executive Order's implementation.[7]

On July 11, 2006, the Department conducted a special training conference for approximately 150 FOIA Public Liaisons in order to review and emphasize their responsibilities

---

[5]Since the June 14, 2006 deadline, the Department has continued to advise all agencies of their obligations under the Executive Order, and informed them of the mechanism to report any deficiencies to the President's Management Council.

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

[7]The Justice Department's 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).

under the Executive Order.[8] At this conference, the Department discussed the explicit roles of FOIA Public Liaisons under the Order, e.g., serving as supervisory officials in relation to agency FOIA Requester Service Centers, assisting in reducing delays, increasing transparency of the status of FOIA requests, and resolving disputes. In addition, the Department emphasized the important roles that FOIA Public Liaisons can perform in support of their agency's Chief FOIA Officer regarding improvement plan implementation and related activities.[9] Special emphasis was placed upon the importance of current implementation efforts and their timely reporting by all agencies in accordance with the Order's February 1, 2007 reporting deadline for the fiscal year 2006 annual FOIA report.

The Department worked quite closely with many individual agencies as the June 14, 2006 deadline arrived in order to facilitate their timely and comprehensive completion of their FOIA improvement plans. In order to aid the public review of all agencies' improvement plans, the Department compiled the plans and made them available for convenient public access at a single location on its FOIA Web site. Thus, interested persons can examine all agency FOIA

---

[8]Under the President's Order, each of the ninety-two 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/oip/servicecenters.htm.

[9]The Department also called upon FOIA Public Liaisons to work to ensure that 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).

improvement plans under the Executive Order side by side, through a standard format recommended for ease of reference, just as they are able to do with the annual FOIA reports that agencies file.

In accordance with the Executive Order, the Attorney General reviewed the agency implementation plans (and the corresponding fiscal year 2005 annual FOIA reports), and, on October 16, 2006, in coordination with OMB, submitted to the President a report on agency FOIA implementation. Pursuant to the Executive Order, the Attorney General report provided the President recommendations related to "continued agency dissemination and release of public information." See Exec. Order No. 13,392 at Sec. 4(a). The Attorney General recommended holding a follow-up meeting of Chief FOIA Officers, streamlining FOIA correspondence, and, significantly, increasing the use of advanced technology and automation to improve agency FOIA operations. The Attorney General ultimately concluded that "the agencies of the Executive Branch have implemented [the Executive Order] in a vigorous manner fully commensurate with the importance of this unprecedented Presidential initiative."[10]

In addition to establishing an implementation plan under the Executive Order, each agency is required to submit with its annual FOIA reports for fiscal years 2006 and 2007 a description of the agency's progress in meeting its milestones and goals under its FOIA improvement plan. As the lead implementation agency, the Department of Justice completed its 2006 annual report on January 19, 2007, two weeks in advance of the February 1 deadline, and posted it on the Department's FOIA Web site to serve as a model for all other agencies. To date,

---

[10] *See* "Attorney General's Report to the President Pursuant to Executive Order 13,392, Entitled 'Improving Agency Disclosure of Information,'"available at: http://www.usdoj.gov/oip/ag_report_to_president_13392.pdf

virtually all agencies have submitted their annual FOIA reports to the Department for review. After submission, OIP works with the agencies to ensure that their reports meet the technical requirements of the FOIA and the Executive Order. Once this process is completed, the reports are then posted on the Department's FOIA Web site for public review.

In accordance with the Executive Order's requirements, the Attorney General will next review the agencies' progress in implementing their FOIA improvement plans and will submit a report on such progress to the President on June 1, 2007. A second such review and report will be made on June 1, 2008.

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 future Governmentwide activities in implementation of the Executive Order.

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

Mr. CLAY. Thank you very much, Ms. Pustay, for your testimony.

We will now move to the question period, and we will proceed under the 5-minute rule.

Now our ranking member, Mr. Turner of Ohio, has joined us, so I will let him proceed with his opening statement of up to 5 minutes, and then questioning of up to 5 minutes.

Mr. Turner.

Mr. TURNER. Thank you, Mr. Chairman. I want to thank you for holding this hearing, and I would like to congratulate you on your first hearing as chairman of this subcommittee. I look forward to working with you over the months to come, and I appreciate your hospitality as we have had discussions concerning the opportunities that this committee presents, and I appreciate your openness and your partnership.

The FOIA statute has become a popular tool of inquiry for the press, researchers, businesses, prisoners, attorneys, activists, and foreign interests, but it is also a tool for the individual. Given the public interest at stake, I think improving the procedural aspects of the act is certainly a worthy goal. Nevertheless, I hope we can continue to balance the need for open government with the need to protect information vital to national security and homeland security, and I hope we all keep in mind the importance of individual privacy throughout this discussion.

Today I look forward to hearing the testimony and the ideas and the thoughts of how we might improve this act. It is important that we have a review of the FOIA processing trends, and from the public interest groups, all of whom are passionate advocates for unfettered access to Government records.

I thank the chairman, and certainly I thank this first panel for their thoughts and comments.

Ms. Koontz, I appreciate the work of GAO and the extensive review that you have done. Could you tell us what department or agency handles FOIA the most effectively?

Ms. KOONTZ. That is a very difficult question to start out with.

Mr. TURNER. If we are looking for a model, who gets the best in class that we might look at for an example?

Ms. KOONTZ. I think that would be very, very difficult to answer, and I think part of the reason that it is is because there is so much difference between different agencies, what they have to deal with. It would be very easy for me to say, well, it is the National Science Foundation, but I know the National Science Foundation has 300 requests a year, and I know that they are of a particular type, so they don't maybe have the challenges that maybe other agencies, such as maybe State Department or CIA, might have. So I think that coming up with the metrics that would allow me as an auditor to answer that question, I don't think I have them.

Mr. TURNER. Well, what are some of the things that you do see in those that you admire that would be best practices that you would like to highlight?

Ms. KOONTZ. I don't know that we have actually recently looked at agency processing. I do know, from looking at the overall agency trends, though, a lot of it seems to be driven by the sort of requests that agencies get. If you look at a certain class of agencies, if you look at VA, if you look at SSA, if you look at HHS, if you look at

agencies that are very sort of have a customer base and they interact with the public quite a bit, you see people coming to them very routinely for specific kinds of information, and you see that information granted in full and turned around fairly quickly.

Then you see other situations that are much more challenging, in terms of the kinds of information that people are asking for, where it may involve sensitive information, it may involve privacy information, may involve review and redaction, and that makes for a much more complicated landscape, and it is very hard to compare the two.

Mr. TURNER. Looking for the Department of Justice's perspective in the Executive order, how has its implementation occurred, and has it had time really to take effect as we look at what amendments or processes that we might want to change in the act.

Ms. PUSTAY. Well, it is important to remember that at this point the agencies have only had 6 months of implementation activity. Their review and plans were completed in June of last year, and what they are just now reporting to us is their efforts basically from June to December, so it is only 6 months time. But I have been very, very encouraged and very pleased with what I have seen so far in the annual reports, the reports of the progress that the agencies have made. I think it is quite remarkable that many agencies have reduced their backlogs, have set up new training programs, have set up computerized system to track requests. In 6 months time, there has been a lot of very, very positive activity on the part of agencies.

Mr. TURNER. Many times when we think of FOIA we think of the press and investigative reporting, but we can't lose sight of the fact that so many of these requests are first person requests. Can you give us an idea as to what percentage or how the first person requests rank in comparison to the other requests that are processed?

Ms. PUSTAY. I think first party requests where people ask for their own records are certainly the most common type of request across agencies, but, as Ms. Koontz said, certain types of agencies are really conducive to that kind of request coming in, like VA and Social Security Administration. You don't get as many with Department of Homeland Security, for example. But law enforcement agencies such as the Department of Justice, of course the agency I am most familiar with, we have the FBI as a component that is a quite popular component for prisoner requestors who are interested in finding out what their FBI file contains on them. Certainly, with many, many people are curious to know what kind of records any agency of the Federal Government has on them, so it is a common request.

Mr. TURNER. Thank you, Mr. Chairman.

Mr. CLAY. Thank you, Mr. Turner, for your comments and your questions.

Ms. Koontz, since the President issued Executive Order 13392 in December 2005, have there been any measurable improvements in agency FOIA operations? Has the addition of agency FOIA public liaisons improved agency response times or reduced the number of disputed requests?

Ms. KOONTZ. I think overall I would say that we were impressed with the quality of the improvement plans. I think agencies took them seriously and they included the areas that were emphasized in the Executive order, but I think that it is too soon for us to say whether or not there has been improvements.

Our testimony today is based on the data that was reported in February 2006, and the new data is not in for us to look at, but when that occurs and when the new reports come in, I think we will then have a basis for determining what improvements have been made and what new trends we might be seeing.

Mr. CLAY. And how smoothly do you think the implementation went, as far as setting up the different offices in those agencies?

Ms. KOONTZ. I can just say that we know in each case that the offices were set up. I don't think we are in a position yet to say how effectively those offices are operating.

Mr. CLAY. Thank you. In your written testimony you note that GAO cannot make many generalizations about agency response under FOIA because of the limited information——

Ms. KOONTZ. Yes.

Mr. CLAY [continuing]. That they are required to report. How has the fact that agencies are only required to report the median number of days to respond impacted your analysis? And can you suggest ways to improve agency FOIA reporting requirements to ensure proper congressional oversight?

Ms. KOONTZ. When agencies report medians, as required in the law—and they often report median dates on a component-by-component basis—that provides, shall we say, one perspective on agency performance, but the limitation there is that, because it is a median, we can't add them up. We can't give you a number of how the Government is doing as a whole and what are the trends from year to year.

Our suggestion has been that agencies should also be required, and we suggest that the Congress consider requiring them to also report statistics such as the average and the range, which would provide more of a suite of statistics that would help us make sense of the information that agencies are reporting.

I know that median was probably selected because it is not subject to skewing by outliers, but it presents other difficulties in terms of being able to get a Government-wide picture of our performance.

Mr. CLAY. Thank you for your response.

Ms. Pustay, every 2 years the Department of Justice publishes a guide to FOIA. I understand that the latest edition was due to be printed in November of last year, but 3 months later is still not available. This report is expected to include new information about the Executive order. What has happened to that report?

Ms. PUSTAY. The actual original date was for December of last year, and I think the best answer is that it was an overly optimistic projected date for the guide to be available. It is still being reviewed internally within the Department of Justice.

You can imagine that it is a topic of great interest to me, and I am the first person that will want to get it out when the review is finished.

Mr. CLAY. Well, you know, even if it was due in December, we are still 2 months behind.

Ms. PUSTAY. Yes.

Mr. CLAY. I think it is important for the Justice Department to also understand that we need to have transparency in Government. We need to bring everything to the light of day, as much as we can, to the public. So would you go back and tell your superiors that they would try to get this report out in due haste.

Ms. PUSTAY. I don't need to do that because I have been working with people within the Department of Justice to get the guide reviewed internally. You have to keep in mind that it has now grown to 1,000 pages, so it is quite a daunting task for anyone to try to review it, and so I understand why it is taking time. But obviously my efforts since I have been Acting Director, one of the first things I did was make a call to find out the status of the guide, so it is something I am actively working on. I can assure you of that.

Mr. CLAY. Any estimation on its release?

Ms. PUSTAY. I feel like, after what happened with the first estimated time, that is the last thing I should do is give a new estimate.

Mr. CLAY. We are waiting patiently here to see the report, too.

Ms. PUSTAY. I know. I know lots of people are looking forward to our guide coming out. As I said, no one is looking forward to it coming out more than me.

Mr. CLAY. Thank you very much for your response.

Mr. Hodes.

Mr. HODES. Thank you, Mr. Chairman.

Ms. Pustay, a couple of questions for you. In October 2001 the Ashcroft memorandum was issued, which essentially discouraged agencies from releasing documents under FOIA if technical grounds could be found to justify the withholding, and it directed that the DOJ would defend agency decisions to assert FOIA exemptions unless they lacked a sound legal basis. And, similarly, in 2002 the then White House chief of staff Andrew Card issued a memorandum urging agencies to safeguard information deemed sensitive but unclassified.

How do those two memorandums work in conjunction with the December 2005, Executive order from President Bush that your agency is in charge of?

Ms. PUSTAY. To go from the back forward, on the comment about sensitive but unclassified information, the key point there in the context of the Freedom of Information Act is that a marking on a document is simply a signal to people, to anybody who is processing a request, that document has sensitivity. It is a marking to enable people within an agency to appropriately handle the document within the agency. It is absolutely not a basis to withhold information.

Our office has consistently advised agencies, since the Card memo came out and before that, that markings on documents are not independent grounds for withholding. You always have to have one of the nine FOIA exemptions apply before a document can be withheld. So the marking is not dispositive, when you are talking about release or not under the FOIA.

Now, on the Ashcroft memorandum——

Mr. HODES. Thank you.

Ms. PUSTAY [continuing]. The key point of the Ashcroft memorandum was that it advised agencies to take into account that of course there is interest, there are interests on the part of the public in learning about the Government, and in transparency that is the whole purpose of the Freedom of Information Act. But at the same time, when Congress passed the FOIA, Congress put in nine exemptions to the FOIA that protect very important interests. Personal privacy has been mentioned here already. Obviously, national security, law enforcement information, business information—the Government records are filled with lots and lots of information that implicate all those other important interests. What the Ashcroft memorandum does is tell agencies, whenever they are making a decision to disclose or not under the FOIA, to keep in mind the important interests that are protected by the exemptions. So all of that is a very logical and reasonable way to look at administration of the FOIA.

Finally, you were asking how that worked in the Executive order. Actually, the Executive order doesn't address the substantive exemptions. The Executive order is addressed completely to the processes by which FOIA is administered, and it is designed to help agencies set up systems where requestors can learn about their requests more readily, have their requests processed more quickly. It doesn't address in any way the substance of what is released or withheld.

Mr. HODES. Thank you. Is it your testimony that, as a result of the Card memorandum and the Ashcroft memorandum, DOJ has not narrowed down in any way the way it tells its agencies to respond in FOIA requests or changed the criteria in any way?

Ms. PUSTAY. It has not changed. It is a fact that it has not changed the legal requirements for withholding information under the FOIA, because those are governed by the exemptions that are in the statute.

Mr. HODES. What has changed?

Ms. PUSTAY. The change from the Ashcroft memorandum, which it is really the only one that really has made a change, is that it is a different tone. I think that is the way it has been described in the past.

Typically, when attorney generals come into office—this has happened back starting in the 1980's—attorney generals will typically issue a memorandum kind of giving their perspective or their direction in terms of how the Freedom of Information Act should be implemented. Attorney General William Bell had a FOIA memorandum and Janet Reno had one and John Ashcroft had one. The change that there is with the Ashcroft memorandum is more the tone, because the tone emphasizes that there are important interests to be protected by the FOIA's exemptions, and that is the difference. I think it is making agencies aware of the fact that there are important public interests in protecting information.

Mr. HODES. Let me just followup briefly, if I may.

Mr. CLAY. Sure.

Mr. HODES. Would you agree with me that, prior to the Ashcroft memorandum, previous policies stated that agencies should release requested information absent some finding of harm?

Ms. PUSTAY. Yes. Under Janet Reno, her memorandum on the FOIA actually affirmatively encouraged agencies to make what we called discretionary releases of information. That is information that fits within an exemption but which an agency is always free legally to say I am looking at a document, it fits within an exemption, but using my discretion I am going to release that information. Agencies are always free to do that because the FOIA exemptions are not mandatory.

Now, under Attorney General Reno's memorandum, she actively encouraged agencies to make discretionary disclosures of information. Now, the Ashcroft memorandum does not actively encourage discretionary disclosure. That is true. But it still makes reference to the fact that when agencies consider making a discretionary disclosure they should keep in mind the competing interests underlying the exemptions.

Mr. HODES. If I may, Mr. Chairman, I have one last question.

Mr. CLAY. Go ahead, Mr. Hodes.

Mr. HODES. Am I correct that as of today you are still operating under the strictures of the Ashcroft memorandum?

Ms. PUSTAY. Yes, that is correct.

Mr. HODES. Thank you. Thank you, Mr. Chairman.

Mr. CLAY. Thank you so much for that line of questioning, Mr. Hodes.

Going to our second round of questioning, Mr. Turner, did you have a second round for this panel?

Mr. TURNER. Yes, Mr. Chairman.

Mr. CLAY. Please proceed.

Mr. TURNER. I am looking here at the Janet Reno memo, itself, and it is going over the prior discussions in the prior administrations concerning FOIA, and it says, "The Department will no longer defend an agency's withholding of information merely because there is a substantial legal basis for doing so," and being a lawyer that always concerns me, because if there is a substantial legal basis you would think that would be something you would want to do. "But rather, in determining whether or not to defend a nondisclosure decision, we will apply a presumption of disclosure." But obviously you have to have some guidelines on a presumption of disclosure, because otherwise you would just be giving everything away. And we all acknowledge that there are some things, both for our national security, which would be our collective interest——

Ms. PUSTAY. Right.

Mr. TURNER [continuing]. And our personal privacy, which is our individual interests——

Ms. PUSTAY. Right.

Mr. TURNER [continuing]. That things should not be merely just posted in the town square and available to anyone to peruse.

Ms. PUSTAY. Exactly.

Mr. TURNER. So, in order to switch from a substantial legal basis for doing so, which I always thought meant someone had done a legal analysis and therefore there was a conclusion that the information should be withheld, to go to a presumption of disclosure there has to be some standard you apply, and looking at it, it says, "Yet, the act's exemptions are designed to guard against harm to Government—" that is a good thing—"and private interests." That

is a good thing. "I firmly believe that these exemptions are best applied with specific reference to such harm, and only after consideration of the reasonably expected consequences of disclosure." Well, in the act, itself, there are a series of exceptions where we have collectively, both the prior administrations in signing the act and amendments, and the Congress in enacting them, have established categories where we have assumed that there would be consequence of disclosure. That is why we accepted them.

Ms. PUSTAY. That is right.

Mr. TURNER. We said don't put it out in these areas because we have had hearings, we have deliberated, and we believe these categories could have harm to either the Government and/or to individual interests.

Ms. PUSTAY. Right.

Mr. TURNER. So if you are not going to just look at those categories of exceptions and apply a standard of legal basis, what would your test be for reasonably expected consequences?

Ms. PUSTAY. This is all back under how we did things under the Janet Reno memo.

Mr. TURNER. Good.

Ms. PUSTAY. As a practical matter, how that applied, at the beginning of your question you mentioned national security interests and personal interests, which are obviously very strong interests. Those are actually two areas where agencies are not, in fact, legally free to make a discretionary release. This whole discussion we are having here is about making discretionary releases, so releases despite the fact that an exemption applies. But in the area of national security, personal privacy, in certain situations for business proprietary information we have other statutes that provide protection for the information. We have the Privacy Act. We obviously have statutes that prohibit disclosure of classified information.

So an agency, because of the operation of other laws, is not free to just release information about individuals or release information that would violate national security. So what that meant as a practical matter was that the effect of the Reno discretionary disclosure policy, it applied most directly to internal agency documents, documents that were subject to exemption two, which protects personnel or administrative matters, and exemption five, which protects privileged matters within the agency. Those were the two areas where there was room under the Reno directive to actually look at a document and say OK, I am looking at this, I see this as an internal rule and procedure. It technically could fit exemption two, but when I look at it, I really don't think there is any harm in disclosure, and therefore I will release it. That is what the Reno position or her policy was designed to promote.

Mr. TURNER. After September 11th in the categories you have described of discretionary disclosure, wouldn't we have wanted a more narrow view of what reasonably expected consequences might be, because of the unknown factor that we were then wading into?

Ms. PUSTAY. Absolutely. Certainly all of us in the FOIA community looked at information in a new light after 9/11, and there certainly have been situations where agencies had to start, for the first time, thinking about the impact of disclosure on a potential terrorist, and we would be irresponsible if we didn't think that

way. So we have had certainly a renewed interest in typically exemption seven. The law enforcement exemptions have been used in a new way because of new threats, new consequences from disclosure that were simply unforeseen before 9/11.

Mr. TURNER. Thank you. Thank you, Mr. Chairman.

Mr. CLAY. Thank you, Mr. Turner.

Ms. Pustay, FOIA requestors have argued that requests involving cooperation among agencies are some of the most problematic to resolve and often lead to the longest delays.

Ms. PUSTAY. Yes.

Mr. CLAY. Is DOJ taking any steps to improve interagency cooperation on FOIA requests?

Ms. PUSTAY. I mean, it is absolutely true, yet I don't have an easy answer to that. Let me just explain that when you have records, especially if you have sensitive records that implicate national security concerns, it is important, and I would certainly always recommend to agencies that they coordinate and consult with other interested agencies. Lots of times records that are responsive to a FOIA request are gathered and collected at the agency site that received the FOIA request, but if they implicate the interests of other agencies they have to go to the other agency to get that other agency's views on disclosure of its information that appears in the first agency's files. It is just the nature of the fact that records don't exist in nice, discrete packages.

But obviously that involves time. I mean, it is absolutely correct, the more you have to consult with other agencies the more time.

Mr. CLAY. Tell me, though, is DOJ doing anything to foster a cooperation among——

Ms. PUSTAY. Yes.

Mr. CLAY [continuing]. The different agencies who may hold a bit of information on a particular case.

Ms. PUSTAY. Absolutely, because it is a necessary requirement of FOIA processing, but obviously it is a very important area to have improvement in. Within the Department of Justice, as part of the Executive order implementation and part of our Executive order duties, this is an area that we have focused on. Increasing communication between agencies, coming up with forms to exchange between agencies, within the Justice Department we have even been able to set up protocols to get information more quickly or to review information offsite. There are different things that agencies can to do help speed the process up, and we definitely are working on those, and it part of the EO implementation.

Mr. CLAY. Along those same lines, resources at agencies seem to be a major barrier to maintaining and training FOIA personnel. Has DOJ looked to improve FOIA training opportunities for FOIA officers?

Ms. PUSTAY. We do lots of training within the Justice Department for across the agencies. I have to say our courses are usually standing room only, sold out courses, so we do have a great demand for training. But just about nearly every month we have formal training programs, so it is something that we are very actively involved in. And we also do individualized agency training sessions. When a particular agency would like one of us to come onsite, we go and train there. So it is absolutely a key part of what we do.

Mr. CLAY. OK. Thank you for your response. Ms. Koontz, there seems to be an inverse relationship between the number of FOIA requests made and the number of cases backlogged across the Government. Why is this?

Ms. KOONTZ. I think you are referring to some of the phenomenon that we talked about earlier is that in some agencies they receive many, many FOIA requests, and these are, in many cases, also privacy requests. They are requests for people for their own record, or they are an authorization for a third party to obtain their record. These in many cases are easily fulfilled, and they are not the sort of kind of—you know, in some cases I think the median days is one on some of these requests. These are not the kind of cases that lead to a backlog.

Mr. CLAY. So the backlogs come when there are restrictions on FOIA and exemptions on what kind of information that you can release?

Ms. KOONTZ. We haven't done a study looking in a detailed way at individual FOIA requests, but what the agencies tell us is that oftentimes we are talking about cases that may involve tens of thousands of pages of responsive records. It may involve going to other agencies through the referrals and through consultations. You know, it may involve the difficulty just of having to search agency wide for responsive records, and in some cases agencies, frankly, do not have the kind of records management systems that facilitate the quick identification of responsive records. There is a variety of reasons that agencies have given us for why some of these take longer.

Mr. CLAY. Thank you so much for your response.

Mr. Hodes, did you want to participate in a second round of questions?

Mr. HODES. I would. Thank you, Mr. Chairman.

Mr. CLAY. Please proceed.

Mr. HODES. Ms. Pustay, I understand from your testimony that DOJ submitted its report on January 19th, which was 2 weeks in advance of the deadline.

Ms. PUSTAY. Yes. I am very proud of that.

Mr. HODES. I understand that. And I note that the Justice Department's report indicates that it stopped working on and reporting on its Executive order compliance on January 9th. You had 3 more weeks before the cutoff. Why did you choose to stop then?

Ms. PUSTAY. Obviously, we didn't stop our work on our implementation activities. When we took what I felt was a very positive step to get our report up early, we knew that we were cutting ourselves short in terms of time for finishing our implementation. But to my mind the value of having it up and posted, not only finished, but posted on the internet as a model was just so important that I wanted to do it, and we have been very pleased with the fact that I think it really did have a very good impact on other agencies.

Mr. HODES. I was surprised to see in the DOJ's report of its own compliance that there were more than two dozen deficiencies, including eight in the FBI, alone. Why were there so many deficiencies in the DOJ's report? And why didn't you take the time after January 9th to do something about DOJ's own deficiencies?

Ms. PUSTAY. Well, first of all, the DOJ has a tremendous—I am very proud of DOJ's annual report. We have, I think, tremendous successes that are delineated in our annual report across a wide range of components. There are deficiencies with some of our components, and I think that is just to be expected. The FBI, in particular, for instance, had a huge move of all their FOIA operation, which is hundreds of people. They moved to Winchester, VA, I think. The logistics of moving that whole shop had a huge ripple effect on their ability to carry out some of the goals that they had set for themselves. That has absolutely nothing to do with the fact that we reported out their successes and their deficiencies early. They would not have been able to cure the effect of moving to Winchester in 2 weeks. Really, one does not have any relation to the other.

Mr. HODES. I want to return briefly to the question of the impact of the Ashcroft memorandum.

Ms. PUSTAY. OK.

Mr. HODES. I am looking at a letter dated February 8, 2007, from James Kovacks, attorney in charge of the civil division.

Ms. PUSTAY. Civil division.

Mr. HODES. He is replying to a fellow named Mr. Hammet, who on January 30, 2007, under FOIA requested records of the civil division relating to the 2006 revision of the DOJ guide to the Freedom of Information Act.

Ms. PUSTAY. OK.

Mr. HODES. And he sought expedited processing for that request. He wanted a copy of the guide. This fellow, Mr. Kovacks, wrote back and said that there was no urgency to inform the public about an actual or alleged Federal Government activity, and the decision was based on the fact that there have been periodic revisions to the guide and there is no evidence that the public is concerned in any way about the 2006 revisions. So he was denying Mr. Hammet access to this guide; is that correct?

Ms. PUSTAY. I don't know if it is correct. I haven't seen the letter.

Mr. HODES. I will be happy to submit that to you.

Ms. PUSTAY. That is fine.

Mr. HODES. My question is: does this have anything to do with the Ashcroft memorandum? Is this the kind of thing that the Ashcroft memorandum has produced in terms of the way DOJ is responding to FOIA requests?

Ms. PUSTAY. No. Again, it is apples and oranges. What you are reading to me there is a request for expedited processing of a request, and a denial of that request for expedited processing. Expedited processing is a whole separate part of the Freedom of Information Act that is not at all addressed in the Ashcroft memorandum, and expedited processing is—in the FOIA, itself, there are provisions for certain requestors and certain circumstances to jump to the head of the line to get their requests processed earlier than anyone else. But in order to go to the head of the line you have to meet strict requirements, because obviously anybody that gets bumped to the front of the line disadvantages all the other requestors who are patiently waiting.

So what you are reading to me there is actually a request for expedited processing and a decision by the civil division that the

standard for expedited processing wasn't met. The Ashcroft memorandum has absolutely nothing to do with that.

Mr. HODES. Thank you. Mr. Chairman, I would submit this for the record.

Mr. CLAY. Without objection.

Mr. HODES. Thank you, Mr. Chairman.

I yield back.

Mr. CLAY. Thank you.

Let me also ask, are there any further questions for this panel?

Mr. TURNER. Mr. Chairman, I would just like to state how impressed I am with both of them and their answers and their responses, because clearly we have all agreed in our questions and in our comments about the need for protection of governmental interests and private interests, but also of the need for release of this information that should be properly released. Clearly, both of them are giving us guidance and information and are committed to the types of policy that certainly everyone on this committee has been espousing.

Thank you.

Mr. CLAY. Thank you.

If either witness or both have a closing comment to make, feel free.

[No response.]

Mr. CLAY. If not, that will conclude the testimony for panel one. I thank you Ms. Koontz and thank you Ms. Pustay for your testimony. You may be excused.

I would like to now invite our second panel of witnesses to come forward, please.

Our second panel will consist of three witnesses.

Our first witness is Mr. Clark Hoyt, who serves as a consultant to McClatchy Newspapers. For the prior 38 years he was reporter, editor, and executive with Knight Ridder, the Nation's second-largest newspaper company, until its acquisition by McClatchy. In 1973 he shared the Pulitzer Prize for national reporting with Robert S. Boy for their coverage of Democratic Vice Presidential Nominee Thomas Eagleton, another Missourian.

Our second witness will be Ms. Caroline Fredrickson, who serves as the director of the Washington Legislative Office. Caroline Fredrickson is the director of the ACLU Washington Legislative Office. As director, Ms. Fredrickson leads all Federal lobbying for the national ACLU, the Nation's oldest and largest civil liberties organization. She is also the organization's top lobbyist and supervises the 50-person Washington legislative team in promoting ACLU priorities in Congress, the White House, and Federal agencies.

Our third witness is Meredith Fuchs, who serves as the general counsel to the National Security Archive at George Washington University. There she oversees Freedom of Information Act and anti-secrecy litigation, advocates open government, and frequently lectures on access to Government information. She is the author of "Judging Secrets: the Role Courts Should Play in Preventing Unnecessary Secrecy and Greasing the Wheels of Justice, Independent Experts of National Security Cases."

It is the policy of the Committee on Oversight and Government Reform to swear in all witnesses before they testify.

[Witnesses sworn.]

Mr. CLAY. Let the record show that they have answered in the affirmative.

As with panel one, I asked that each witness now give a brief summary of their testimony and to keep the summary under 5 minutes in duration. Bear in mind your complete written statement will be included in the hearing record.

Mr. Hoyt, let's begin with you.

STATEMENTS OF CLARK HOYT, MCCLATCHY NEWSPAPERS, ON BEHALF OF THE SUNSHINE IN GOVERNMENT INITIATIVE; CAROLINE FREDRICKSON, DIRECTOR, WASHINGTON LEGISLATIVE OFFICE, AMERICAN CIVIL LIBERTIES UNION; AND MEREDITH FUCHS, GENERAL COUNSEL, NATIONAL SECURITY ARCHIVE AT GEORGE WASHINGTON UNIVERSITY

STATEMENT OF CLARK HOYT

Mr. HOYT. Mr. Chairman, Ranking Member Turner, and members of the subcommittee, I am honored to appear before you today to speak in support of efforts to strengthen the Federal Freedom of Information Act. I am testifying on behalf of the Sunshine in Government Initiative, a coalition of 10 media groups committed to promoting policies that ensure the Government is accessible, accountable, and open.

I believe the Freedom of Information Act is one of the most important tools available to journalists and citizens, alike, to monitor the performance of our Government, but it has flaws that I hope this Congress in its wisdom will address. Because of FOIA, Chris Adams of McClatchy Newspapers was able to report this past weekend that the Department of Veterans Affairs is ill-equipped to handle the wave of returning Iraq war veterans suffering from post traumatic stress syndrome.

I would like to tell you about an earlier 2005 series of stories on the VA by Knight Ridder written by Chris and Allison Young. I think you will see that their experience gathering public records provides strong evidence that FOIA needs to be strengthened. Early in 2004 Chris and Allison undertook a comprehensive inquiry into how the VA determines who gets disability benefits and who doesn't. In February, Chris asked the VA what kinds of relevant data bases the Department maintained. The VA stonewalled. It wouldn't give him the record lay out for different data bases. In March a public affairs officer told Chris that the Department didn't want to tell him how it maintained records because officials feared it was "Leading to a big FOIA."

Although FOIA explicitly says that individuals requesting public documents don't have to say why they want them, the public affairs officer probed to find out what the stories would say. Officials at the Veterans Benefits Administration "Certainly would like to know why the information is needed," he said in an e-mail.

In March Chris filed our first FOIA request asking, in effect, for the records of what records the VBA maintained. There was no response. We appealed. No response.

At one point Chris was invited to view a version of the record layout, but as he was leaving VA officials demanded his notes so

other officials could clear them. I believe the demand was not supported in any way by law, but Chris complied. The notes were faxed to him the next day. Eventually, Chris learned on his own what records he needed for the project, and on April 15th he filed a FOIA request. Here, from Chris' notes, is what happened next. Please keep in mind the 20-working-day statutory deadline for an agency response to a FOIA request.

May 6, a VBA FOIA officer told Chris the request was "Being worked." On June 4th, June 16th, July 19th, and August 6th VA officials said the request, in the same words, "Were still being worked." August 8th, "They are still working on them. It is being worked, not like it is sitting there." September 3rd, a VA official admitted they did not get to it 4 months ago. Part of it was the queue, part of it was the whole general counsel, and part of it was miscommunication.

At one point the VA demanded from us $41,000 to copy the records of 11,000 service officers who help veterans file their claims. We had asked for two files.

Finally, after numerous unanswered FOIA requests and six administrative appeals, we filed a lawsuit in November. In December the long-sought records began flowing. By February 2005 we had most of what we had requested. In March the stories ran. The stories documented how veterans nationwide are being short-changed by a benefit system prone to long delays, wrongful denials, and inconsistent rulings. In addition to seven journalism awards and the satisfaction of knowing we did our duty by persevering in the quest to examine the performance of a Federal agency that affects millions of Americans, Knight Ridder got legal bills totaling more than $100,000.

Because the VA surrendered the data bases and other records before our suit went to trial, we were prevented from recovering legal fees because of the way the appellate court that governs Washington, DC, interprets the Supreme Court's decision in *Buckhannon Board and Care Home, Inc.* v. *West Virginia Department of Health and Human Resources.*

How do I believe FOIA should be strengthened? Based on our experience, I would like to suggest four broad changes.

First, create a FOIA ombudsman within Federal agencies, a champion for FOIA training and compliance, a place where individuals seeking to exercise their rights under FOIA can go for help, short of filing a lawsuit.

Second, eliminate what Senator John Cornyn has correctly called "the Buckhannon tax." Make it clear that plaintiffs forced to sue to get public records are entitled to get legal fees, even though the defendant agency throws in the towel before a court decision.

Third, make FOIA's deadlines meaningful. If the law says a request must have a response within 20 working days, put teeth in it with real sanctions for agencies that don't comply.

Fourth, the law would work better if every FOIA request was assigned a tracking number. Any individual should be able to check at any time on the status of a request and get an accurate account of the progress. Combined with more meaningful reporting of each agency's overall FOIA performance, this would help achieve greater accountability.

Mr. Chairman, in closing I request that an in-depth analysis of FOIA implementation prepared by the Coalition of Journalists for Open Government titled "The Waiting Game: FOIA Performance Hits New Lows," be entered into the record of this hearing.

Thank you.

Mr. CLAY. Without objection, so ordered.

[The prepared statement of Mr. Hoyt follows:]

Testimony of

Clark Hoyt

Representing

Sunshine in Government Initiative

Freedom of Information Act

House of Representatives

Committee on Oversight and Government Reform

Subcommittee on Information Policy, Census, and

National Archives

February 14, 2007

Chairman Clay, Ranking Member Turner and Members of the Subcommittee on Information Policy, Census and National Archives, I'm honored to appear before you today to speak in support of efforts to strengthen the Federal Freedom of Information Act.

I am testifying on behalf of the Sunshine in Government Initiative, a coalition of ten media groups committed to promoting policies that ensure the government is accessible, accountable and open. *

I must say I feel strange sitting at this table. I spent many of my 40-plus years as a journalist *covering* Congressional hearings, not taking part in them. But I've stepped out of my longtime role as a reporter, editor and news executive who doesn't take part in government deliberations because I believe the Freedom of Information Act is one of the most important tools available to journalists and citizens alike to monitor the performance of our government. I appreciate this opportunity to celebrate its success and to point up some flaws in the act that I hope this Congress, in its wisdom, will address.

I come before you today as someone who has spent virtually his entire adult life as a journalist. I came to Washington as a correspondent for The Miami Herald in 1970. I

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

was later a national correspondent for the Herald's parent company, Knight Ridder Newspapers, which was then the nation's second largest newspaper publisher, Washington Bureau Chief and, subsequently, Vice President/News. In 1999, I returned here as Washington Editor, with responsibility for the Washington Bureau, Knight Ridder's 10 international bureaus and the editorial operations of Knight Ridder/Tribune Information Services. I served in that capacity until June of last year, when Knight Ridder was sold to the McClatchy Company.

Throughout my newspaper career, I've known the value of – and fought for -- public access to the public's records.

As a young reporter at the Ledger in Lakeland, Florida, in 1967, I investigated substandard housing. Using county property and court records, I discovered that much of Lakeland's worst housing was tied up in the estate of a man who had died years before and left his rental properties to a church-affiliated orphanage. But a lax probate court never closed out the estate, and the man's brother, a leading retailer in Lakeland, had taken over the properties and collected the rents. The resulting stories, which would not have been possible without public records, put a spotlight on the scandalous conditions in which many Lakeland residents lived. Though their shacks were literally in danger of falling down on them, they were most in fear of the weekly visit from the rent collector, who would remove their front doors if they didn't pay up.

Florida has long had a history of valuing access to public records and public meetings. The records I sought and examined in the Polk County Courthouse were first declared

public in 1909, with passage of the Public Records Law. In 1967, Florida passed a greatly expanded Public Records Law and a landmark Government-in-the-Sunshine law opening government meetings. Today, in Florida, the citizen's right of access to government information and meetings is enshrined in the state constitution.

The federal government, I must say, came rather late and reluctantly to the party. The Freedom of Information Act was passed in 1966 without the support of the Johnson administration. But FOIA has become an essential tool for journalists attempting to find out for the public what the vast and complex federal government is up to – how it is spending tax dollars, enforcing or failing to enforce regulations or how it is deciding who gets veterans' benefits -- and who doesn't.

Because of FOIA, readers of USA Today learned earlier this month the locations of 122 levees around the country that are so poorly maintained that they could fail in a major flood. The levees protect big population centers such as Sacramento, California; Springfield, Massachusetts and Albuquerque, New Mexico, and smaller towns, such as Lincoln, New Hampshire, Redmond, Utah and Sweetwater, Idaho. The Army Corps of Engineers, which built many of the levees, refused to name the affected communities until USA Today and the Associated Press pressed a FOIA request.

Because of FOIA, the Marine Corps Times was able to reveal in 2005 that nearly 10,000 Marines were issued body armor that flunked government safety tests and had potentially life-threatening flaws. Faced with imminent publication of the story, the Marine Corps recalled more than 5,000 of the armored vests, which failed in tests to stop 9 mm pistol rounds.

Because of FOIA, McClatchy Newspapers were able to report this past weekend that the Department of Veterans Affairs is ill equipped to handle the wave of returning Iraq war veterans suffering from post-traumatic stress syndrome. My former colleague, Chris Adams, a superb investigative reporter in the McClatchy Washington Bureau, analyzed 200 million – yes, 200 million – computerized VA records, including every medical appointment in the system in 2005.

He found that veterans with psychiatric problems are receiving less care than they did in the past, the amount of mental health care provided by the VA varies dramatically from state to state, and nearly 100 VA clinics offer little or no mental health care at all.

I'd like to tell you about a series of stories in 2005 on the VA by Chris and a colleague, Alison Young. I think you'll see that the reporters' experiences while gathering public records for these stories provide strong evidence that FOIA needs to be strengthened.

Early in 2004, Chris and Alison undertook a comprehensive inquiry into how the VA determines who gets disability benefits and who doesn't.

In February, Chris asked the VA what kinds of relevant databases the department maintained. The VA stonewalled, refusing to give him what was known as the "record layout" for different databases. In March, a public affairs officer told Chris that the department didn't want to tell him how it maintained its records because officials feared it was "leading to a big FOIA."

Although FOIA explicitly says that individuals requesting public documents don't have to say why they want them, the VA was clearly trying to figure out what the reporters

planned to write. In an e-mail to Chris, the public affairs officer said that officials at the Veterans Benefits Administration "certainly would like to know why the information is needed in terms of the possible news story lead you envision, what is motivating this as a topic worthy of inquiry at this level of detail. People ask me, 'Why? What are they looking for?'"

In March, Chris filed our first FOIA request, asking in effect for the records that would tell us what records the VBA maintained. There was no response. We appealed. Still no response.

At one point, Chris was invited to go over to the VA and look at a version of the record layout. He was allowed to take limited notes. Then, as he was leaving, VA officials demanded his notes. They said the notes had to be cleared by other department officials. I believe the demand was an outrage not supported in any way by law, but Chris complied. The notes were faxed to him the next day.

Eventually Chris learned on his own what records he needed for the project, and on April 15 he filed a FOIA request for those databases.

Here, from Chris' notes is what happened next. Please keep in mind the 20-working-day statutory deadline for an agency response to a FOIA request.

- May 6, a VBA FOIA officer told Chris the request was "being worked."
- May 12, Chris filed a request for additional files.
- June 4, a VA official said the requests "were still being worked."

- June 16, a FOIA officer said the requests "were still being worked."
- July 19, "still being worked."
- August 6, "still being worked."
- August 8, "They are still working on them ... It is being worked ... not like it's sitting there."
- September 1, "A general estimate is probably a couple months."
- September 3, a VA official admits, "They did not get to it four months ago ... Part of it was the queue, part of it was the whole general counsel, and part of it was miscommunication ... I told them this has taken too long."
- September 14, asked when one of the requested files might be available, a FOIA officer said, "Hopefully, I will have that answer by tomorrow at the latest. That's my hope."

Alison was also filing FOIA requests for her part of the VA project, and she was getting similar results. At one point, the VA demanded $41,000 to copy the records of 11,000 service officers who help veterans file their claims. We had asked for two files.

Finally, after numerous unanswered FOIA requests and six administrative appeals, we filed suit in November in Federal District Court in the District of Columbia. In December, the long-sought records began flowing to Chris and Alison. By February of 2005, they had most of what they'd requested. In March, their stories ran.

When you hear what the stories said, I think you'll understand why the VA dragged its feet and fought so hard to prevent clearly public records from becoming public.

The stories documented how veterans nationwide are being shortchanged by a benefits system prone to long delays, wrongful denials and inconsistent rulings. Over the prior decade, 13,700 veterans died waiting for disability claims to be resolved. Chris and Alison found that two million poor veterans and widows were missing out on a VA pension to which they were entitled. Recent Iraq war veterans couldn't get education benefits. If a veteran asked the agency for advice, he or she was more likely to get a wrong answer than the right answer. The VA made 103,000 errors in 2004 alone in deciding veterans' benefits cases.

Ironically, after fighting us so fiercely, the VA circulated Chris and Alison's stories to its regional offices with instructions to "read the articles, digest the underlying message and then take action to ensure you and your people learn from these writings."

The VA stories won seven journalism awards. But I think the biggest satisfaction came when we learned that Frank Fong, a World War II fighter pilot who was partially blinded in a plane crash, finally got his disability claim approved -- 50 years after it was filed. Chris and Alison had highlighted Fong's case as an example of the Dickensian nature of the VA appeals process. Fong was awarded $67,000 in back payments.

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

Because the VA surrendered the databases and other records before our suit went to trail, we were prevented from recovering legal fees because of the way the appellate court that governs Washington, DC, interprets the Supreme Court's decision in

Buckhannon Board and Care Home, Inc. v. West Virginia Department of Health and Human Resources. The high court ruled in *Buckhannon* that parties didn't have to pay their opponents' legal fees if the defendants gave the plaintiffs essentially everything they were seeking prior to a court judgment.

Buckhannon encourages delaying tactics by agencies that are trying to evade the requirements of FOIA. I believe, though I cannot prove it, that VA officials knew they had a losing case but decided to fight us as long as possible to test our resolve and the depth of our pockets. They knew that in doing so, the VA faced no potential liability.

How do I believe FOIA should be strengthened? You will hear from experts far more versed in the details of the law. But based on our experience with the VA, let me suggest four broad changes:

First, create a FOIA ombudsman within the federal government, a champion for FOIA training and compliance, a place where individuals seeking to exercise their rights under FOIA can go for help short of filing a lawsuit. Had there been such an independent FOIA advocate for Chris and Alison to work with, I believe they could have obtained the records they needed from the VA faster and without the lawsuit that proved costly to us, and that had to be costly to taxpayers.

Second, I urge Congress to eliminate what Sen. John Cornyn (R-TX) has correctly called "the *Buckhannon* tax." Make it clear that plaintiffs forced to sue to get public records are entitled to legal fees, even though the defendant agency throws in the towel before a court decision.

Third, make FOIA's deadlines meaningful. If the law says a request must have a response within 20 working days, put some teeth in it, with real sanctions for agencies that don't comply.

Fourth, as Chris' futile efforts to determine the status of his FOIA requests suggest, the law would work better if every FOIA request was assigned a tracking number. Any individual should be able to check at any time on the status of a request and get an accurate account of its progress. Combined with more meaningful reporting of each agency's overall FOIA performance, this would help achieve greater accountability.

Mr. Chairman, I'm well aware that we're living in a highly polarized political climate. But I think it's important to conclude by pointing out that the free flow of government information isn't a partisan issue. It isn't a liberal vs. conservative issue. Regardless of party or political philosophy, I believe everyone can agree that the government's information is the people's information and that – with certain exceptions for national security or privacy reasons – it should be available to the people.

Thank you for allowing me to appear before you today.

Mr. CLAY. Thank you for your testimony.

Ms. Fredrickson, please proceed.

STATEMENT OF CAROLINE FREDRICKSON

Ms. FREDRICKSON. Good afternoon, Subcommittee Chairman Clay, Ranking Member Turner, and members of the subcommittee. Thank you for the opportunity to testify today on behalf of the American Civil Liberties Union, its 560,000 members, our activists, and 53 affiliates nationwide about an issue of critical importance, the Freedom of Information Act.

FOIA gives ordinary people the power to hold the Governors accountable to the governed. We like to think of FOIA as democracy's x-ray because it shows us the inner workings of Government so we can identify the waste, fraud, abuse, and corruption that weaken our Nation. But that x-ray machine has grown old and needs a tune-up. Backlogs clog the system and cause expensive, unnecessary delays.

Under the Open America Doctrine, agencies can use their backlog as an excuse for failing to meet statutory deadlines for new FOIA requests; however, the real problem is the current administration is intentionally and improperly shielding itself from view, using national security as a barrier to prevent Americans from seeing what is happening inside our Government.

FOIA is the best tool that Congress has created to expose Government abuse, and through exposure to help end those abuses. ACLU litigators are now using that power with great effect to bring to light illegal and improper methods pursued by the Bush administration in its global war on terror.

The ACLU recognizes that increased oversight is even more important when people are afraid that national security is being threatened. For example, ACLU's FOIA requests have revealed Pentagon and FBI spying programs targeting peaceful protest groups in the United States such as the American Friends Service Committee, Veterans for Peace, United for Peace and Justice, Greenpeace, and the Catholic Workers Group. This is wasteful and dangerous. Every hour the FBI spends infiltrating a Quaker peace group is one less hour it can spend finding the next Mohammed Atta.

Another ACLU FOIA request demanded information about detainees held by the United States overseas. It exposed evidence of interrogation techniques in U.S. detention facilities in Guantanamo Bay, Cuba, Afghanistan, and Iraq that are widely regarded as torture under international law.

Once it came to light through our FOIA requests and other sources, this abuse triggered a national soul searching about abusive interrogation techniques used in the fight against terrorism.

These two examples demonstrate how the public disclosure of Government misconduct through FOIA can serve to curb such improper Government activities. The activities waste precious resources and do irreparable harm to our core values and the image of the U.S. Government, particularly in the international community, where cooperation against trans-national terrorism is an essential component of our national security strategy.

I would like to highlight a few of the problems the ACLU has seen in its FOIA litigation. In torture litigation the ACLU filed the FOIA request for information on detainees in October 2003, 6 months before the Abu Ghraib photos were leaked to the media, but the agencies released virtually nothing until the court required them to begin processing the documents in August 2004.

Who knows what abuse might have been prevented had the Government been more forthcoming when the FOIA request was first filed? We are still pressing for the release of the documents, themselves, which the CIA continues to withhold.

NSA warrantless wiretapping—the Government made astonishing secrecy claims regarding NSA warrantless wiretapping. It took the extraordinary position that even the number of documents and the total number of pages at issue was classified. The Government even argued that document review by a special magistrate would violate the separation of powers.

U.S.A. Patriot Act—the Justice Department at first refused to release statistics to the ACLU regarding the FBI's use of section 215 authorities and national security letters, but those statistics were released by the administration months alter in an attempt to head off congressional efforts to require such disclosure. Releasing that information had no adverse effect on national security. In other words, when the ACLU sought the information through FOIA and it was inconvenient politically for the Government to disclose it, it was withheld on national security grounds. When openness became politically expedient, that information was released.

The common threads running through these examples are the administration's disdain for the principles of open government that underscore the Freedom of Information Act and its refusal to obey and faithfully execute the laws duly passed by Congress.

I see I am running out of time, so I will not go into a discussion of the Ashcroft memo, which has already been discussed by the previous panel, but I do want to point out a couple of things. We have put up a couple of exhibits here.

We do agree that governments can and should withhold truly secret information that is essential to national security, but it appears time and time again that information is, instead, withheld to hide potentially embarrassing information or misconduct.

Two examples are relevant to our torture FOIA case. You can see in exhibit A a heavily redacted e-mail released in response to the ACLU's torture FOIA request. Senator Carl Levin requested an unredacted version of the e-mails for use in Senate confirmation hearings and received a less-redacted version, which you can see in exhibit B. The information that was not redacted in the second says simply, quoting an FBI person, it says, "I will have to do some digging into old files to see if we have specifically told our personnel in writing to not deviate from bureau policy." That was obviously redacted simply to avoid embarrassing the FBI. And the other piece that is redacted is the name of the person who was up for confirmation in front of Senator Levin's committee.

The second example of FOIA abuse is more troubling, because it goes to the heart of how national security classification designations have been used to hide misconduct. As Steven Aftergood, senior researcher at the Federation of American Scientists, pointed out

in testimony before the Subcommittee on National Security, Emerging Threats, and International Relations in August 2004, the Department of Defense improperly classified the report written by Major General Antonio Taguba detailing evidence of torture at the Abu Ghraib prison in Iraq. The report was classified secret, in violation of Executive Order 12958, which states, "In no case shall information be classified to conceal violations of the law."

In closing, I would join my colleague here in recommending the changes to FOIA that he has already stated and that are contained in the Open Government Act. There are some very clear ways to improve the functioning of FOIA, and we look forward to working with the committee to do so.

Thank you very much.

[The prepared statement of Mr. Romero follows:]

WASHINGTON
LEGISLATIVE OFFICE

AMERICAN CIVIL
LIBERTIES UNION
WASHINGTON
LEGISLATIVE OFFICE
915 15th STREET, NW, 6TH FL
WASHINGTON, DC 20005
T/202.544.1681
F/202.546.0738
WWW.ACLU.ORG

Caroline Fredrickson
DIRECTOR

NATIONAL OFFICE
125 BROAD STREET, 18TH FL.
NEW YORK, NY 10004-2400
T/212.549.2500

OFFICERS AND DIRECTORS
NADINE STROSSEN
PRESIDENT

ANTHONY D. ROMERO
EXECUTIVE DIRECTOR

RICHARD ZACKS
TREASURER

Statement of Anthony D. Romero

Executive Director

American Civil Liberties Union

On

The Freedom of Information Act

Before the Subcommittee on Information Policy, Census, and National Archives

House Committee on Oversight and Government Reform

February 14, 2007

Good afternoon Subcommittee Chairman Clay, Ranking Member Turner, and Members of the Subcommittee on Information Policy, Census, and National Archives. Thank you for the opportunity to testify today on behalf of the American Civil Liberties Union, its more than half a million members and activists, and 53 affiliates nationwide, about an issue of critical importance to us, to this Subcommittee, and to all Americans: the right of the people to know what our government is doing and to have access to documents created on the taxpayer's dime. Congress enacted the Freedom of Information Act[1] in 1966 to give ordinary people the power to compel the government to act as our servant, so that as an informed citizenry we can "hold the governors accountable to the governed."[2] A healthy, vital democracy requires no less.

I like to think of the Freedom of Information Act as democracy's x-ray machine, because it gives us an inside look at the internal machinery of government so we can identify the waste, fraud, abuse and corruption that leave our nation dangerously weak, inefficient, and ineffective. Unfortunately the x-ray machine is not working as well as it should, and important information about the health of our democracy is being hidden from view. Part of the problem is that the machine is old and needs a good cleaning. Backlogs clog the system and cause expensive, unnecessary delays in responding to FOIA requests. And under the "*Open America*" doctrine, agencies can use their backlogs as an excuse for failing to meet statutory deadlines for new FOIA requests.[3] But the real problem is that the administration is intentionally and improperly shielding itself from view, increasingly using "national security" as a barrier to prevent Americans from seeing what's going on inside their government.

The American Civil Liberties Union is no stranger to our government's natural tendency to restrict civil liberties during periods of national insecurity. In 1920, during our first year of existence, the ACLU fought U.S. Attorney General A. Mitchell Palmer's campaign of harassment and deportation by championing the politically radical immigrants targeted by Palmer and securing the release of hundreds of activists imprisoned for their anti-war views and activities. During World War II the ACLU stood almost alone in denouncing the federal government's round-up and internment of more than 120,000 Japanese Americans. At times in our history when frightened civilians have been pressured by the authorities to trade their freedom and rights for a measure of security, the ACLU has been the bulwark for liberty. And the ACLU continues to work daily in courts, legislatures and communities to defend and preserve the individual rights and

---

[1] 5 U.S.C. §552 (2000)
[2] *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).
[3] See *Open America v. Watergate Special Prosecution Force*, 547 F. 2d 605 (D.C. Cir. 1976).

liberties that the Constitution and laws of the United States guarantee to everyone in this country.

The Freedom of Information Act was created during a period of national turmoil similar to today. In 1966 the U.S. military was actively engaged in an unpopular foreign war, there was a pervasive fear of ideologically-driven enemies infiltrating the country with ill intent, and the economic, social and political status quo was being threatened by a generation of Americans determined to ensure that the Constitution's promise of liberty applied to all equally. After the Pentagon Papers and Watergate scandals revealed the extent of the executive branch's cynical misuse of national security as an excuse to justify hiding potentially embarrassing and illegal activities, Congress recognized the critical role public oversight plays in protecting national security, and in 1974 voted to strengthen FOIA, overriding a presidential veto to close loopholes that had allowed the executive to circumvent the intent of the statute by simply not responding in a timely basis to FOIA requests. While national security exemptions to FOIA remain (and continue to be abused), the 1974 amendment and later amendments in 1976, 1986, and 1996, created significant improvements such as statutory deadlines for agencies to respond to FOIA requests, authorization for judicial review of classification claims, and fee waivers that have made FOIA an indispensable tool for journalists, scholars, lawyers and other interested parties to gain access to information held by our government.

ACLU FOIA LITIGATION

FOIA is the best tool Congress has created to help expose government abuse, and though exposure, help to end those abuses. ACLU litigators are now using that power with great effect to bring to light illegal and improper methods the Bush administration has pursued in its Global War on Terror. The ACLU recognizes that increased oversight is even more necessary when people are more fearful about threats to our national security.

For example, ACLU's FOIA requests have revealed abusive Pentagon and FBI surveillance targeting peaceful protest groups in the United States, such as the American Friends Service Committee, Veterans for Peace, United for Peace and Justice in the case of the Pentagon, and Greenpeace and the Catholic Workers Group in the case of the FBI.[4] Documents turned up as a result of those requests show that the government is targeting innocent activists who dissent from government policy, not people who are dangerous terrorists. This is both wasteful and dangerous: every hour the FBI spends

[4] See ACLU, "No Real Threat: The Pentagon's Secret Database on Peaceful Protest" January 2007, FBI Electronic Communication dated 5/23/2001 *available at* http://www.aclu.org/spyfiles/jttf/670_671.pdf and the ACLU "Spy files" at http://www.aclu.org/safefree/spyfiles/index.html

documenting the activities of a Quaker peace group is one less hour it can spend finding the next Mohammed Atta.

Another ACLU FOIA request demanded information about detainees held by the United States overseas. It exposed evidence of widespread and systemic mistreatment of prisoners – much of it officially sanctioned – in U.S. detention facilities in Guantanamo Bay, Cuba, Afghanistan, and Iraq. This mistreatment would be deemed to constitute torture and abuse under prevailing international legal standards. Once it came to light, both through our FOIA requests and other sources, this abuse triggered a necessary national soul searching about the use of abusive interrogation techniques in the fight against terrorism.

These two examples demonstrate how the public disclosure of government misconduct through FOIA can serve to curb such improper government activities. Those activities waste precious resources and do irreparable harm to our core values and the image of the United States government, particularly in the international community where cooperation against trans-national terrorism is an essential component of our national security strategy.

The ACLU "Torture FOIA", filed in October of 2003, has thus far resulted in the release of over 100,000 pages of documents, mostly from the Department of Defense and the FBI. Although federal agencies continue to withhold critical documents that would shed light on high-level official responsibility for the abuse, the documents released thus far have underscored the need for further investigation and reform. The ACLU's FOIA requests demanding information on the government's use of powers authorized in the USA Patriot Act resulted in the release of the first significant public information about the FBI's controversial use of National Security Letters; about the FBI's use of the extraordinary authorities granted under Patriot Act section 215; and about the Foreign Intelligence Surveillance Court, including the rules of the FISA Court. In a FOIA request for information relating to the detention of immigrants, the ACLU's Immigrants' Rights Project was able to obtain a key legal document about the local enforcement of immigration laws. In the document, the Department of Justice had reversed itself regarding state and local authority to make immigration arrests even though the relevant statutes had not changed. Under the Reno Justice Department, the DOJ took the position that local law enforcement officials could not detain non-citizens based on civil violations of the immigration laws because the federal government has primary authority in this area and has not authorized such arrests. The document showed that the Ashcroft Justice Department took an opposing position -- that local law enforcement officials had the inherent authority to arrest individuals for any violation of the immigration laws. Although the DOJ had announced its new conclusion publicly, it had refused to release the legal

analysis that explained that conclusion. Obtaining the analysis allowed police officials and advocates to better understand and evaluate the Department's shift. These successes demonstrate the ACLU's willingness to invest significant time, energy, and resources to ensure that our government is accountable to the American people.

But these successes do not imply that FOIA is working the way Congress intended it to. Responses to FOIA requests are hopelessly slow, often requiring litigation to compel the government to release the documents the law requires it to release. All too often, evidence of government misconduct is redacted or entirely withheld from the public in the name of national security or agency deliberations. Indeed, part of the reason for the ACLU's success is that it has the resources needed to litigate these cases. For the average American seeking information from his or her government, the expense of litigation to force compliance with the law presents an impossible burden.

I would like to highlight a few of the problems ACLU has seen in its FOIA litigation, to illuminate the practical realities we face in attempting to ensure that this government remains, as President Lincoln prayed it would, a government of the people, by the people, and for the people.

From ACLU's Torture FOIA:

1. The ACLU filed the FOIA request for information on detainees held by the United States in October of 2003 (six months before the Abu Ghraib photos depicting detainee abuse leaked to the media), but the agencies released virtually nothing until the court required them to begin processing the documents in August of 2004. Who knows what abuse might have been prevented had the government been more forthcoming when the FOIA request was first filed?

2. The government opposed the expedited processing of our FOIA request. In rejecting any further delay, the court wrote: "The information plaintiffs have requested are [sic] matters of significant public interest. Yet the glacial pace at which defendant agencies have been responding to plaintiffs' requests shows an indifference to the commands of FOIA, and fails to afford accountability of government that the act requires. If the documents are more of an embarrassment than a secret, the public should know of our government's treatment of individuals captured and held abroad."[5]

3. The Department of Defense continues to oppose the ACLU's request for release of photographs (redacted for identifying details) depicting

---

[5] *American Civil Liberties Union v. Dep't of Def.* 339 F. Supp. 2d 501, 504-05 (S.D.N.Y. 2004).

prisoner abuse at overseas locations other than Abu Ghraib even though in September 2005, the district court specifically held that:

> Publication of [such] photographs is central to the purposes of FOIA because they initiate debate, not only about the improper and unlawful conduct of American soldiers, "rogue" soldiers, as they have been characterized, but also about other important questions as well-for example, the command structure that failed to exercise discipline over the troops, and the persons in that command structure whose failures in exercising supervision may make them culpable along with the soldiers who were court-martialed for perpetrating the wrongs. . . .[6]

. Remarkably, the Defense Department invoked the Geneva Conventions among other reasons for withholding these images, even though in February 2002 the President himself held that Taliban and al Qaeda detainees were not entitled as a matter of law to protection under those Conventions. Withholding the photographs only serves to deny the American people knowledge essential to their continuing understanding of the conflict, and delay accountability for this misconduct. We continue to press for the release of these photographs in a case pending before the Second Circuit Court of Appeals.

4. In opposing the release of the photographs, the Department of Defense attempted to file some of its legal arguments under seal, which would have prevented the public even from knowing why the government thought the photos should be suppressed. We opposed the filing under seal and the court ultimately ruled in our favor.

5. Agency responses to the ACLU's FOIA requests for documents on torture also demonstrate the arbitrary and capricious nature in which the various agencies respond to FOIA requirements. The Office of Legal Counsel and the CIA released virtually no documents in response to our FOIA requests. The Department of Defense released 58,010 pages, if only grudgingly, the Army contributed another 27,428 pages, the Navy, 1,929 pages, the FBI 3,818 pages, and the Defense Intelligence Agency released 207 pages. Agencies that did release documents seemed to apply different redaction standards and large portions of documents -- and entire documents -- were redacted.

6. Invoking what is known in FOIA parlance as a "Glomar response,"[7] the CIA refused even to acknowledge the existence of critical documents let alone consider them for release. It argued that disclosure of

---

[6] American Civil Liberties Union v. Dep't of Def., 389 F. Supp. 2d 547, 578 (S.D.N.Y. 2005).

[7] A "Glomar" response to a FOIA request is an agency's express refusal to confirm or deny whether responsive documents even exist. Courts first recognized this type of response in *Phillippi v. CIA*, 546 F.2d 1009, 1013 (D.C. Cir. 1976), where the issue was whether the CIA could refuse to confirm or deny that it had ties to the ship, the *Glomar Explorer*.

the existence or non-existence of a Presidential directive to the CIA regarding overseas detention facilities abroad and a Justice Department memo authorizing the CIA to use abusive interrogation methods would be highly detrimental to national security. It remained steadfast in its recalcitrance despite the fact that the documents' existence had been widely reported in the news media. The President ultimately disclosed related information in a public speech in a September 2006 speech. He discussed the existence of detention centers abroad where the CIA had been holding at least 14 high-level al Qaeda operatives. In other words, the CIA invoked Exemption 1 (and Exemption 3, which incorporates the National Security Act) to withhold information that the President later felt comfortable disclosing on national TV. Following the President's speech, the CIA acknowledged that two documents did in fact exist, thereby confirming that it was all along invoking national security as a pretext for withholding the two documents, and that in fact, disclosure of the existence of these documents would not compromise national security. We are still pressing for the release of the documents themselves, which the CIA continues to withhold.

From the ACLU's NSA warrantless wiretapping FOIA:

1. The government made astonishing secrecy claims. It took the extraordinary position that even the number of documents and the total number of pages at issue was all classified.

2. Despite the fact that the D.C. Circuit has approved the use of Special
Magistrates in a District Court judge's endeavor to gain some control over voluminous FOIA records for *in camera* review purposes, the government took the extraordinary position that such an activity would violate the separation of powers doctrine.

And from the ACLU's USA Patriot Act FOIA:

The Department of Justice refused to release statistics regarding the FBI's use of section 215 authorities and National Security Letters, citing exemption b(1) -- national security concerns. It said that to release even the raw numbers indicating how often these intrusive surveillance techniques had been used would do irreparable harm to national security. But those statistics were released by the administration months later for political reasons in an attempt to resist congressional efforts to require such disclosure and to revise Section 215. There was no adverse effect on the national security at all. In other words, when the ACLU sought the information and it was inconvenient politically for the government to disclose it, it was withheld on national security grounds. When secrecy became politically inconvenient, that information was released.

POLICY IMPLICATIONS

The common threads running through these anecdotal examples are the administration's disdain for the principles of open government that underpin the Freedom of Information Act — a disdain Attorney General Ashcroft articulated in a memo issued shortly after the attacks of September 11, 2001 — and its unwillingness to obey and faithfully execute the laws duly passed by Congress. To this administration, secrecy is the default response. Although the Supreme Court made clear early on that the "dominant objective" of FOIA is "disclosure, not secrecy,"[8] U.S. Attorney General John Ashcroft issued a memorandum in October of 2001 encouraging executive branch agencies responding to FOIA requests to consider "other fundamental values," such as "safeguarding our national security, enhancing the effectiveness of our law enforcement agencies, protecting sensitive business information, and... preserving personal privacy," before making disclosures under FOIA. He vowed to defend any agency's discretionary decision to withhold records unless the agency lacks a "sound legal basis" and replaced it with a policy to "resist disclosure wherever legally possible."[9] The Ashcroft memo superseded an earlier memo by Attorney General Janet Reno that emphasized reliance on a "presumption of disclosure" to achieve the goal of "maximum responsible disclosure." A 2003 GAO study revealed that about one-third of the FOIA officers interviewed reported a decreased likelihood of discretionary disclosure, most citing the Ashcroft memo as the primary reason for the change.[10]

We are at a pivotal moment in our nation's history, when our executive branch is claiming unprecedented authority to spy on ordinary Americans, to jail people indefinitely without trial, sometimes in secret prisons, and to use interrogation techniques widely regarded under international law as torture and abuse. Congress must act to reign in this abuse and restore the checks and balances that are essential to our constitutional democracy.

Secrecy is, as President John F. Kennedy once said, "repugnant in a free and open society." Despite the almost universal recognition that the over-classification of intelligence actually harms national security by impeding information sharing, and was in fact a contributing factor in the intelligence failures that led to 9/11, more information is being classified

---

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

[9] Attorney General John Ashcroft, Memorandum for Heads of all Federal Departments and Agencies, October 12, 2001.

[10] U.S. General Accounting Office, "Freedom of Information Act: Agency Views on Changes Resulting from New Administration Policy," Report to the Ranking Minority Member, Committee on the Judiciary, U.S. Senate, September 2003.

post-9/11 than before. Hearings last March before the Subcommittee on National Security, Emerging Threats, and International Relations revealed that there were over 15 million classification decisions for fiscal year 2004, and keeping secrets cost the government $7.2 billion.[11] As Judge Victor Marrero stated in ACLU's National Security Letter litigation, "democracy abhors undue secrecy."[12] Of course we do not argue that every piece of information the government has should be available to the public.

Government agencies can, of course, withhold truly secret information that is essential to national security. No one is arguing, for example, that the government has to disclose information about current troop movements in Iraq. But it appears time and time again that information is instead withheld to hide potentially embarrassing information or misconduct, where the national security of the United States would not be implicated by the release of information.

Two examples are relevant to our Torture FOIA case. In the first, the FBI released a heavily redacted series of e-mails dated May 10, 2004 in response to the ACLU's Torture FOIA request, which can be seen in Exhibit A. It was not until Senator Carl Levin (D-MI) pressed for the release of an un-redacted version of the memo for use in Senate confirmation hearings that a less redacted version was released to him, and then provided to the ACLU. It is attached as Exhibit B. As you can see from comparing Exhibits A and B, the information was deleted not for any security purpose, but rather to shield the FBI from embarrassment. In its entirety, the sentence that contained the deletion reads, "I will have to do some digging into old files (to see if we specifically told our personnel, in writing, to not deviate from Bureau policy)." The release of two versions of the May 10, 2004 FBI e-mail offers the rare opportunity to evaluate the redactions made in a FOIA release, and the evaluation clearly demonstrates excessive and unnecessary redactions.

The second example is more troubling, because it goes to the heart of how national security classification designations have been used to hide misconduct. As Steven Aftergood, Senior Researcher at the Federation of American Scientists pointed out in testimony before the Subcommittee on National Security, Emerging Threats and International Relations in August of 2004, the Department of Defense improperly classified a report written by Maj. Gen. Antonio Taguba detailing evidence of torture at the Abu Ghraib prison in Iraq.[13] The report was classified as "secret" in violation of

---

[11] See: The Subcommittee on National Security, Emerging Threats, and International Relations briefing memo for the March 14th Subcommittee hearing, dated March 9, 2006, http://www.house.gov/shays/news/2006/march/March14BriefingMemo.pdf

[12] *Doe v. Ashcroft*, 334 F.Supp.2d 471 (S.D.N.Y. 2004).

[13] See: Steven Aftergood, "Too Many Secrets: Overclassification as a barrier to critical information sharing," testimony before the Subcommittee on National Security, House

Executive Order 12958 as amended, which provides that, "In no case shall information be classified to... conceal violations of law."[14] In attempting to limit the dissemination of information revealing evidence of their reckless disregard of the law, this administration is clearly willing to violate its own official policies.

RECOMMENDATIONS FOR REFORM

Congress has amended FOIA several times over the years, demonstrating its willingness, in spite of executive branch opposition, to try and get it right. Congress needs to act again. The first order of business should be legislative action to rescind the Ashcroft memo and restore the original purpose of FOIA by emphasizing the presumption toward disclosure. Further recommendations include the following:

1. Congress should provide more funding to decrease FOIA backlogs, and require monthly reporting to Congress on the FOIA backlogs, the number of FOIA requests received each month, how many are processed.

2. Congress should task the Government Accountability Office with issuing a report analyzing claims that information is exempt from disclosure on national security grounds to determine whether agencies are improperly withholding government information by claiming security exemptions.

3. Congress should create automatic penalties against government agencies for violating the statutory deadline for responding to FOIA requests.

4. Congress should legislatively override the Open America[15] doctrine.

5. Congress should require the granting of expedited processing (or create a presumption in favor of expedited processing) whenever a request

---

Committee on Government Reform, August 24, 2004, http://www.fas.org/sgp/congress/2004/082404aftergood.pdf

[14] Executive Order 13292 (March 25, 2003).

[15] The FOIA authorizes courts to extend statutory deadlines for an agency to respond to FOIA requests in cases of "exigent circumstances. *Open America v. Watergate Special Prosecution Force, Id.*, held that massive agency FOIA backlogs could constitute "exigent circumstances" justifying such extensions. Courts have interpreted this rule to authorize extensions even where the agency shows no efforts to address the backlogs (see James X. Dempsey, "Electronic FOIA Act Adopted; Will Affect Paper Records Too," National Security Archive Special Counsel, October 22, 1996, http://www.gwu.edu/~nsarchiv/nsa/efoiacom.html).

concerns the potential ongoing violation of constitutional rights and the requestor presents credible allegations of constitutional violations.

6. Because courts still defer too much to Exemption (b)(1) national security claims, Congress should require *in camera* review of Exemption (b)(1) claims as a matter of course (rather than at the discretion of the court). Congress should once again clarify that courts have the obligation to independently determine whether information is properly classified.

7. Congress could also strengthen a FOIA litigant's entitlement to attorney's fees and costs by allowing fees under the "catalyst theory." This is particularly important for ACLU FOIAs because typically once we sue to enforce the FOIA deadlines, the government agrees to set a processing schedule. If the parties agree on a schedule that is then ordered by the court (which the courts seem to prefer), attorney's fees are unavailable in connection with that result. The Openness Promotes Effectiveness in our National Government Act of 2005, (S. 394, the "OPEN Government Act") introduced in the Senate last session includes a provision (Sec. 4) which accomplishes this reform, but includes a troubling definition of the "substantially prevailed" standard to require the complainant receive a "substantial part of its requested relief." This could be interpreted to require more than is intended by the spirit of this reform proposal. Often the release of only a few key documents is necessary to prevail for the purposes of the FOIA litigation, but these few documents may not reflect a "substantial part" of the requested documents. The provision should be liberalized to ensure that a party that receives the key responsive documents will be deemed to have substantially prevailed. Congress should pass this legislation, after making this necessary change.

8. Congress should amend the fee waiver standard to make clear that bloggers and organizations like the ACLU that routinely disseminate information obtained through FOIA to the public are entitled to a FOIA fee waiver.

9. Congress should refrain from adopting (b)(3) exemptions, which allow Congress to designate any records as FOIA exempt for any reason, except in truly extraordinary circumstances

CONCLUSION

Despite the Bush administration's obsession with secrecy, we have had brief glimpses of what is going on inside the "unitary executive." Conscientious whistleblowers, enterprising journalists, and effective activists and lawyers have combined to reveal unprecedented levels of government waste, fraud, abuse, and corruption that sap our national strength. The American Civil Liberties Union is proud to have played an important role in

bringing some measure of accountability to this government. But much more needs to be done.

The photographs from Abu Ghraib alone should be enough to convince this Congress that our body politic is not well. More pictures are being improperly withheld by our government as we speak. Do they show that the abuse pre-dated Abu Ghraib, or perhaps that it continued after the events that we know about? The CIA has refused to say whether it is continuing to use abusive interrogation techniques, making a mockery of the concept of a government that answers to the people. Congress needs to restore and even improve democracy's x-ray, so that the American people can correctly diagnose the problems, and make informed decisions about how to improve their government. A robust Freedom of Information Act will not make us weak; it will demonstrate for all to see the unconquerable strength of a free nation dedicated to the supremacy of the rule of law.

Message

SECRET

Page 1 of 3

[redacted] (IR) (FBI) b6 -1 b7C -1

From: [redacted] (Div13) (FBI)
Sent: Monday, May 10, 2004 12:26 PM
To: HARRINGTON, T J. (Div13) (FBI) [redacted] (IR) (FBI); [redacted] b6 -1 b7C -1
Cc: BATTLE, FRANKIE (Div13) (FBI); [redacted] (Div13) (FBI); [redacted] (Div13) (FBI); [redacted] (Div13) (FBI); CUMMINGS, ARTHUR M. (Div13) (FBI)
Subject: Instructions to GTMO interrogators.

SECRET//ORCON,NOFORN
RECORD 315N-MM-C99102

TJ,

I will have to do some digging into old files [redacted]. We did advise each sincerely that went to GTMO to stay in line with Bureau policy and not deviate from that [redacted]. I went to GTMO with [redacted] early on and we discussed the effectiveness [redacted] with the SSA. We (BAU and ITOS1) had also met with Generals Dunlevey & Miller explaining our position (Law Enforcement techniques) vs. DoD. Both agreed the Bureau has their way of dong business and DoD has their marching orders from the Sec Def. Although the two techniques differed drastically, both Generals believed they had a job to accomplish. It was our mission to gather critical intelligence and evidence [redacted] in furtherance of FBI cases. In my weekly meetings with DOJ we often discussed [redacted] techniques and how they were not effective or producing intel that was reliable. [redacted] (SES) [redacted] (SES) [redacted] (now SES [redacted] at the time) and [redacted] (SES Appointee) all from DOJ Criminal Division attended meetings with FBI. We all agreed [redacted] were going to be an issue in the military commission cases. I know [redacted] brought this to the attention of [redacted]

b5 -1 b6 -1,4,5 b7C -1,4,5 b7D -1 b7E -1

One specific example was [redacted]. Once the Bureau provide DoD with the findings [redacted] they wanted to pursue expeditiously their methods to get "more out of him" [redacted] We were given a so called deadline to use our traditional methods. Once our timeline [redacted] was up [redacted] took the reigns. We stepped out of the picture and [redacted] ran the operation [redacted] FBI did not participate at the direction of myself [redacted] and BAU UC [redacted]. We would receive IIRs on the results of the process.

b5 -1 b6 -1,2 b7C -1,2

I went to GTMO on one occasion to specifically address the information coming from [redacted] We (DoD 3 Star Geoff Miller, FBI, CITF [redacted] etc) had a VTC with the Pentagon Detainee Policy Committee. During this VTC I voiced concerns that the intel produced was nothing more than what FBI got using simple investigative techniques (following the trail of the detainee in and out of the US compared to the trail of [redacted] was providing [redacted] portion of the briefing. [redacted] was present at the Pentagon side of the VTC. After allowing [redacted] to produce nothing, I finally voiced my opinion concerning the information. The conversations were somewhat heated. [redacted] agreed with me. [redacted] finally admitted the information was the same info the Bureau obtained. It still did not prevent them from continuing the [redacted] methods". DOJ was with me at GTMO [redacted] during that time.

b1 b5 -1 b6 -1,2,5 b7C -1,2,5

Bottom line is FBI personnel have not been involved in any methods of interrogation that deviate from our policy. The specific guidance we have given has always been no Miranda, otherwise, follow FBI/DOJ policy just as you would in your field office. Use common sense. Utilize our methods that are proven (Reed school, etc).

If you would like to call me to discuss this on the telephone I can be reached at [redacted] b2 -1

---Original Message---

SECRET

9/26/2004

DATE: 10-09-2004
CLASSIFIED BY: 65179/DMH/SCB/ROS/04-CV-4151
REASON: 1.5 (C)
DECLASSIFIED ON: 10-09-2029

ALL INFORMATION CONTAINED
HEREIN IS UNCLASSIFIED EXCEPT
WHERE SHOWN OTHERWISE

DETAINEES-2709

DOJFBI-001373

From: HARRINGTON, T J. (Div13) (FBI)
Sent: Monday, May 10, 2004 9:21 AM
To: [redacted] (Div13) (FBI) b6 -1
Subject: RE: pls confirm b7C -1

SENSITIVE BUT UNCLASSIFIED
NON-RECORD

Referral/Direct

We have this information, now we are trying to go beyond, did we ever put into writing, in an EC, memo, note or briefing paper to our personnel our position [redacted] that we were pursuing our traditional methods of building trust and a relationship with subjects. Tom

-----Original Message-----
From: [redacted] (Div13) (FBI) b6 -1
Sent: Monday, May 10, 2004 10:52 AM b7C -1
To: HARRINGTON, T J. (Div13) (FBI)
Cc: [redacted] (Div13) (FBI); BATTLE, FRANKIE (Div13) (FBI); BOWMAN, MARION E. (Div09) (FBI)
Subject: RE: pls confirm

SENSITIVE BUT UNCLASSIFIED
NON-RECORD

BAU at the request of the then (GTMO Task Force, ITOS1) wrote an EC (quite long) explaining the Bureau way of interrogation vs. DoDs methodology. Our formal guidance has always been that all personnel conduct themselves in interviews in the manner that they would in the field. [redacted] along with FBI advised that the LEA (Law Enforcement Agencies) at GTMO were not in the practice of the using [redacted] and were of the opinion results obtained from these interrogations were [redacted] BAU explained [redacted] FBI has been successful for many years obtaining confessions via non-confrontational interviewing techniques. b5 -1 b6 -2 b7C -2

Referral/Direct

We spoke to FBI OGC with our concerns. I also brought these matters to the attention of DOJ during detainee meetings with [redacted] express their concerns to [redacted] b5 -1 b6 -2 b7C -2

[redacted] has a copy of all the information regarding the BAU LHM. I believe she has provided that to TJ Harrington. b6 -1 b7C -1

I may have more specific information in my desk at HQ. I will search what I have when I return (5/17).

-----Original Message-----
From: HARRINGTON, T J. (Div13) (FBI)
Sent: Monday, May 10, 2004 4:33 AM
To: BATTLE, FRANKIE (Div13) (FBI); [redacted] (Div13) (FBI) [redacted] (Div13) (FBI) b6 -1 b7C -1
Subject: FW: pls confirm

SENSITIVE BUT UNCLASSIFIED
NON-RECORD

Please review our control files, did we produce anything on paper???
-----Original Message-----
From: Caproni, Valerie E. (Div09) (FBI)
Sent: Sunday, May 09, 2004 2:31 PM
To: [redacted] (Div09) (FBI); HARRINGTON, T J. (Div13) (FBI) [redacted] b6 -1 b7C -1

SECRET

(Div13) (FBI) [redacted] (Div13) (FBI) b6 -1
Subject: pls confirm b7C -1

SENSITIVE BUT UNCLASSIFIED
NON-RECORD

I think I've heard this several times, but let me ask one more time: b1

Has there been any written guidance given to FBI agents in either GTMO or Iraq about when they should "stand clear" b/c of the interrogation techniques being used by DOD or DHS [redacted] (S)

[redacted] (S)

b1
b5 -1

~~SENSITIVE BUT UNCLASSIFIED~~

~~SENSITIVE BUT UNCLASSIFIED~~

~~SENSITIVE BUT UNCLASSIFIED~~

~~SENSITIVE BUT UNCLASSIFIED~~

DERIVED FROM: G-3 FBI Classification Guide G-3, dated 1/97, Foreign Counterintelligence Investigations
DECLASSIFICATION EXEMPTION 1
SECRET//ORCON,NOFORN

U.S. Department of Justice

United States Attorney
Southern District of New York

86 Chambers Street, 5th Floor
New York, New York 10007

March 21, 2005

By Federal Express
Lawrence S. Lustberg, Esq.
Gibbons, Del Deo, Dolan,
Griffinger & Vecchione, P.C.
One Riverfront Plaza
Newark, N.J. 07102

Re: ACLU, et al., v. Department of Defense, et al.,
No. 04 Civ. 4151 (AKH)

Dear Mr. Lustberg:

The Federal Bureau of Investigations has elected to release information on documents bearing bates numbers DETAINEES-2709 to DETAINEES-2711 that was previously withheld. We have enclosed a new version of these documents that contains the previously withheld information.

Very truly yours,

DAVID N. KELLEY
United States Attorney

By: _____
SEAN H. LANE (SL-4898)
PETER M. SKINNER (PS-9745)
Assistant United States Attorneys
Telephone: (212) 637-2737

Encl.

Message SECRET Page 1 of 3

[redacted] (IR) (FBI) b6 -1

From: [redacted] (Div13) (FBI) b7C -1
Sent: Monday, May 10, 2004 12:26 PM
To: HARRINGTON, T J. (Div13) (FBI)
Cc: BATTLE, FRANKIE (Div13) (FBI) [redacted] (IR) (FBI) [redacted] (Div13) (FBI); [redacted] (Div13) (FBI); [redacted] (Div13) (FBI); [redacted] (Div13) (FBI); CUMMINGS, ARTHUR M. (Div13) (FBI) b6 -1 b7C -1
Subject: Instructions to GTMO interrogators.

SECRET//ORCON,NOFORN
RECORD 315N-MM-C99102

TJ,

I will have to do some digging into old files (to see if we specifically told our personnel, in writing, to not deviate from Bureau policy). We did advise each supervisor that went to GTMO to stay in line with Bureau policy and not deviate from that (as well as made them aware of some of the issues regarding DoD techniques). I went to GTMO with Andy Arena early on and we discussed the effectiveness (or lack there of) of the DoD techniques with the SSA. We (BAU and ITOS1) had also met with General's Dunlevey & Miller explaining our position (Law Enforcement techniques) vs. DoD. Both agreed the Bureau has their way of dong business and DoD has their marching orders from the Sec Def. Although the two techniques differed drastically, both Generals believed they had a job to accomplish. It was our mission to gather critical intelligence and evidence (that could be use in a DoD court of law) in furtherance of FBI cases. In my weekly meetings with DOJ we often discussed DoD techniques and how they were not effective or producing intel that was reliable. Bruce Swartz (SES), Dave Nahmias (SES), Laura Parsky (now SES, GS15 at the time) and Alice Fisher (SES Appointee) all from DOJ Criminal Division attended meetings with FBI. We all agreed DoD tactics were going to be an issue in the military commission cases. I know Mr. Swartz brought this to the attention of DoD OGC.

One specific example was [redacted] Once the Bureau provide DoD with the findings [redacted] and other connections to [redacted] et al) they wanted to pursue expeditiously their methods to get "more out of him" [redacted] We were given a so called deadline to use our traditional methods. Once our timeline (that DoD put into place) was up, DoD took the reigns. We stepped out of the picture and DoD ran the operation against [redacted] FBI did not participate at the direction of myself, Andy Arena, and BAU UC [redacted] We would receive IIRs on the results of the process. {S}

b6 -1,3,4 b7C -1,3,4 b7D -1 b7E -1

I went to GTMO on one occasion to specifically address the information coming from the IIRs produced by DoD re [redacted] We (DoD 3 Star Geoff Miller, FBI, CITF [redacted] etc) had a VTC with the Pentagon Detainee Policy Committee. During this VTC I voiced concerns that the intel produced was nothing more than what FBI got using simple investigative techniques (following the trail of the detainee in and out of the US compared to the trail of [redacted] [redacted] based on classified info from the Pentbomb investigation). Lt. Col [redacted] was providing the DoD portion of the briefing [redacted] was present at the Pentagon side of the VTC. After allowing DoD (Lt. Col [redacted] to produce nothing, I finally voiced my opinion concerning the information. The conversations were somewhat heated. [redacted] agreed with me. DoD finally admitted the information was the same info the Bureau obtained. It still did not prevent them from continuing the "DoD methods". DOJ was with me at GTMO (Dave Nahmias) during that time.

b1 b6 -2,3,4 b7C -2,3,4 b7D -1 b7E -1

Bottom line is FBI personnel have not been involved in any methods of interrogation that deviate from our policy. The specific guidance we have given has always been no Miranda, otherwise, follow FBI/DOJ policy just as you would in your field office. Use common sense. Utilize our methods that are proven (Reed school, etc).

If you would like to call me to discuss this on the telephone I can be reached at [redacted] b2 -1

—Original Message—

DETAINEES-2709

SECRET

9/26/2004 [redacted]

From: HARRINGTON, T J. (Div13) (FBI)
Sent: Monday, May 10, 2004 9:21 AM
To: [redacted] (Div13) (FBI)
Subject: RE: pls confirm

b6 -1
b7C -1

SENSITIVE BUT UNCLASSIFIED
NON-RECORD

We have this information, now we are trying to go beyond, did we ever put into writing, in an EC, memo, note or briefing paper to our personnel our position [redacted] that we were pursuing our traditional methods of building trust and a relationship with subjects. Tom

Referral/Direct

-----Original Message-----
From: [redacted] (Div13) (FBI)
Sent: Monday, May 10, 2004 10:52 AM
To: HARRINGTON, T J. (Div13) (FBI)
Cc: [redacted] (Div13) (FBI); BATTLE, FRANKIE (Div13) (FBI); BOWMAN, MARION E. (Div09) (FBI)
Subject: RE: pls confirm

b6 -1
b7C -1

SENSITIVE BUT UNCLASSIFIED
NON-RECORD

BAU at the request of the then (GTMO Task Force, ITOS1) wrote an EC (quite long) explaining the Bureau way of interrogation vs. DoDs methodology. Our formal guidance has always been that all personnel conduct themselves in interviews in the manner that they would in the field. [redacted] along with FBI advised that the LEA (Law Enforcement Agencies) at GTMO were not in the practice of the using [redacted] and were of the opinion results obtained from these interrogations were suspect at bast. BAU explained to DoD, FBI has been successful for many years obtaining confessions via non-confrontational interviewing techniques.

Referral/Direct

b6 -2
b7C -2

We spoke to FBI OGC with our concerns. I also brought these matters to the attention of DOJ during detainee meetings with Laura Parsky and Dave Nahmias. DOJ express their concerns to DoD OGC.

[redacted] has a copy of all the information regarding the BAU LHM. I believe she has provided that to TJ Harrington.

b6 -1
b7C -1

I may have more specific information in my desk at HQ. I will search what I have when I return (5/17).

-----Original Message-----
From: HARRINGTON, T J. (Div13) (FBI)
Sent: Monday, May 10, 2004 4:33 AM
To: BATTLE, FRANKIE (Div13) (FBI); [redacted] (Div13) (FBI) [redacted] (Div13) (FBI)
Subject: FW: pls confirm

b6 -1
b7C -1

SENSITIVE BUT UNCLASSIFIED
NON-RECORD

Please review our control files, did we produce anything on paper???
-----Original Message-----
From: Caproni, Valerie E. (Div09) (FBI)
Sent: Sunday, May 09, 2004 2:31 PM
To: [redacted] (Div09) (FBI); HARRINGTON, T J. (Div13) (FBI) [redacted]

b6 -1
b7C -1

b6 -1
b7C -1

(Div13) (FBI) [redacted] (Div13) (FBI)
Subject: pls confirm

SENSITIVE BUT UNCLASSIFIED
NON-RECORD

I think I've heard this several times, but let me ask one more time:

Has there been any written guidance given to FBI agents in either GTMO or Iraq about when they should "stand clear" b/c of the interrogation techniques being used by DOD or DHS [redacted] (S)

b1 [redacted]

b1
b5 -1 [redacted] (S)

~~SENSITIVE BUT UNCLASSIFIED~~

~~SENSITIVE BUT UNCLASSIFIED~~

~~SENSITIVE BUT UNCLASSIFIED~~

~~SENSITIVE BUT UNCLASSIFIED~~

DERIVED FROM: G-3 FBI Classification Guide G-3, dated 1/97, Foreign Counterintelligence Investigations
DECLASSIFICATION EXEMPTION 1
SECRET//ORCON,NOFORN

Mr. CLAY. Thank you so much for your testimony, Ms. Fredrickson.

Our next witness will be Ms. Fuchs. Proceed.

STATEMENT OF MEREDITH FUCHS

Ms. FUCHS. Thank you. Chairman Clay, Ranking Member Turner, members of the subcommittee, I am honored to be here with you today and to talk about the Freedom of Information Act. I am testifying for the National Security Archive, where I am general counsel. We are a nonprofit research institute, and we publish a wide range of publications in print and electronic form about national security, intelligence policy, foreign policy, and the like. We have been recognized many times for our journalistic work, including receiving a 2005 Emmy Award for outstanding news research.

In my 5 years at the Archive, I have overseen five audits of Federal Government FOIA processing, including two that tried to identify the oldest pending request in the Federal Government. I think I can say that I am an expert on what the FOIA requestor experiences when they make FOIA requests. My organization has filed 30,000 FOIA requests in our 20 years of existence, but there are 25 of us working there filing FOIA requests. Everything that we request we publish, and it is all available and used by academics, journalists, and the public.

Let me briefly touch on the good news. I attached to my testimony a list of 100-some-odd stories. Take a look at them. They are stories that show you the wide range of issues that people use FOIA to cover. That is journalists, public interest organizations, and the public. It shows you how people are able to find out about important things that matter to the American public, that matter to our health, our safety, our welfare, and the like. I am not going to focus on that. You have that in front of you.

Now let me tell you the bad news. Despite the fact that some of us, people from groups like ours that have the capacity and the resources to try to fight for our records, the FOIA system is really plagued by delay and inefficiency and, frankly, by outright obstruction by some of the agencies. There are many people who we work with who we respect at Federal agencies dealing with FOIA, and I serve on the board of the American Society of Access Professionals, which is an organization of FOIA professionals within the Government, but there are many offices that do not live up to the standards of the law, nor do they live up to our expectations as American taxpayers.

As you know, the FOIA requires agencies to process requests within 20 business days. I mentioned our 10 oldest reports. The first one, which was published in 2003, found requests as old as 16 years—a lot longer than 20 business days. Our second audit, which was published in 2005, found requests as old as 17 years, in fact, many of the same ones that we had identified in 2003. Which was the oldest? It was a 1989 request by a graduate student at the University of Southern California asking the Defense Department for records on the U.S. Freedom of Navigation program. Well, William Aceves, that graduate student, is now a full professor, and in a moment I will give you some good news about his request.

Anyway, in January we began our latest 10 oldest audit, and we have already found that there are requests older than 10 years still pending in the Federal Government. That is despite the Executive order that you heard about earlier.

How can you address delays? Well, better reporting is an essential part of the package. Ms. Koontz talked a little bit about some of the issues with the reports. I wholeheartedly agree with her. We have taken a good look at those reports, and, just to give you an example of how misleading a median can be, Professor Aceves' 17-year-old FOIA request, well, if you had looked at DOD's annual FOIA report for fiscal year 2005 you would have read that DOD's median processing time in that year was 15½ business days for simple requests and 85 business days for complex requests. Well, Professor Aceves had been pending for over 4,000 business days. So the data is simply misleading, not that the agencies are misreporting it, although I will tell you that, in talking to agencies, we have often heard that when they got multiple components that median is a median of the medians, so it is not even a median of all the response times.

I won't talk about the Veterans Administration. Ms. Koontz touched on that. But I would agree that the aggregating of Privacy Act requests and of FOIA request data is misleading and makes the Veterans Administration look like it gets the most requests and does the best job processing them; whereas, in fact, as you heard from Mr. Hoyt's testimony—and I will second, based on our experience—the VA is one of the most poorly functioning FOIA offices in the Government.

So now, to get to the good news, Professor Aceves' highly publicized FOIA request has now been processed, and DOD's FOIA staff wrote "An Ode to Freedom from Freedom of Navigation" to celebrate that they have finally gotten their oldest processed.

What about tracking? Can tracking help? I will just say, in my written testimony I have some more details about reporting that I would recommend, but I will turn to tracking.

I think tracking is a critical issue. We brought a lawsuit against the Air Force after we found out that their 10 oldest were all our own requests, and they were old, 15 years or so. We found out that they have no system-wide tracking, that many requests were simply thrown out or lost, and recently, when we tried to—well, we went to court and a Federal judge found they had a pattern and practice of not processing FOIAs. Just getting them to identify where the FOIAs were in their system has taken months. And when we recently tried to file a FOIA request with the Air Force Material Command, we found a fax number on the Air Force Web site, which is where we sent our FOIA request. That fax number actually was the telephone number for a patient room in a hospital maternity and delivery ward. We searched all over the Air Force Web site, couldn't find any kind of fax number. We finally got another Air Force office to forward our request to Air Force Material Command. They told us they would then forward our request to every other component of Air Force Material Command, and that they don't keep track of what happens after it gets out of their office or, indeed, where it goes. So with a situation like that it is very hard for a FOIA requestor to try to press for a response.

And then, if it is not hard enough to deal with all those kind of administrative issues, once you do decide to go court——

Mr. CLAY. Ms. Fuchs, your time has expired.

Ms. FUCHS. I will finish up.

Mr. CLAY. Go ahead and close, please.

Ms. FUCHS. I just want to make one more point, if I could.

Once you do decide to go to court, the Government plays games. We won a lawsuit in 1990 against the CIA. For 15 years the CIA followed the court's decision. Suddenly, in October 2005 they decided to change their policy. We filed a lawsuit. They did nothing in response to our complaint. We filed summary judgment motion. The night that we filed our summary judgment motion, at 6:30, after working hours had ended on a Friday night, they send a letter changing their policy.

Next thing we expect them to argue is that we don't deserve attorney's fees.

[The prepared statement of Ms. Fuchs follows:]

Hearing on
The State of FOIA: Assessing Agency Efforts to Meet FOIA Requirements

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

Statement of Meredith Fuchs, General Counsel, National Security Archive
February 14, 2007

Chairman Clay, Ranking Member Turner and Members of the Subcommittee on Information Policy, Census and National Archives, I'm honored to appear before you today to speak in favor of efforts to strengthen the Federal Freedom of Information Act.

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

In my five years at the Archive, I have overseen five audits of federal agency FOIA processing, including two that identified the ten-oldest pending FOIA requests in the federal government and one that examined the proliferation of sensitive but unclassified information labeling policies. Through those audits, through my colleagues' FOIA requests, through litigation, and through training federal agency FOIA officers, I have learned about both the good and the bad of the Freedom of Information Act.

Let me briefly touch on some of the good news. FOIA makes a difference. It empowers citizens to learn about their government and engage in informed advocacy and voting. Attached to my written testimony is a list of almost 100 selected news stories from the last several years that are based on records released under FOIA. These stories demonstrate the power of FOIA to shake loose vital information about government operations and public health and safety. For instance, journalists and concerned citizens have used FOIA to show that more than 80 military recruiters were disciplined in 2005 for sexual misconduct with potential enlistees; that DOJ is owed $35 billion in litigation fees and billions more in unpaid penalties against corporations for safety and environmental violations; that federal inspections showed levels of salmonella bacteria in ground turkey produced at one company's plants more than twice the national average; that Interior Department officials disregarded recommendations from government biologists about protecting eight endangered species; and, that a DOD prime vendor program allowed some contractors to set their own prices for products sold to the Pentagon, including $20 each for ice cube trays and $1000 for toasters and popcorn makers. I ask you to look at the list and get a sense of the range of issues that get attention as a result of citizens using FOIA to find out about how their government agencies are addressing matters of public concern.

Now, let me tell you the bad news. The FOIA system remains plagued by inefficiency, delay and sometimes outright obstruction. Despite many outstanding people administering FOIA programs throughout the government – and they deserve praise for their work – there are far too many FOIA offices that fail to live up to the expectations of

the law and the needs of the taxpaying public. Unfortunately, the FOIA statute does not provide the needed incentives to improve those poorly functioning FOIA programs.

As you know, the FOIA requires agencies to process requests within 20 business days. In 2003 the Archive conducted an audit that identified unprocessed FOIA requests as old as 16 years. (http://www.gwu.edu/%7Ensarchiv/NSAEBB/NSAEBB102/press.htm) When we repeated the audit in 2005, we found requests as old as 17 years. (http://www.gwu.edu/~nsarchiv/NSAEBB/NSAEBB182/press.htm) One of the oldest requests identified in both audits was submitted in 1989 by a graduate student at the University of Southern California asking the Defense Department for records on the U.S. "freedom of navigation" program. So much time had elapsed that the requester, William Aceves, is now a full professor at California Western School of Law. Other oldest requests identified by those two audits were languishing at the Federal Bureau of Investigation, the Central Intelligence Agency, the Air Force, the Department of Energy and the National Archives and Records Administration. In January we began another 10 oldest audit and already we have found requests more than 10 years old.

Addressing delays will require a combination of (1) **better reporting,** so problems are identified before a decade elapses; (2) **better tracking** of requests by agencies, so that problems in the system can be fixed; (3) **better leadership**, including from the Chief FOIA officers appointed as a result of Executive Order 13,392; (4) **more resources**, including perhaps requiring agencies to fix FOIA budgets as a percentage of

their growing public affairs' budgets; and (5) **penalties for delay**, including perhaps disallowing agencies from collecting any processing or duplication fees if they cannot meet the 20-day deadline.

Better reporting is an essential part of the package. FOIA annual reports do not permit Congress to conduct quality oversight, do not permit agency managers to identify problems and improve processing, and do not permit the public to press for responses. For example, remember Professor Aceves' 17-year-old FOIA request? You would never have imagined that the "Freedom of Navigation" request, the oldest pending at Department of Defense in Fiscal Year 2005, could have existed if you looked at DOD's FY 2005 annual report and read that DOD's "median processing time" in that year was 15.5 business days for simple requests and 85 business days for complex requests. (http://www.dod.mil/pubs/foi/FY2005report.pdf) That is a lot shorter than the over 4000 business days that Professor Aceves "Freedom from Navigation" request had been pending. The data is simply misleading.

Similarly, the Veterans Administration reports some of the shortest processing times of any federal agency. Even though it claimed in FY 2002 that its median processing time was between 4 and 24 days, the agency was not able to respond within ten months to the Archive's simple request for VA's ten oldest pending FOIA requests. (http://www.va.gov/foia/report/FY2002/Compliance.html) The disconnect between VA's annual report data and our experience with VA's processing of FOIA requests is partly due to the fact that the VA aggregates its FOIA request data with its Privacy Act request

data. The Privacy Act requests include the easy to find and easy to release records sought by individual veterans about themselves. The problem is that the annual reports make it look like VA has the highest FOIA caseload and the quickest processing times. That is not the reality.

The data are also misleading because each agency uses different standards in terms of when they will begin counting the days between receipt of a FOIA request and response to a FOIA request. Agencies have many ways to delay the running of the clock on their 20 day response time. Fee status disputes are one of the most prevalent tactics. Take the example of Dr. Jeffrey Richelson, a noted author of 10 books and numerous articles regarding the organization and operations of the U.S. intelligence community, U.S. military space activities, and presidential national security directives. Starting in 2001, agencies began challenging his news media status. In every case he was successful in obtaining news media status, but the dispute created prolonged delay in his work. In the case of the Central Intelligence Agency, the matter took 7 ½ months to resolve. In the case of the National Security Agency, the dispute held up his request for 6 months, and he later was again denied news media status by the NSA. In the case of the Department of Energy Albuquerque Operations Office, the process took 8 months between Dr. Richelson's assertion of news media status and resolution of the issue. Chances are that none of these agencies started running their response time until after these disputes were resolved.

I urge the subcommittee to require better, more reliable reporting, including requiring data on: average processing times, range of processing times, oldest pending requests, the number of requests abandoned by requesters due to delay, the number of requests rejected because the records are operational files, the number of expedited requests received, the number denied, and the processing times for expedited requests. In addition, the subcommittee should require more standardized reporting, including measuring response time from receipt of the FOIA request and disaggregating FOIA requests from Privacy Act requests.

I assure you, such transparency and exposure will have an impact. Just to lighten the mood a bit I wanted to let you know that this month we learned Professor Aceves' highly-publicized FOIA request is finally complete 17 years after it was filed. DOD's FOIA staff even wrote an "Ode to Freedom from Freedom of Navigation" in honor of the completion of the processing of the request!

What about tracking? Can it make a difference? Our audits exposed serious backlog problems with the Air Force. When we sued, we learned that the Air Force had no system-wide tracking system – so there were no tools in place to manage FOIA requests, even if they had wanted to. We also learned that many FOIA requests were simply thrown out or lost. We were able to persuade a federal judge to find that the Air Force has a "pattern or practice" of not processing FOIAs. Just last week when we tried to file a FOIA request with the Air Force Materiel Command, we discovered that the fax number listed on the Air Force FOIA Web site for submitting a request to Materiel

Command is actually the phone number for a patient room in a hospital maternity and delivery ward. We could not locate a proper fax number anywhere despite extensive research. After we finally managed to get the request forwarded to the Air Materiel Command FOIA office, we were told that it would be forwarded to all Materiel Command components because the main FOIA office does not keep track of all requests to Materiel Command components. Obviously, with a system like that, tracking won't solve the problem. It will, however, enable FOIA requesters and agency managers to identify where the problems lie and take steps to fix the problems.

As if it were not hard enough for your ordinary FOIA requester to get attention in this system, when a requester seeks to pursue the matter and litigate a denial, the agencies play games that waste requester and taxpayer resources. For example, in 1990 the Archive won a lawsuit against the CIA in which a federal court found that the Archive is to be treated as a representative of the news media for the purpose of charging processing fees. For 15 years the CIA abided by that ruling. Suddenly and without explanation, starting in October 2005, the CIA took the position that it – and not the media – was entitled to decide what was "newsworthy." The CIA then began to deny the Archive's requests for news media status. We tried to administratively appeal the denials, but the Agency refused to accept the appeals. Finally, we sued in federal court. Only after a complaint and motion for summary judgment had been filed by the Archive in the United States District Court for the District of Columbia did the CIA purport to reverse its determinations for the 42 FOIA requests at issue, but even then the CIA fell short of committing to abide by controlling judicial precedents.

Now the CIA is arguing that the case is moot and the court should not issue a ruling. Next they will argue we are not entitled to attorneys' fees under FOIA's private attorney general provision that allows successful FOIA litigants to receive the attorneys' fees incurred in bringing the litigation. In essence, the CIA wasted money and time for the Archive, the Department of Justice lawyers who had to defend the Agency, and the judicial system, because there is nothing in the FOIA statute to require the Agency to take a responsible legal position until they get worried that a court might rule against them. Instead, they were able to simply delay for nine months and then change their position at the last minute. This is only one of many similar stories I have heard from people who have tried to enforce their rights through the judicial system. I urge this subcommittee to pursue FOIA attorneys' fees reform and support, with some minor changes, the language introduced in the Restore Open Government Act of 2005, H.R. 2331 109th Cong., 1st Sess. (2005).

There are many other changes to the FOIA system that could improve processing and end delay. Innovations such as requiring agencies to receive FOIA requests and send FOIA responses electronically, to provide an index of denied records to requesters, to set up a more independent administrative appeal system within each agency, to establish interagency processing arrangements, to proactively post electronically records that are likely to be requested under FOIA, and to make focused technology investments, all could contribute to improving FOIA administration.

Some of these ideas are identified in the Agency FOIA Improvement Plans issued pursuant to Executive Order 13,392, entitled "Improving Agency Disclosure of Information," issued by President Bush. At the Archive, we have read each one of the 91 FOIA Improvement Plans published by agencies. Upon reading the Attorney General's Report to the White House summarizing those plans, we responded with grave concern that the Report failed to acknowledge that many of the admirable goals set by the agencies can only be met with an increased commitment of resources – a commitment that the Executive Order makes clear is not being considered by the Administration. Further, many of the most intractable interagency problems, such as the sending of FOIA requests to other agencies on referral or for consultation, are not addressed at all, thus highlighting the absence of any cross-agency authority over FOIA policy matters. (http://www.gwu.edu/~nsarchiv/news/20061019/index.htm) The Executive Order is useful because it forced agencies to examine their programs – and some agencies used the opportunity to conduct serious evaluations. For example, despite the issues I raised about delay at the Department of Defense, it is clear from their improvement plan that they are on the right track, including examining tracking, training, professionalizing their personnel, and technology. But it is also clear that they can only do what they envision with high level support and some funding. In some cases, problems will not be solved unless Congress mandates solutions. Thus, I urge you to pursue FOIA reform and continue to conduct focused oversight activities to help create a truly transparent and accountable government.

FOIA IN THE NEWS:
HEADLINES MADE POSSIBLE BY FOIA, 2003-PRESENT
COMPILED BY
THE NATIONAL SECURITY ARCHIVE
GEORGE WASHINGTON UNIVERSITY

"Despite security defects, FRA hands out few violations," ***Pittsburgh Tribune Review,*** **January 14, 2007.**

Documents provided by the Federal Railroad Administration in response to a Freedom of Information Act show that from October 3, 2003, to October 6, 2005, FRA inspectors conducting inspections in 42 states wrote 793 reports detailing 4,997 security defects at rail yards, chemical plants and warehouses owned by 525 corporations. According to the documents, only one out of every 173 companies with defects ever receives a "violation" or enters into a long "enforcement action" process. Not all of the defects are serious. However, in almost 9 out every 10 reports, FRA inspectors found no security plans at all or large sections missing, despite federal regulations three years ago mandating the creation of such plans. Additionally, in 61 percent of the facilities receiving planning defects, the FRA found no evidence that employees received mandatory training on how to secure hazmat, report suspicious behavior, or survive a terrorist attack.

"HAFB has bit role in $$ scandal," ***Deseret Morning News*** **(Salt Lake City, UT), January 14, 2007, by Lee Davidson.**

A report obtained by the Deseret Morning News through a Freedom of Information Act shows that Hill Air Force Base was an unwitting player in a Pentagon spending scandal that cost taxpayers millions of dollars. The report shows that former top Air Force acquisitions officer Darlene Druyun hurried Hill into approving contract changes that gave Boeing $4.5 million too much. The changes came as Boeing had given jobs to Druyun's daughter and son-in-law. Boeing later gave a $250,000-a-year job to Druyun herself. The scandal led to Druyun's imprisonment, the removal of two top Boeing corporate leaders, jail time for one, and a $516 million fine for Boeing. As a result of the findings in the new report, the Defense Department Inspector General recommends that no future contract revisions be finalized until the Defense Contract Audit Agency issues its final report and evaluation on proposed price increases.

"Leak Probes Stymied, FBI Memos Show," ***The New York Sun,*** **January 10, 2007, by Josh Gerstein.**

More than 300 pages of FBI leak investigation files released to *The Sun* under the Freedom of Information Act show that lack of cooperation from one or more intelligence agencies led the FBI to abandon several recent criminal investigations into leaks of classified information to the media. The documents provide insight into the Bush administrations efforts to combat leaks of classified information. They also illustrate how the "much-vaunted" full cooperation between the FBI and other intelligence agencies has failed to materialize, at least in the case of leak investigations.

"Report: Officers could have prevented crash," ***The Evening Sun*** **(Hanover, PA), November 28, 2006, by Melissa Nann Burke.**

A report obtained through a Freedom of Information Act request showed that pilot error and commanders' inadequate supervision led to a February 17, 2006, helicopter accident that killed 10 U.S. service people. The Marines announced in November that they have made changes to prevent similar incidents.

"Activists say rulings imperil species," ***The Salt Lake Tribune,*** **November 1, 2006, by Joe Baird.**

An Interior Department Official has come under fire from environmental groups for disregarding recommendations from the U.S. Fish and Wildlife Service to protect as many as eight threatened animal, fish and plant species under the Endangered Species Act. According to documents obtained by conservation groups under the Freedom of Information Act, Interior Deputy Assistant Secretary Julie MacDonald has rejected, reversed, or

altered findings of Fish and Wildlife biologists. Environmental groups have called for the Department to reject MacDonald's decisions so the agency can do the reviews it has already determined are necessary.

"Science slighted in CDC awards; Cash bonuses at troubled health agency frequently go to bureaucrats instead of researchers," ***The Atlanta Journal Constitution*****, September 17, 2006, by Alison Young.**

Documents obtained by the Atlanta Journal-Constitution under the Freedom of Information Act show that the most frequent large cash awards and performance bonuses awarded at the Center for Disease Control went to non-scientists working at the agency. Critics claim that the distribution of the awards is evidence that the CDC is becoming more focused on management and bureaucracy instead of its public health mission. Low morale in the agency and the loss of key scientific leaders has caused concern among several of the agency's former directors and has drawn the attention of a congressional committee. The fear is that turmoil in the agency will hamper its ability to handle public health emergencies.

"Sexual Abuse by Military Recruiters," ***CBS News/Associated Press*****, August 20, 2006.**

A six-month Associated Press investigation found that more than 80 military recruiters were disciplined in 2005 for sexual misconduct with potential enlistees. Records obtained by the AP under several Freedom of Information Act requests showed that at least 35 Army recruiters, 18 Marine Corps recruiters, 18 Navy recruiters, and 12 Air Force recruiters were disciplined in 2005 for sexual misconduct or other inappropriate behavior. This is significantly more than the cases reported in the past decade. Congressman Ike Skelton of Missouri called such behavior unacceptable and proposed the adoption of a military-wide "No One Alone" policy, which would prohibit recruiters from being alone anywhere with female enlistees. He also said he would seek an Armed Services Committee hearing to explore new penalties for military recruiters who violate the military code.

"Missouri base leads military in "don't ask, don't tell," discharges," ***Associated Press*****, August 14, 2006, by Nancy Zuckerbrod.**

Documents obtained through the Freedom of Information Act by the Service Members Legal Defense Network, a legal advocacy group that advises military personnel on its policies towards homosexuals, show that Fort Leonard Wood (Missouri) used the "don't ask, don't tell" policy to discharge more soldiers than any other military installation in 2005. According to the documents, sixty people were dismissed in 2005. This number was up from 40 discharges in 2004. According to the Pentagon, there were a total of 726 military members discharged under the policy in 2005, up 11 percent from the previous year.

"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.

"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.

"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.

"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.

"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.

"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.

"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.

"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.

"Mentally Unfit, Forced to Fight," Series published in ***The Hartford Courant*****, May 14-17, 2006, by Lisa Chedekel and Matthew Kauffman.**

Based on pre-deployment screenings, military investigative records and interviews with families, The Hartford Courant reveled that the military is increasingly sending, keeping and redeploying mentally troubled troops into combat. This practice is in violation of the Pentagon's own regulations and illustrates significant gaps in the military's mental health system. The documents were obtained by the reporters through the Freedom of Information Act. The series of stories propelled Congress to add legislation to the 2007 Defense Authorization Bill to address the flaws in the military's mental health system.

"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, 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.

"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, 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.

"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, 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.

"Report: N.H. in top 10 of water pollution offenders," *Associated Press*, March 24, 2006.

The New Hampshire Public Interest Research Group reported New Hampshire ranks seventh nationally in a survey of facilities releasing more than their allowed limit of pollutants into local waterways. The group based its findings on documents obtained through a Freedom of Information Act request to the Environmental Protection Agency. According to the report, three-quarters of New Hampshire facilities examined exceeded their pollntion limit at least once during an 18-month period in 2003-2004. Facilities cited for violating their permits included paper mills, power plants, wastewater treatment facilities and an environmental testing facility.

"Peace group claims FBI spied on activities; Feds say their interest was in an individual, not the Merton Center," *Pittsburgh Post-Gazette*, March 15, 2006, by Paula Reed Ward.

The Thomas Merton Center for Peace & Justice and the ACLU released documents that members say prove the FBI was spying on their activities. The FBI claims its agents were simply conducting an investigation into one person and not the group's political activities. The Center does not plan to seek any legal actions against the FBI, but its members want the public to know what the government is doing.

"Fake findings used to secure $16M grant," *Pittsburgh Tribune Review*, February 22, 2006, by Jennifer Bails.

Documents obtained under the Freedom of Information Act by the Pittsburgh Tribune Review show that a University of Pittsburgh reproductive biologist relied on the now-discredited stem-cell findings of disgraced Korean scientist Hwang Woo-Suk to secure a $16.1 million federal grant. Gerald Schatten will use the funds for an ambitious stem-cell research program. The five-year grant awarded by the National Institutes of Health is based in part on cloning experiments deliberately falsified by Hwang Woo-Suk. It is unclear whether the NIH will consider withdrawing Schatten's grant because of the connections to fraudulent research.

"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, 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."

"Study: Many Incorrectly Identified As Immigration Law Violators," ***The New York Sun*****, December 9, 2005, 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.

"Vietnam War Intelligence 'Deliberately Skewed,' Secret Study Says," ***The New York Times*****, December 2, 2005, 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.

"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.**

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.

"On Range, deadly illness went unreported; Mesothelioma strikes years after victims' exposure to asbestos," ***Star Tribune*** **(Minneapolis, MN), August 21, 2005, 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.

"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, 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.

"Fighter jet's brake failures elicit urgent safety alerts," ***The Virginian-Pilot*** **(Norfolk, VA), August 5, 2005, 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.

"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, 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.

"Investigation raises questions about birth-control patch," ***Ventura County Star*** **(California), July 17, 2005, 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.

"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, 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.

"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, 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.

"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, 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.

"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.

"A breach of the truth," ***Chattanooga Times Free Press*** **(Tennessee), March 4, 2006.**

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."

"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.

"PETA urges AF to stop Taser testing ou 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.

"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.

"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.

"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).

"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.

"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.

"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.

"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.

"Many FDA Scientists had Drug Concerns, 2002 Survey Shows," *Washington Post*, December 16, 2004, 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.

"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.

"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.

"Feds fault Chiron for lax cleannp 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.

"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.

"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.

"U.S. Scrutinized Assets Well Before War; Documents Tell of Cheney Group's Look at Iraq," ***The Houston Chronicle*****, July 19, 2003, by David Ivanovich.**

According to documents obtained by public interest group Judicial Watch through a legal battle under FOIA, Vice President Dick Cheney's Energy Task Force examined maps of Iraqi oil fields, refineries, and pipelines in March 2001. Documents also show lists of companies that were interested in conducting business with Saddam Hussein's Iraq regime. Other documents show oil and gas projects in Saudi Arabia and the United Arab Emirates.

"Feds Don't Track Airline Watchlist Mishaps," The Associated Press State & Local Wire, July 24, 2003, at State and Regional, by David Kravets.

The Transportation and Security Administration (TSA) does not keep track of how many passengers are being subjected to delays because of confusion over security watchlists. The American Civil Liberties Union (ACLU) obtained documents through FOIA showing that, while names are added almost daily to the two airline watchlists, the TSA sees no need to monitor "false positive" situations. The ACLU has filed a lawsuit to force the government to release the names on the lists, explain how names are placed on them, and how individuals can remove their names from them.

"Critical Flaws in Shuttles Loom as Potential Disaster Systems Constantly Malfunction or Fail, but NASA Thinks the Problems Aren't Dangerous Enough to Doom a Flight," ***The Orlando Sentinel*****, Aug. 17, 2003, by Kevin Spear and Jim Leusner.**

The Orlando Sentinel reviewed thousands of hazard-evaluation studies and malfunction reports obtained through FOIA from all 113 past shuttle missions revealing critical flaws and the responses to them. Critics argue that the responses have been inadequate and NASA has ignored flaws. The problems include the misfiring of explosive

bolts used to attach the shuttle to the launch pad, faulty wiring, fuel leaks, thruster failures, and foam damage from the external fuel tank.

"Extra IDs a Liability for Hill, 13 Other Bases," ***Deseret Morning News*** **(Salt Lake City), Aug. 21, 2003, by Lee Davidson.**

Extra identification badges have been issued and unaccounted for at a number of Air Force bases raising concerns about security and the possibility of improper access to the bases. Documents obtained by *The Deseret Morning News* through FOIA show that the Air Force's own investigation found that 13 bases did not properly control and monitor ID cards for contractors. Additionally, the documents show that nearly half of the contractors given access to sensitive computer systems at one base had not undergone criminal background checks.

"Watchdog Says Hanford Workers at Risk," ***The Oregonian*****, Sep. 16, 2003, by Joe Rojas-Bourke.**

A nonprofit group's report based in part on documents it obtained through FOIA cites increased incidents of vapor exposure to and physician visits by workers at a nuclear clean up site. The workers are transferring radioactive and chemical waste to safer holding tanks to await a more permanent disposal.

"The Slaughterhouse Gamble: The Risk of Self-Policing; New Safety Rules Fail to Stop Tainted Meat," ***The New York Times*****, Oct. 10, 2003, by Melody Petersen and Christopher Drew, Bud Hazelkorn contributed to this report.**

Meat inspectors' reports obtained through FOIA from the Food Safety and Inspection Service indicate the presence of contaminants on food as it is processed at meatpacking plants, even after it has gone through the plant's safety processes. Inspectors also reported several cases in which meat that had been condemned because of disease or contamination was not marked or clearly removed from production. In one example, an inspector ordered meat not to be shipped after finding out that cuts of meat condemned the previous day had been readied for shipment. Additionally, the article concludes that inspector's reports and recommendations to take action often go unheeded.

"Mission of Sacrifice Series: Casualties of Peace, Part One of Seven Parts," ***Dayton Daily News*** **(Ohio), Oct. 26, 2003, by Russell Carollo and Mei-Ling Hopgood.**

Documents obtained through FOIA by *The Dayton Daily News* show the dangers that Peace Corps volunteers face. The information from 1991-2002, including never-before-released statistics, shows that volunteers are frequently placed in dangerous situations, substandard housing, and with little training. Volunteers are increasingly victims of robbery, sexual assault, and murder.

"False Evidence Cited in Overturning Arms Dealer's Case," ***The Washington Post*****, Oct. 30, 2003, by Dana Priest.**

Evidence gathered from documents obtained from the Department of Justice through FOIA helped overturn a conviction of a former CIA operative, Edwin Wilson. The operative had been convicted of arms dealing with Libya, but claimed that the activities were part of his cover. The documents show that officials with the CIA and the Justice Department knew that Wilson had extended high-level relationships with CIA officials during the period of the arms dealing, but denied this in court. "'In the course of American justice,' the judge in the case wrote, 'one would have to work hard to conceive of a more fundamentally unfair process with a consequentially unreliable result than the fabrication of false data by the government, under oath by a government official, presented knowingly by the prosecutor in the courtroom with the express approval of his superiors in Washington.'"

"Program Blasted by HUD; City Told to Halt Housing Repairs," ***The Houston Chronicle*****, Nov. 13, 2003, by Dan Feldstein.**

The Department of Housing and Urban Development (HUD) ordered the city of Houston to suspend a housing-assistance program for poor-quality work and overpayment to contractors. The Houston Chronicle obtained documents through FOIA that show HUD inspections turned up numerous problems with homes that had been worked on as part of the Houston program. Among the problems HUD cited were poor work quality, incomplete work, and discrepancies in the estimated amount of materials and those actually used. Homeowners, also complained of negative attitudes among workers and contractors and lack of information provided about equipment and warranties.

"Documents Say 60 Nuclear Chain Reactions Possible," ***Las Vegas Review-Journal*** **(Nevada), Nov. 26, 2003, by Keith Rogers.**

Nevada state officials have raised concerns regarding the possibility of an uncontrolled nuclear chain reaction inside the planned Yucca Mountain nuclear waste repository. The state obtained documents through FOIA that report on such possibilities and appear to contradict Department of Energy statistics in its final impact statement.

"A Flawed Terrorist Yardstick; The Justice Dept. Tally of More Than 280 Suspects Detained for Prosecution After Sept. 11 Is Inflated with Dismissed and Unrelated Cases," ***The Los Angeles Times*****, Dec. 1, 2003, by Richard B. Schmitt.**

The Los Angeles Times conducted a review of documents obtained from the Department of Justice through FOIA concerning the Department's statistics of prosecutions related to terrorism since September 11, 2001. The review found instances of individuals who were arrested, found not to have any terrorist links, and not prosecuted. Yet, these individuals were still part of the statistics the Department of Justice cites as terrorism-related charges when commenting on the progress of its anti-terrorism efforts.

"Mining Leaders Drafting Steens Blueprint," ***The Oregonian*****, Dec. 3, 2003, by Michael Milstein.**

The Oregonian obtained documents under FOIA that raise questions about possible conflicts of interest of a private management company hired by the Bureau of Land Management. The company was hired to develop management options for one of the largest public landscapes in Oregon, including handling public comments. Officials of the company, however, also hold positions in the mining industry, some having made comments opposed to public involvement in land management decisions.

"Stealth Merger: Drug Companies and Government Medical Research; Some of the National Institutes of Health's Top Scientists Are Also Collecting Paychecks and Stock Options from Biomedical Firms. Increasingly, Such Deals Are Kept Secret," ***The Los Angeles Times*****, Dec. 7, 2003, by David Willman.**

The Los Angeles Times conducted an investigation of payments from drug companies to employees of the National Institutes of Health (NIH) and the agency's research collaborations with the industry. Documents obtained from the NIH under FOIA showed that researchers and scientists receive consulting fees and stock options from biomedical companies. The NIH allows the majority of its officials to keep such income confidential and does not require that it be reported in financial disclosures. The practices raise ethical concerns regarding whether those incomes will affect researchers' decisions regarding the safety of subject patients, public health, and the interpretation of study results.

"Papers Show How Pennsylvania Nuclear Plant Prepared for Terror Threat," ***York Daily Record*** **(York, Pennsylvania), Dec. 16, 2003, by Sean Adkins.**

The York Daily Record obtained reports and notes from the Nuclear Regulatory Commission through FOIA that detail the response of officials to a threat on a nuclear reactor. The materials describe the timeline and response of plant, state, and federal agencies and officials to a purported threat to one of the reactors at Three Mile Island in Pennsylvania. The threat did not turn out to be credible. The chronology has been used to improve and coordinate a response to future threats.

"Scramble for Energy Pits Drillers, Ranchers, Landowners in Wyoming Say Efforts to Extract Methane Undermine Their Rights," ***The Denver Post*****, Dec. 21, 2003, by Mike Soraghan.**

The Powder River Basin has large natural gas deposits of great interest to energy companies. As a result of environmental concerns and pressure, a moratorium on development was imposed in 1999. The Bureau of Land Management conducted an environmental impact statement to determine what impact the increasing drilling would have on the river basin. A local Wyoming environmental group learned through a FOIA request that the study was conducted by an environmental consultant that also writes permit applications for companies seeking to drill in the basin. Critics challenge the impartiality of the report and the comprehensiveness of the environmental options it examined.

"Transcript: U.S. OK'd 'Dirty War' in Argentina," ***The Miami Herald*****, Dec. 4, 2003, by Daniel A. Grech.**

Documents obtained by the National Security Archive through FOIA from the Department of State show that the U.S. approved of the Argentine military junta's use of harsh tactics against leftists in the 1970s. The document shows that Secretary of State Kissinger gave the green light to the Argentine foreign minister to hurry up and finish the military's "dirty war" - which resulted in the deaths and disappearances of 30,000 people from 1975 to 1983. Previously, Kissinger and other top aides denied condoning the human rights abuses in Argentina.

"Federal Coal-Mining Policy Comes Under Fire; Fish and Wildlife Service Says the Administration Ignored Its Protection Plan," ***The Los Angeles Times*****, Jan. 7, 2004, by Elizabeth Shogren.**

Documents obtained though FOIA show that the Bush administration's move to let coal miners continue the practice of "mountaintop removal" ignored environmental concerns raised by government officials. The coal mining process levels mountain tops and discards the leftover rock into valleys and streams. The administration revised a previous draft environmental impact study that examined limiting the process, and substituted three alternative approaches. The U.S. Fish and Wildlife Service said these alternatives do not improve environmental protection. The documents include a memo from Deputy Interior Secretary J. Steven Griles recommending a new draft, directing officials to say that he was not involved in "finalizing the document," and information on how to respond to questions about his involvement in the change.

"Green Groups Sue EPA for Closed-Door Meetings with Chemical Companies," ***The Register Guard*** **(Eugene, Oregon), Jan. 16, 2004, by Scott Maben.**

A number of environmental interest groups have filed suit against the Environmental Protection Agency (EPA) for meeting with a group of chemical companies behind closed doors. Documents obtained under FOIA show that the pesticide industry group has met privately with EPA officials at the same time that it has urged the agency to dilute protections for Northwest salmon and other endangered species. The environmental groups claim that such closed-door meetings violate federal law requiring agency meetings with advisory groups to be open to the public.

"Northwest Gave U.S. Data on Passengers; Airline Had Denied Sharing Information for Security Effort," ***The Washington Post*****, Jan. 18, 2004, by Sara Kehaulani Goo.**

Documents obtained under FOIA by the Electronic Privacy Information Center (EPIC) show that Northwest supplied information on millions of its passengers who flew from October to December 2001. Northwest supplied the information, without passenger knowledge, to NASA for a project on aviation security. Northwest had previously denied any information sharing after another airline, JetBlue, acknowledged that it had turned over passenger information to a defense contractor.

"Experts Say USDA Officials Underestimate Mad-Cow Risk," *The Denver Post*, Feb. 13, 2004, by Anne C. Mulkern.

Experts argue that the U.S. Department of Agriculture (USDA) underestimates the risk of mad cow disease outbreaks. The USDA argues that the risk is very low, citing a Harvard University study. The comments of scientists critical of the Harvard study were not released by the USDA until *The Denver Post* filed FOIA requests seeking them. The critics cite unrealistic assumptions and incorrect mathematical models in determining the risk of a mad cow disease outbreak in the U.S.

"Chemawa Warnings Date to '89," *The Oregonian*, Feb. 20, 2004, by Kim Christensen and Kara Briggs.

The Bureau of Indian Affairs (BIA) had been warned for 15 years about the dangers of holding intoxicated students at its Chemawa Indian School, a boarding school in Salem, Oregon. The Oregonian obtained documents through FOIA that show that BIA officials failed to act on repeated warnings by Indian Health Service officials regarding the school's "holding cells," citing the lack of supervision and availability of medical treatment. A sixteen year old girl recently died in one of the cells due to alcohol poisoning.

"NASA Can't Find Millions in Property," *The Houston Chronicle*, Feb. 27, 2004, by Patty Reinert.

NASA documents obtained through a FOIA request by a San Antonio television station show that the agency has lost about $34 million in government property since 1997. The information details the missing items from each of the agency's ten centers. The Goddard Space Flight Center in Greenbelt, MD, had the highest losses at $16.8 million, while NASA's Washington, D.C., headquarters had the least with $174,000.

"Seeing Murder in a Face; A Family Refuses to Believe a Battered Prisoner Hanged Himself, as Officials Say. The U.S. Government Has Reopened the Case," *The Los Angeles Times*, Mar. 9, 2004, by Richard A. Serrano.

The Department of Justice reopened the investigation into the death of an inmate in an Oklahoma federal prison nine years after the incident. Originally, the death was ruled a suicide. However, the family of the inmate refused to believe that explanation in light of the various bruises and wounds found on his body. As a result of a FOIA request, the family learned of an erased videotape, that the inmate's cell was cleaned prior to the arrival of the FBI, inconsistent statements from prison guards, and forensic evidence apparently inconsistent with the official explanation.

"Review: Director of Aging Agency Earned Nearly $460,000 in 2003," The Associated Press State & Local Wire, Mar. 24, 2004, by Michelle Saxton.

The director of a West Virginia County Council on Aging is being investigated for his nearly $460,000 salary and sick leave payouts. The Associated Press obtained state investigation documents through a FOIA request. The documents show that the official was paid far more than counterparts in other counties and that he took steps to adjust the composition of the Council's board to remove outside agency representation and consolidate record-keeping and financial responsibilities.

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

Documents obtained by *The Washington Post* through a FOIA request show that District of Columbia officials knew of unsafe levels of lead in the city's water 15 months before the public learned of the problem. The D.C. Department of Health maintained that they did not know of the problem until early 2004. However, e-mails between the Department of Health and the D.C. Water and Sewer Authority indicate that the Department was aware of the contamination in October 2002.

"Tension in Venezuela; Activist Eyes Groups' Funding; Brooklyn Lawyer Says U.S. Government Funds Are Aiding Those Trying to Overthrow President," ***Newsday*** **(New York), Apr. 4, 2004, by Bart Jones.**

A New York immigration lawyer has raised questions about U.S. organizations' funding for groups in opposition to Venezuela's president, Hugo Chávez. Documents she requested through FOIA show that several Venezuelan groups associated with the government's opposition have received funding from the National Endowment for Democracy, a federally funded private organization. The endowment provides grants to nongovernmental organizations that strengthen democratic institutions. The leaders of two groups the endowment has funded served in the opposition's cabinet when Mr. Chávez was briefly ousted in 2002, a coup that the White House initially endorsed. A third group that has received funding has helped a recall petition of Mr. Chávez by collecting signatures.

"Group: Industry Exceeds Clean Water Act," ***Waste News*****, Apr. 12, 2004, by Bruce Geiselman.**

The U.S. Public Information Research Group (PIRG) obtained documents through FOIA from the Environmental Protection Agency that show more than 60 percent of industrial and municipal facilities nationwide exceeded their Clean Water Act permit limits at least once. During the eighteen month period beginning January 2002, the average facility exceeded their permit limit by 600 percent.

"GI Sex Cases from Iraq Often Stall; Army Records Show Prosecution Rare, Reprimands from Officers Common," ***The Denver Post*****, Apr. 12, 2004, by Miles Moffeit.**

Army documents obtained through FOIA by *The Denver Post* show that soldiers in Iraq and Afghanistan accused of sex crimes are given light administrative punishments. Military commanders have broad discretion in how to deal with accused soldiers and it is up to them to recommend criminal prosecution. The documents show that soldiers often receive demotions in rank, fines, or discharge - or no punishment at all - even when investigations have not been fully completed. Of thirty-seven accusation cases from February to December 2003, four were court-martialed - and only two of those resulted in convictions.

"Campbell Sought Way Around Bidding Process, Records Show," The Associated Press Newswires, Apr. 13, 2004, by Robert Gehrke.

The Associated Press obtained documents through the FOIA showing a two year effort of Senator Ben Nighthorse Campbell's (R-CO) office to speed up funding for a technology project in Colorado. The documents show that Campbell secured funding for a computer networking project by an Oregon company, Thinkstream, for use by agencies of the Rocky Mountain High Intensity Drug Trafficking Area and then urged the Office of National Drug Control Policy (ONDCP) to award the funding directly to a Colorado sheriff's department to circumvent the bidding process. When, after a visit to Thinkstream, the High Intensity Drug Trafficking Area's board suggested opening up the project to bidding, a letter with Campbell's signature scolded the board for not going ahead with the project. Campbell has claimed he did not sign the letter and his office has since asked for a Senate Ethics Committee investigation to look into whether a staffer improperly used his signature to lobby the board.

"Rat-Poison Makers Stall Safety Rules; EPA Had Drafted Regulations to Protect Children, Animals," ***The Washington Post*****, Apr. 15, 2004, by Juliet Eilperin.**

According to internal documents obtained by the Natural Resources Defense Council through FOIA, the Environmental Protection Agency (EPA) gave the rodenticide industry broad access to its regulation decision making. Beginning in August 1998, the EPA concluded that rat poison posed a significant risk to children and animals. As a result, the agency called for two new safeguards in the formulation of rat poison. By 2001, however, the EPA had abandoned the new regulations, citing "mutual agreement" with the industry. The documents show that the industry was given broad access to revise EPA documents describing the environmental impact of rat poison on wildlife. The review, which was termed "error only," lasted 15 months during which time consumer and environmental groups were not consulted.

"Texas Official Seeks HHS Probe; Ex-Head Start Leader Denies She Misused Funds," ***The Washington Times*****, Apr. 22, 2004, by Cheryl Wetzstein.**

The National Head Start Association (NHSA) accused a former Head Start chapter head, and now Department of Health and Human Services official, of misconduct during her tenure in Texas. NHSA claims that documents obtained under FOIA show that $140,000 in overbilling occurred under the official's watch, as well as unauthorized bonuses and a vacation time payout.

"Pentagon Ban on Pictures of Dead Troops Is Broken," ***The New York Times*****, Apr., 23 2004, Bill Carter, by Jim Rutenberg and Mindy Sink contributed reporting for this article.**

Russ Kick, who operates the website the Memory Hole, obtained photographs of flag-covered coffins of deceased soldiers returning from Iraq through the FOIA. Initially, Kick's request was denied by the Air Force but, upon appeal, 361 photographs were released to him. The release broke a ban that the Pentagon had issued prohibiting media coverage of arriving coffins. An employee of a defense contractor and her husband were fired when she released a photo of flag-draped coffins she had taken while on a military transport plane. News organizations were unaware that such photographs even existed - unaware the Pentagon was continuing to take pictures for historical purposes. These organizations have argued that the release of such photos should be allowed as part of the national dialogue on the Iraq war. Polls have also shown that public support favors release of such photos.

"Navy Confirms Weapons Facility Was Temporarily Decertified," The Associated Press State & Local Wire, Apr. 24, 2004, at State and Regional.

A local Washington state newspaper, *The Bremerton Sun*, confirmed an incident at a local Navy submarine facility where a nuclear missile was mishandled. The paper received an e-mail from its FOIA request that described the reassignment of officers in charge of the facility and the facility's decertification to handle nuclear weapons for more than two months.

"Salem Faces $385,000 in Fines for Crime Reporting Violations," The Associated Press Newswires, May, 21 2004, by Pam Ramsey.

Security on Campus, a watchdog group, obtained a report from the Department of Education through the FOIA that shows that Salem International University faces up to $385,000 in fines for failing to report campus crime as required by federal law. The report indicates that the university's campus security failed in many respects, including the reporting of sexual offenses and under-reporting incidents. Mount St. Clare College in Iowa is the only other school that has been fined under the twelve year old Jeanne Clery Act.

"FBI Invoked Controversial Search Power - ACLU," Reuters News, June 17, 2004, by Gail Appleson.

Documents obtained by the American Civil Liberties Union through FOIA show that the Federal Bureau of Investigation (FBI) attempted to use the controversial section 215 of the USA Patriot Act. The provision allows the FBI to seek court permission to secretly review confidential materials - such as business, doctor, university or library records - without the knowledge of the target of the investigation. Previously, Attorney General John Ashcroft has denied any usage of section 215.

"Alabama Tobacco Growers Stand to Benefit from Proposed Federal Buyout," ***Montgomery Advertiser*****, June 23, 2004, by Ana Radelat.**

The Environmental Working Group obtained documents from the Department of Agriculture through FOIA that detail Alabamians who would receive tobacco buyouts under a current proposal in Congress. The Environmental Working Group opposes the planned buyout because the group sees it as a benefit to large tobacco growers and companies. The group's study says that two-thirds of the $9.6 billion buyout would go to only ten percent of growers, with more than eighty percent of those eligible receiving less than $1,000 a year over five years.

"Growing Tobacco, and Controversy; Students Cultivate a Crop They're Taught to Avoid," ***The Washington Post*****, June 26, 2004, by Manuel Roig-Franzia.**

The Washington Post obtained documents from the Department of Agriculture through FOIA that shows that 41 school districts - in Indiana, Kentucky, Ohio, Tennessee and Virginia - grew almost 50,000 pounds of tobacco in 2003. The schools use tobacco quotas that came with purchased land to grow tobacco as a means of teaching agriculture and as a source of revenue. The practice raises questions about the propriety of schools collecting revenue from tobacco and whether it undermines efforts at anti-smoking health prevention.

"White House Help Sought on N-dump," ***The Salt Lake Tribune*****, June 28, 2004, by Robert Gehrke.**

Documents obtained by the Natural Resources Defense Council's FOIA lawsuit against Vice President Dick Cheney show that a Utah company asked for help from Mr. Cheney's Energy Task Force. Private Fuel Storage, seeking to build a nuclear waste storage facility on the Skull Valley Goshute Indian Reservation in Utah, sent a letter asking the Task Force to urge the Defense Department to complete a study necessary for the company to gain final approval of the project. The letter appeared to prompt a meeting between Deputy Interior Secretary J. Steven Griles and the company's lobbyist. The Task Force also sent a letter to the Department of the Interior inquiring what was needed to move forward with approval of the project.

Mr. CLAY. Thank you so much for that testimony, Ms. Fuchs.

Ms. FUCHS. Thank you.

Mr. CLAY. Since you finished up, we are going to start with you.

Ms. FUCHS. OK.

Mr. CLAY. So you can express a little bit more.

Let me share with you, I have a very close friend who is a public information officer back in St. Louis who takes the FOIA requests. They work for a local government and they don't have a person assigned to fill these requests. I bet you run into that quite often with a lot of local governments who may not be as well financed. And this is for you, but anybody else on this panel can try to answer this. How do you balance that? And what do you do about limited resources among local governments who don't have enough people? This person has even expressed to me that newspapers, journalists come and request this information and they never come and pick it up. I am sure you all have dealt with smaller governments like that. What do you think is a good balance there? How should we handle that?

Ms. FUCHS. I think resources is definitely one of the main concerns that the FOIA offices have, and I think it is a legitimate concern, but to simply say we are not going to do our job because we don't have resources doesn't seem acceptable.

Some of the agencies that we have the biggest delays in, they still do their job wonderfully. I mean, I would say the State Department and DOD have extreme delays, and yet we find that the people at those agencies are professional and are trying to do it right.

What concerns us is that there are agencies who don't try at all, and there is nothing in the law to push those agencies to do a better job.

Mr. CLAY. OK.

Ms. FUCHS. That is why we think it is necessary for Congress to take some action.

Mr. CLAY. OK. Mr. Hoyt or Ms. Fredrickson, any response?

Mr. HOYT. Well, Mr. Chairman, most of my history has been with the Federal FOIA, not at the local level.

Mr. CLAY. OK.

Mr. HOYT. But it is my understanding, and some observation, that actually State and local governments do a far better job with FOIA with the State laws about freedom of information than the Federal Government does, even with their limited resources.

Mr. CLAY. That is probably accurate. Yes, ma'am, anything?

Ms. FREDRICKSON. I don't really have anything to add there.

Mr. CLAY. Let me also go back to Ms. Fuchs and ask, do you find that agencies have generally complied with the requirements of the 1996 e-FOIA law? This law went into effect more than 10 years ago. Can you offer some examples of agencies that have not been compliant with e-FOIA requirements, such as the requirement to make repeatedly requested records available online?

Ms. FUCHS. Thank you for asking the question. We are actually engaged in a big study right now about e-FOIA, and I hope to be able to give you even more details at a future date.

I would say that, based on what we have looked at so far, there is a wide disparity between agencies' compliance with e-FOIA. When we read the agencies' FOIA improvement plans, there were

some agencies that had not changed their regulations since 1996, despite the enactment of e-FOIA. When you look at the agencies' Web sites, many clearly do not include frequently requested records.

Another problem with that is that the Justice Department has said frequently requested records means a specific record which has been requested three or more times. It is our view that agencies would serve themselves and the public better by looking at it topically and saying the public is interested in the Abu Ghraib. We are beginning to release them. Why don't we put everything up that we can put up so that all of the public can take a look at it as soon as possible.

Mr. CLAY. Thank you.

Ms. FUCHS. We think that would help agencies.

Mr. CLAY. Thank you very much for that response.

Ms. Fredrickson, from your perspective does the awarding of attorney's fees to a prevailing requestor provide an adequate incentive for agencies to be more responsive in their judgment?

Ms. FREDRICKSON. I think that is certainly one element that would be very helpful in ensuring that the requests are processed appropriately, but I think Congress should also look at some other elements as have been laid out, are contained in the Open Government Act, and consider whether there should be additional penalties or agencies that impose excessive delays on the processing.

Mr. CLAY. OK. I think, Mr. Hoyt, did you mention the agency ombudsman?

Mr. HOYT. Yes, sir.

Mr. CLAY. Yes. And then so do you think that would help foster a better response time?

Mr. HOYT. Yes. I think if you created an ombudsman that had independent stature and teeth, some authority to make things happen, it would be a way for requestors who were being denied proper access to records to go somewhere without having to go to the expense and difficulty and time consuming process of filing a lawsuit and prosecuting it that way.

Mr. CLAY. Thank you so much for your response.

Mr. Turner, do you have any questions?

Mr. TURNER. Yes. Thank you, Mr. Chairman.

Mr. Hoyt, I appreciate your comment about local government. I served as mayor for city of Dayton two terms in Ohio, which in Ohio is very liberal Freedom of Information Act process.

Mr. HOYT. I believe your Freedom of Information history goes all the way back to the late 1700's, in fact, sir.

Mr. TURNER. Luckily, I do not.

Mr. HOYT. Your State is one of the best.

Mr. TURNER. So your knowledge would exceed mine. However, I would tell you that, coming from that background and also being very supportive of it as a tool that no one in government can ever say that by having a closed system in government we can assure either efficiency or effectiveness. You have to have the ability for those to review what government is doing in order for us to be able to hold it accountable to make certain that it is performing. Any closed organization or system, whether it be a business or government, is going to find inefficiency, ineffectiveness, or other perver-

sions of their goals and responsibilities, to the extent that they are closed systems.

Having said that, and being an advocate for freedom of information, in fact, having spoken on it as a mayor in Turkey to advocate for how it works for local government and how it can assist local governments, there is a lot of the testimony that concerns me that I hear of so-called advocacy groups for freedom of information because there is this underlying negativity that goes beyond just what I just said, which is it is in all of our best interests for the information to be out there.

So my first question for you is that you mentioned several recommendations in your testimony. Will you provide to this subcommittee a draft of recommendations from your coalition that the committee can review that would be in the form of addressing what some of the issues that you see are a problem?

Mr. HOYT. Yes, we will.

[The information referred to follows:]

COALITION OF
JOURNALISTS FOR
OPEN GOVERNMENT
1101 Wilson Blvd, Suite 1100, Arlington, VA. 22209 703-807-2100

2/13/07

Chairman William Clay Jr.
Subcommittee on Information Policy, Census, and National Archives
Committee on Oversight and Government Reform
B -349 C Rayburn House Office Building, Washington, DC.

The Coalition of Journalists for Open Government has recently completed a new study on agency performance in implementing the Freedom of Information Act that we believe could be helpful as the Subcommittee on Information Policy investigates the problems and issues related to the law and its execution.

The study looks at the key performance indicators of 26 representative departments and agencies over the first eight years, beginning in 1998, that agencies have been required by Congress to report to the public on FOIA operations. We have updated that research with a comparative look at the reports that had been filed through Feb. 9.

To our knowledge, no one else has looked at the patterns or trends in performance government-wide. The Justice Department posts each of the individual annual reports on its website but provides no comparative data or analysis. The agencies themselves have historically made limited, if any, reference to their own performance in prior years.

Thus it has been difficult to judge how well, or poorly, any agency is doing overall, and to determine the merit of anecdotal examples or departmental defenses.

We believe the data we've assembled does, indeed, show the need for modifications in the act that will mandate operational changes and create greater oversight of this law, which is so critical to government accountability and public trust.

We respectfully request that this research report be added to the record for the subcommittee Feb. 14th hearing.

Pete Weitzel
Coalition of Journalists for Open Government

American Court and Commercial Newspapers, American Society of Newspaper Editors, Associated Press Managing Editors, Association of Alternative Newsweeklies, Association of Capitol Reporters and Editors, Association of Health Care Journalists, Brechner Center on Freedom of Information, Criminal Justice Journalists, Committee of Concerned Journalists, Council of National Journalism Organizations, Education Writers Association, Freedom Forum First Amendment Center, Information Trust, Investigative Reporters and Editors, Media Law Resource Center, Military Reporters and Editors, National Association of Science Writers, Newspaper Association of America, National Conference of Editorial Writers, National Federation of Press Women, National Freedom of Information Coalition, National Newspaper Association, National Press Club, National Society of Newspaper Columnists, Online News Association, Radio Television News Directors Association, Reporters Committee for Freedom of the Press, Society of Professional Journalists, Project on Excellence in Journalism, Society of Environmental Journalists, University of Missouri Freedom of Information Center

THE WAITING GAME:

FOIA PERFORMANCE HITS NEW LOWS

An in-depth analysis of FOIA implementation across federal agencies by the Coalition of Journalists for Open Government

COALITION OF
JOURNALISTS FOR
OPEN GOVERNMENT

COALITION OF
JOURNALISTS FOR
OPEN GOVERNMENT

Federal agencies appear to have made only modest progress, if any, in meeting President Bush's directive to improve service to FOIA requesters.

Requests remain heavily backlogged. Requesters still have long wait times for a response from many agencies. And people seeking records and information remain less likely to get the information they seek than in the past.

New research by the Coalition of Journalists for Open Government shows that the government's overall FOIA performance remains at the lowest point since agency reporting began in 1998, despite President Bush's executive order last December directing agencies to become more service oriented and reform legislation introduced in the Congress.

The Coalition collected the FOIA performance reports from the 15 Cabinet-level departments and 15 agencies dating back to 1998. It analyzed in depth the performance records of 26 of those departments and agencies, excluding the Social Security Administration and three others that primarily respond to requests from individuals seeking personal data where no discretionary decisions are involved. The 2006 performance reports of the 13 agencies that had filed by Feb. 9 were also reviewed.

Few of the agency annual reports filed provide any year-to-year comparisons; none offer cross-agency comparisons. The Justice Department posts the reports but provides no analysis. The Coalition's research project is an effort to fill that void.

The Coalition's look at the first eight years of reporting by the 26 agencies shows a clear need for FOIA reform. The reports of the 13 agencies that have filed 2006 reports indicates that, so far at least, there has been little meaningful change for the requester.

- **The backlog is getting worse.** The backlog of requests – the percentage of requests unprocessed at the end of the year – hit a record 31% in 2005, a whopping 138% above the 1998 level. The 13 agencies that have so far reported 2006 data show a slightly higher backlog that the year before.

- **People are waiting longer for information.** In 1998, only five of the 26 agencies reported a "median" response time greater than the 20 working-day statutory requirement in handling "simple" requests. In 2005, 13 failed. The 2006 reports filed through Feb. 9 do not indicate any overall improvement. Nor do they suggest any improvement in the handling of processing complex requests. None of the departments or agencies met the deadline in 2005; all those reporting so far also showed they came up long in 2006.

- **Agencies said "no" more often.** The percentage of requesters who received all or even part of the information sought fell 31% among the agencies that have so far reported for 2006. That's on top of an overall 6% decline in 2005, when 52,398 fewer requesters than in 1998 got any of the information they sought.

- **Those denied information initially got relief on appeal less often.** With the Justice Department leading the way, the 26 agencies granted an average of 21 percent fewer appeals from 2002 through 2005 than they did in the last three years of the Clinton administration. Justice granted a yearly average of 49% fewer appeals in that period. Only 19% of those appealing were granted relief in 2005. The 13 agencies reporting so far were even less disposed to grant an appeal in 2006, cutting their appellate grants by 6%.

- **FOIA costs continue to rise.** FOIA requests hit a highpoint in 2000 and have fallen modestly since then. The cost of handling FOIA requests, however, rose 85% from 2000 to 2005. The 13 agencies reporting 2006 costs showed a four percent increase.

- **Staffing is down percent despite the growing backlog.** The 26 agencies reported in 2005 that their FOIA staffs were 20% smaller than in 1998. In 2006, six of the 13 agencies reporting, all with double digit backlogs, added staff, including the Environmental Protection Agency, which increased staff by 50% and cut its backlog from 27% to 16%.

The following tables provide additional detail on the performance of the 26 agencies analyzed for the 1998 through 2005 period and for the 13 who had reported 2006 data as of February 9. In addition, comparative data on all reported categories in the department and agency filings for each of the eight years is available at the Coalition Web site, www.cjog.net.

If you have any questions or would like additional research materials, contact
Pete Weitzel, Coalition of Journalists for Open Government, 703-807-2100,
pweitzel@cjog.net

Comparing Backlog, 1998-2002-2005-2006

Department/ Agency	1998			2002			2005			2006		
	Requests Processed	Yearend Backlog	%	Requests Processed	Yearend Backlog	%	Requests Processed	Yearend Backlog	%	Requests Processed	Yearend Backlog	%
Agriculture	88,204	1,506	2%	78,062	2,012	3%	51,922	1,965	4%			
Commerce	2,283	157	7%	2,063	298	14%	1,834	278	15%	1,987	309	16%
Defense	106,191	10,240	10%	76,943	12,543	16%	78,775	14,953	19%	72,266	18,216	25%
Education	1,679	137	8%	1,718	219	13%	2,219	545	25%			
Energy	2,314	741	32%	3,319	1027	31%	3,831	1159	30%	3,861	910	24%
Homeland Sec							126,126	82,591	65%			
HUD	3,354	1,456	43%	4,171	671	16%	2,923	3,725	127%			
Interior	5,002	545	11%	4,378	902	21%	6,420	1,910	30%			
Justice	195,105	25,304	13%	184,928	32,545	18%	51,435	8,637	17%	54,925	8,004	15%
Labor	17,540	994	6%	18,201	809	4%	23,284	780	3%			
State	2,317	5,349	231%	4,636	5,343	115%	3,870	2,728	70%			
Transportation	17,406	4,362	25%	17,540	3,885	22%	9,384	2,072	22%	8,758	2,197	25%
Treasury	1,775	895	50%	47,812	7,681	16%	53,987	4,883	9%			
AID	263	99	38%	222	148	67%	197	469	238%			
CIA	7,169	4,716	66%	3,046	1,547	51%	3,110	975	31%	2,579	896	35%
CPSC	13,467	239	2%	9,636	166	2%	5,387	112	2%	4,728	84	2%
EEOC	17,551	1,343	8%	16,735	1,701	10%	16,232	1,907	12%	16,936	1,779	11%
EPA	18,848	6,117	32%	19,259	4,567	24%	11,108	2,991	27%	12,685	1,973	16%
GSA	NR	NR		1,407	141	10%	1,561	93	6%			
Archives	5,930	1,111	19%	8,826	3,590	41%	8,878	6,382	72%			
NASA	2114	230	11%	1723	137	8%	1351	135	10%	1,132	241	21%
NLRB	6133	162	3%	5550	206	4%	4702	133	3%	5,553	269	5%
NRC	448	53	12%	426	55	13%	345	80	23%			
NSF	213	15	7%	254	2	1%	266	17	6%	340	5	1%
SEC	3,190	114	4%	2,888	821	28%	7,422	9,710	131%	8,268	10,403	126%
SBA	2,293	72	3%	2,117	65	3%	3,737	32	1%			
Subtotal	520,789	65,957	13%	515,860	81,081	16%	480,306	149,262	31%			

Increase

NR=Not Reported

Median Days Wait for Response to Simple, Complex,and Expedited Requests

	1998			2002			2005			2006		
	Simple	Compl.	Exped.	Simple	Compl.	Exped.	Simple	Compl.	Exped.	Simple	Compl.	Exped.
Agriculture	131	268	12	2\ 85	9\ 905	3\ 76	2 \ 90	12 \ 1,27	3 \ 40			
Commerce	10	30	5	12	45	0	12	40	8	12	45	44
Defense	16	39	2.5	19.5	57.5	1	15.5	85	0	17	5/15	0
Education	13	30	3	5\ 35	7\ 180	2\ 10	35	66	24			
Energy	0	184.1	0	75	238	118	5 \ 106	10 \ 170	1 \ 12	2/108	34/431	2/6
Homeland Sec.							16 \ 61	3 \ 242	2 \ 45			
HUD	22	0	0	15\ 59	34\ 83	5\ 27	21 \ 65	35 \ 160	9 \ 70			
Interior	18	0	4.5	10\ 58	0	5\ 33	2 \ 43	28 \ 89	1 \ 15			
Justice	1 \ 40	1 \ 292	1 \ 18	3\ 49	13\ 621	1\ 190	2 \ 139	12 \ 863	2 \ 185	1/109	12/510	3/398
Labor	10	25	3	1\ 25	7\ 49	2\ 28	6 \ 28	14 \ 60	2 \ 18			
State	333	0	85	351	431	225	14	142	136			
Transportation	14	40	9	8	39	29	1 \ 30	20 \ 134	5 \ 30	1/36	14/142	9/60
Treasury	13	97	0	4\ 17	6\ 383	2\ 5	2 \ 86	3 \ 251	1			
AID	0	36	0	52	0	0	55	0	34			
CIA	0	440	0	7	83	0	7	68	0	7	59	
CPSC	7	30	0	7	27	0	6	35	0	6	45	
EEOC	15.5	0	4	19	0	5	18	0	5	19	0	4
EPA	16	20 \ 27	7	17\ 113	31\ 123	6\ 75	13 \ 32	4 \ 166	8 \ 109	15/101	40/156	8/81
GSA	NR	NR	NR	0	14	0	0	14	0			
NARA	29	0	0	7	20	0	13.5	252.4	0			
NASA	17	27	20	19	29	3	19	49	15	5/140	7/91	1/60
NLRB	10	0	0	11.5	0	0	9	0	0	6		
NRC	15	15	0	14	25	23	12	75	20			
NSF	10	0	0	10.39	0	0	14	0	0	18		
SEC	7	151	0	16	137	5	26	410	14	15	706	
SBA	12	0	9	1	0	0	7	0	0			

Missed Response Deadline | NR = Not Reported

Agencies are required by FOIA to respond to all requests within 20 working days. Those that reported a median response time beyond the 20 days are highlighted. Some agencies report only by component unit, providing no agency total. In those instances, the "Median Day" figures shown here reflect the lowest and highest processing times reported by the components. We have used the latter in determining agency compliance.

Comparing Agency Grants of FOIA Requests, 1998-2002-2005-2006

Department/ Agency	1998			2002			2005			2006		
	Granted in Full	Partial Grant	%	Granted in Full	Partial Grant	%	Granted in Full	Partial Grant	%	Granted in Full	Partial Grant	%
Agriculture	84,144	1,908	98%	70,965	2,339	94%	46,352	2,277	94%			
Commerce	1,332	240	69%	855	380	60%	652	296	52%	672	382	53%
Defense	65,164	9,998	71%	40,458	11,133	67%	36,587	15,307	66%	35,452	12,886	67%
Education	1,144	319	87%	1,079	344	83%	806	732	69%			
Energy	1,183	355	66%	2,227	277	75%	3,126	269	89%	2,913	306	83%
Homeland Sec							28,631	48,564	61%			
HUD	2,631	313	88%	1,686	384	50%	1,165	485	56%			
Interior	3,225	647	77%	2,212	764	68%	2,145	2873	78%			
Justice	65,135	31,036	49%	81,426	40,571	66%	18,539	7,066	50%	19,537	7,045	48%
Labor	5,556	2,179	44%	5,514	6,442	66%	8,938	6,959	68%			
State	650	572	53%	634	818	31%	437	905	35%			
Transportation	8,918	2,047	63%	8,803	2,171	63%	3,695	2,180	63%	3,401	2274	65%
Treasury	1,052	181	69%	21,144	4,622	54%	25,451	3,366	53%			
AID	117	76	73%	77	45	55%	70	58	65%			
CIA	3,188	1,652	68%	391	999	46%	334	1,051	45%	267	939	47%
CSPC	12,586	470	97%	8561	531	94%	4447	454	91%	3,753	465	89%
EEOC	3,623	11,372	85%	1,335	11,853	79%	1,191	11,018	75%	973	10,787	69%
EPA	16,718	746	93%	9,080	603	50%	5,385	518	53%	4,204	612	38%
GSA	NR	205		945	169	79%	1,014	184	77%			
NARA	5,423	157	94%	8,141	48	93%	434	101	6%			
NASA	1,156	534	80%	693	592	75%	469	367	62%	387	334	64%
NLRB	5,342	180	90%	4304	455	86%	3560	386	84%	3,402	478	70%
NRC	232	93	73%	175	110	67%	108	99	60%			
NSF	69	92	76%	51	157	82%	29	197	85%	29	245	81%
SEC	889	416	41%	522	333	30%	1898	294	30%	2,065	181	27%
SBA	1,438	719	94%	1487	213	80%	3172	178	90%			
All	290,915	66,507	69%	272,765	86,353	70%	198,635	106,184	63%			

Above the Average

NR = Not Reported

The Results of FOIA Appeals by Agency, 2006

	1998			2002			2005			2006		
Department/ Agency	Appeals Processed	% Backlog	Appeals Granted	Appeals Processed	% Backlog	Appeals Granted	Appeals Processed	% Backlog	Appeals Granted	Appeals Processed	% Backlog	Appeals Granted
Agriculture	186	50%	48%	164	68%	59%	162	41%	51%			
Commerce	56	27%	41%	78	0%	24%	40	43%	13%	84	-18%	21%
Defense	1,098	0%	14%	928	0%	21%	798	0%	22%	747	26%	18%
Education	15	60%	20%	13	115%	15%	39	3%	26%			
Energy	115	0%	35%	71	6%	24%	46	7%	11%	50		16%
Homeland Sec							885	57%	12%			
HUD	33	0%	18%	58	34%	14%	33	42%	15%			
Interior	209	18%	62%	165	43%	50%	157	20%	40%			
Justice	3,626	18%	15%	3,491	7%	8%	2,441	20%	6%	1,970	40%	4%
Labor	458	0%	32%	319	0%	44%	188	94%	31%			
State	179	0%	63%	184	18%	68%	243	34%	61%			
Transportation	334	0%	20%	184	0%	18%	136	0%	28%	136	-31%	31%
Treasury	13	85%	38%	1,010	0%	19%	413	0%	13%			
AID	9	0%	67%	6	0%	33%	1	33%	0%			
CIA	195	12%	20%	224	0%	13%	233	0%	27%	203	-22%	19%
CPSC	43	0%	14%	12	8%	0%	19	0%	0%	29	0%	17%
EEOC	326	0%	46%	416	0%	40%	345	0%	49%	321	0%	44%
EPA	38	226%	24%	105	0%	16%	110	6%	27%	202	-77%	26%
GSA	17	0%	41%	11	27%	73%	13	0%	62%			
NARA	14	7%	14%	19	5%	37%	29	0%	21%			
NASA	24	0%	29%	21	0%	38%	22	0%	27%	13	7%	23%
NLRB	40	0%	15%	43	0%	28%	38	0%	26%	23	4%	22%
NRC	17	0%	35%	15	0%	20%	12	17%	58%			
NSF	3	0%	67%	7	0%	14%	6	0%	17%	7	0%	14%
SEC	28	0%	11%	55	47%	31%	244	43%	18%	334	20%	15%
SBA	30	7%	53%	20	0%	45%	16	25%	56%			
All	7,106	8%	22%	7,619	1%	19%	6,669	22%	19%	4,119	27%	14%

Above the Average

Combined Agency Performance 1998 to 2005

	Requests				Grants				
	Received	Processed	Backlog	%	Full	Partial	%	Denials	Other *
1998	516,446	520,262	65,957	13%	290,915	66,302	69%	23,003	169,371
1999	548,086	53,492	77,279	14%	295,246	70,430	68%	19,402	188,718
2000	608,511	604,801	78,679	13%	331,814	72,418	67%	20,999	187,123
2001	490,394	484,545	87,378	18%	278,513	76,267	73%	13,093	118,810
2002	505,390	515,860	81,081	16%	272,765	86,353	70%	13,949	142,793
2003	532,570	531,688	83,393	16%	253,109	108,375	68%	13,154	157,019
2004	547,193	524,909	105,119	20%	234,438	116,544	67%	15,383	166,227
2005	525,247	480,306	149,262	31%	198,635	106,184	63%	11,435	156,443
Change 1998 - 2005	8,801	-39,956	83,305	126%	-92,280	39,882	-8%	-11,568	-12,928

Overall 52,398 fewer requests were granted in 2005 than in 1998 by the 26 agencies surveyed.

*Other: A denial of the request in which the agency cites a reason other than one of the nine exemptions, such as "no such record", "withquest withdrawn", "fee related", "duplicate", and "not an agency record".

Year-to-Year Change in Backlog, Agency Efficiency, 1998 to 2005

	Requests Processed	% Change	Percent Backlog	% Change	Cost per Request	% Change	Requests per FTE	% Change
1998	520,789		13%		$ 294		129	
1999	534,924	3%	14%	8%	$ 220	-25%	137	6%
2000	604,801	13%	13%	-7%	$ 283	29%	145	6%
2001	484,545	-20%	18%	38%	$ 416	47%	138	-5%
2002	515,860	6%	16%	-11%	$ 429	3%	135	-2%
2003	531,688	3%	16%	0%	$ 444	3%	136	1%
2004	524,909	-1%	20%	25%	$ 437	-2%	144	6%
2005	480,306	-8%	31%	55%	$ 494	13%	143	-1%
98 to 05		-8%		138%		68%		11%
00 to 05		-21%		138%		74%		-1%

Increase from Prior Year

The cost per FOIA request has risen 68% even as the number of requests decline, employees processed more requests per person, and the agencies fell further behind.

FOIA Workforce Shrinks, Backlog Grows

	FTEs	Yr to Yr	Back-log	Yr to Yr
1998	4042		13%	
1999	3901	-3%	14%	8%
2000	4185	7%	13%	-7%
2001	3507	-16%	18%	38%
2002	3828	9%	16%	-11%
2003	3903	2%	16%	0%
2004	3650	-6%	20%	25%
2005	3350	-8%	31%	55%

The FOIA workforce in the 26 agencies studied has declined by 20% since the year 2000 while the percent of requests unprocessed has risen 138%. The year 2000 was the highpoint in the FOIA workforce.

Departments and Agencies Included in Study

Agriculture	Department of Agriculture
Commerce	Department of Commerce
Defense	Department of Defense
Education	Department of Education
Energy	Department of Energy
Homeland Sec	Department of Homeland Security
HUD	Department of Housing and Urban Development
Interior	Department of the Interior
Justice	Department of Justice
Labor	Department of Labor
State	Department of State
Transportation	Department of Transportation
Treasury	Department of the Treasury
AID	Agency for International Development
CIA	Central Intelligence Agency
CPSC	Consumer Product Safety Commission
EEOC	Equal Employment Opportunity Commission
EPA	Environmental Protection Agency
GSA	General Services Administration
NARA	National Archives and Records Administration
NASA	National Aeronautics and Space Administration
NLRB	National Labor Relations Board
NRC	Nuclear Regulatory Commission
NSF	National Science Foundation
SEC	Securities and Exchange Commission
SBA	Small Business Administration
HHS	Department of Health and Human Services
OPM	Office of Personnel Management
SSA	Social Security Administration
VA	Department of Veterans Affairs

The 26 agencies listed in the top section and shown in all of the Coalition comparisons in this study are those included in frequent report on FOIA by the Government Accountability Office, and several other agencies receiving a high number of third party FOIA requests.

The remaining four agencies are also regularly included in GAO studie but were not included in the analysis because most of the requests they receive are from individuals seeking personal records. Those request involve no discretionary decisions and are routinely granted with minimal delay

Agency Backlog

In both 1998 and 2000, the combined backlog for the 26 agencies was 13 percent. By 2005, it was 31%. The early reporting for 2006 suggests the backlog is still growing.

- Requests to the Securities and Exchange Commission have nearly tripled from 2001 to 2005. The agency's backlog went from an average of 4.5% to 225 percent in 2004. It dropped back to 131% in 2005, then 126% in 2006.
- The State Department, the Agency for International Development, and the National Archives have had backlogs that exceed the government-wide average every year since reporting began. State increased its FOIA staffing in recent years and cut the backlog significantly, although it's still further behind than most. In contrast, the far smaller AID reduced FOIA personnel and its backlog has skyrocketed to 238% in 2005. At that rate, it will be two years before a request is even looked at.

Efficiency

In 1998, the 26 agencies processed 520,789 FOIA requests and had a backlog of 13%. By 2005, the number of requests handled had declined to 480,306, despite an increase in requests, and the backlog had more than doubled to 31%.

- Despite the fact that the agencies processed 39,956 fewer requests in 2005 than eight years earlier, they spent 85% more doing it. That came to 83.9 million more in tax dollars.
- The average cost of processing a request rose from $294 in 1998 to $494 in 2005.
- The CIA had the highest per request handling cost -- $2,685.
- Only three agencies, State and Energy and the SEC, reduced their per-request handling costs over the eight years. State's per request cost fell from $5,438 to $2,565; Energy's from $1,888 to $1,049; the SEC's from $533 to $517.
- The sharpest increase in cost-per-request was logged by the Justice Department. DOJ's cost-per-request rose from $253 in 1998 to $1,101 in 2005. It dropped back to $793 in 2006.

Complex requests

Agencies processed fewer requests overall in 2005 than eight years earlier. They processed even fewer complex requests. This suggests that the complexity of requests was not a factor in the sharp increase in agency backlog or in the longer time requesters waited for a response. .

The Percent of Backlog and the FOIA Workforce by Agency, 1998 to 2005

Department/	1998		1999		2000		2001		2002		2003		2004		2005	
Agency	BL	FTEs	BL	FTEs	BL	FTEs	BL	FTEs	BL	FTEs	BL	FTEs	BL	FTEs	BL	FTEs
Agriculture	2%	150	2%	263	2%	533	4%	275	3%	476	3%	608	4%	585	4%	219
Commerce	7%	19	14%	19	13%	27	10%	27	14%	21	15%	18	15%	18	15%	17
Defense	10%	806	12%	776	12%	890	16%	871	16%	719	18%	704	17%	721	19%	752
Education	8%	10	21%	10	18%	9	19%	6	13%	8	12%	7	17%	11	25%	10
Energy	32%	42	34%	56	38%	72	59%	70	31%	38	43%	75	35%	71	30%	71
Homeland Sec	*Department did not exist until 2003.*										18%	410	30%	469	65%	622
HUD	43%	16	126%	16	36%	40	50%	40	16%	41	69%	41	61%	41	127%	41
Interior	11%	132	11%	128	16%	131	19%	167	21%	127	31%	122	42%	114	30%	121
Justice	13%	954	15%	1047	14%	1069	18%	1056	18%	1076	14%	716	14%	563	17%	524
Labor	6%	113	5%	201	4%	229	6%	183	4%	201	3%	198	3%	191	3%	190
State	231%	126	137%	124	188%	136	187%	152	115%	158	52%	148	40%	182	70%	143
Transportation	25%	218	17%	182	20%	111	19%	118	22%	134	24%	55	18%	57	22%	87
Treasury	50%	14	77%	16	73%	16	76%	16	16%	337	10%	144	9%	146	9%	104
AID	38%	8	35%	7	49%	6	76%	5	67%	6	109%	6	162%	6	238%	5
CIA	66%	118	48%	65	51%	78	51%	75	51%	70	44%	272	34%	76	31%	74
CPSC	2%	17	1%	18	1%	17	1%	17	2%	16	1%	15	1%	15	2%	11
EEOC	8%	46	9%	36	7%	44	7%	43	10%	53	9%	41	10%	52	12%	49
EPA	32%	1002	37%	623	66%	630	89%	192	24%	159	18%	155	16%	176	27%	181
GSA	NR	NR	11%	19	10%	14	6%	14	10%	14	11%	18	20%	18	6%	19
NARA	19%	22	34%	40	19%	33	31%	47	41%	27	108%	26	105%	26	72%	25
NASA	11%	16	8%	19	11%	18	8%	19	8%	25	11%	19	16%	20	10%	19
NLRB	3%	10	4%	13	7%	11	4%	10	4%	11	5%	11	3%	9	3%	8
NRC	12%	16	14%	15	14%	14	12%	13	13%	12	16%	10	14%	9	23%	9
NSF	7%	2	2%	2	3%	2	2%	2	1%	1	3%	1	3%	1	6%	2
SEC	4%	20	4%	24	5%	26	5%	59	28%	61	90%	62	225%	64	131%	36
SBA	3%	165	3%	183	4%	31	5%	34	3%	38	3%	20	2%	13	1%	11
Total	13%	4042	14%	3901	13%	4185	18%	3507	16%	3828	16%	3903	20%	3651	31%	3350

BL= Percent Backlog FTEs=Full Time Equivalents (Total number of work years) NR= Not reported

Greater Than Average Backlog

The State Department, Agency for International Development, and the National Archives have had backlogs that exceeded the government-wide average in each year since reporting began. State has increased its FOIA staffing in recent years and cut the backlog significantly, although it's still one of the highest agencies. In contrast, the far smaller AID has reduced FOIA personnel and its backlog has skyrocketed to 238%. At that rate, a request will sit two years before being looked at.

The second worst backlog in recent years has been at the Securities and Exchange Commission, where requests have averaged 148 percent – a year and a half backlog – in each of the past three years. Despite that, the SEC cut FOIA personnel last year.

Backlogs at Energy, HUD and the CIA exceeded the agency average in seven of the eight years reported

Comparing Agency Efficiency, 1998 v. 2005

Department/ Agency	Requests Processed		% change	Percent Backlog		FTEs		Requests per FTE		Cost per Request	
	1998	2005	98-05	1998	2005	1998	2005	1998	2005	1998	2005
Agriculture	88,204	51,922	-41%	2%	4%	150	219	587	237	$71	$190
Commerce	2,283	1,834	-20%	7%	15%	19	17	121	106	$405	$669
Defense	106,191	78,775	-26%	10%	19%	806	752	132	105	$368	$608
Education	1,679	2,219	32%	8%	25%	10	10	170	220	$343	$479
Energy	2,314	3,831	66%	32%	30%	42	71	55	54	$1,888	$1,049
Homeland Sec	*	126,126	*	*	65%	*	622	*	203	*	$225
HUD	3,354	2,923	-13%	43%	127%	16	41	177	71	$160	$684
Interior	5,002	6,420	28%	11%	30%	132	121	38	53	$806	$1,194
Justice	195,105	51,435	-74%	13%	17%	954	524	204	98	$253	$1,101
Labor	17,540	23,284	33%	6%	3%	113	190	155	122	$248	$688
State	2,317	3,870	67%	231%	70%	126	143	18	27	$5,438	$2,565
Transportation	17,406	9,384	-46%	25%	22%	218	87	80	108	$614	$782
Treasury	1,775	53,987	2942%	50%	9%	14	104	127	517	$208	$239
AID	263	197	-25%	38%	238%	8	5	35	38	$1,495	$2,335
CIA	7,169	3,110	-57%	66%	31%	118	74	61	42	$990	$2,685
CPSC	13,467	5,387	-60%	2%	2%	17	11	792	481	$121	$212
EEOC	17,551	16,232	-8%	8%	12%	46	49	382	331	$91	$122
EPA	18,848	11,108	-41%	32%	27%	1002	181	19	61	$239	$851
GSA	NR	1,561		NR	6%	NR	19	NR	82	NR	$840
NARA	5,930	8,878	50%	19%	72%	22	25	267	355	$164	$196
NASA	2114	1351	-36%	11%	10%	16	19	130	72	$273	$835
NLRB	6133	4702	-23%	3%	3%	10	8	601	613	$18	$166
NRC	448	345	-23%	12%	23%	16	9	28	38	$2,490	$2,947
NSF	213	266	25%	7%	6%	2	2	125	177	$646	$805
SEC	3,190	7,422	133%	4%	131%	20	36	156	206	$533	$517
SBA	2,293	3,737	63%	3%	1%	165	11	14	349	$113	$217
Total	520,789	480,306	-8%	13%	31%	4042	3350	129	143	$294	$494

Improved Performance NR= Not reported *Department did not exist until 2003.

*Most of the Treasury Department's component agencies did not report data in 1998.

Year to Year Change in Backlog, Agency Efficiency, 1998 to 2005

	Requests Processed	% Change	Percent Backlog	% Change	Cost per Request	% Change	Requests per FTE	% Change
1998	520,789		13%		$ 294		129	
1999	534,924	3%	14%	8%	$ 220	-25%	137	6%
2000	604,801	13%	13%	-7%	$ 283	29%	145	6%
2001	484,545	-20%	18%	38%	$ 416	47%	138	-5%
2002	515,860	6%	16%	-11%	$ 429	3%	135	-2%
2003	531,688	3%	16%	0%	$ 444	3%	136	1%
2004	524,909	-1%	20%	25%	$ 437	-2%	144	6%
2005	480,306	-8%	31%	55%	$ 494	13%	143	-1%
98 to 05		-8%		138%		68%		11%
00 to 05		-21%		138%		74%		-1%

Increase from Prior Year

The cost per FOIA request has risen 68 per cent even as the number of requests declined and employees processed more requests per person, and the agencies fell further behind.

FOIA Workforce Shrinks, Backlog Grows

	FTEs	Yr to Yr	Back-log	Yr to Yr
1998	4042		13%	
1999	3901	-3%	14%	8%
2000	4185	7%	13%	-7%
2001	3507	-16%	18%	38%
2002	3828	9%	16%	-11%
2003	3903	2%	16%	0%
2004	3650	-6%	20%	25%
2005	3350	-8%	31%	55%

The FOIA workforce in the 26 agencies studied has declined by 20 percent since the year 2000 while the percent of requests unprocessed at the end of increased by 138 percent. The year 2000 was the highpoint in FOIA workforce numbers.

Complex Requests Processed, 1998 to 2005

	1998	1999	2000	2001	2002	2003	2004	2005
Agriculture	9,751	72,825	9,051	8,831	6,388	5,250	26,616	5,451
Commerce	950	525	852	660	937	495	465	511
Defense	17,907	17,228	15,872	17,182	13,391	10,817	12,922	11,385
Education	261	290	417	263	400	324	442	329
Energy	2361	232	375	1151	688	770	493	246
Homeland Sec	*The department did not exist until 2003.*					41,165	34,391	29,117
HUD	0	0	0	52	337	186	258	286
Interior	0	0	905	0	0	0	30	189
Justice	104,151	90,341	55,905	50,069	46,383	7,023	7,049	5,769
Labor	1,957	3,988	5,646	4,730	4,030	4,906	3,959	5,834
State	0	3,424	2,637	2,763	2,764	4,493	3,710	2,216
Transportation	1,680	4,261	3,246	7,347	9,568	4,232	4,614	3,982
Treasury	258	278	404	1,083	46,436	59,323	63,844	48,574
AID	263	157	NR	0	0	0	0	0
CIA	7,169	4,245	3,415	2,989	2,624	2,759	2,834	2,533
CPSC	795	596	777	2,018	1,826	1,572	757	528
EEOC	0	0	0	0	0	0	0	0
EPA	75	603	272	21	24	26	17	170
GSA	NR	0	1407	0	1407	1363	1561	1561
NARA	0	361	425	331	193	251	299	209
NASA	735	527	373	426	311	702	454	410
NLRB	0	0	0	0	0	0	0	0
NRC	35	17	10	21	14	34	27	28
NSF	0	0	0	0	0	0	0	0
SEC	15	15	14	12	11	66	419	1099
SBA	0	0	0	0	0	0	0	0
Total	148,363	199,913	102,003	99,949	137,732	145,757	165,161	120,427

NR=Not Reported

*The 1999 spike for the Agriculture department is not explained in their annual report. That same report shows an even greater one year decline in simple requests.

**The steady decline in complex requests reported by the Department of Justice reflects fewer requests to the Immigration and Naturalization Service from 1998 to 2003 when that agency was transferred to the Department of Homeland Security.

***Most Treasury Department component units, including the Internal Revenue Service did not report until 2002.

Waiting Time

Agencies continued to stretch the 20-working statutory deadline for responding to requests.

- The median response times reported in the handling "complex" requests soared. The three highest median times reported by agency components in 1998 were 268, 292 and 440 working days. In 2005, the top three wait times were 410, 863 and 1,277 working days. (There are 241 working days in the federal year. So in the case of the Agriculture Department's Animal and Plant Health Inspection Service, which reported the 1,277 median day response time, 97 people who had made requests were still waiting for a response after five years.)
- The Justice Department failed to meet the 20-day deadline in processing either simple or complex requests in any of the eight years. It did report a median-response time under 20 days in handling expedited requests in 1998, but not since.
- In most cases, when agencies failed to make the deadline for simple requests, their median days response time was only a few days long. The State Department was the exception. Its lowest median day score was 37 days; the highest 351 days
- Only one agency reported in 2005 that it met the deadline in handling complex requests – GSA.
- The Energy Department's achieved some kind of record in 2003 when its Rocky Flats office failed to respond to more than half its "simple" requests for 985 days kept half of its "complex" requests unprocessed for 2,143 days.

Median Days Response Time, Simple Requests, 1998 to 2005

Department/ Agency	1998	1999	2000	2001	2002	2003	2004	2005
Agriculture	131	11	26	30	2\ 85	1 \ 91	14 \ 77	2 \ 90
Commerce	10	16	14	14	12	13	13	12
Defense	16	20	25	23	19.5	20.5	17	15.5
Education	13	19.5	16	17	5\ 35	2 \ 90	3 \ 30	35
Energy	0	16	133	211	75	4 \ 985	10 \ 152	5 \ 106
Homeland Sec.						15 \ 155	8 \ 84	16 \ 61
HUD	22	53	43	27\ 266	15\ 59	11 \ 62	21 \ 95	21 \ 65
Interior	18	19	18	13\ 157	10\ 58	13 \ 177	15 \ 834	2 \ 43
Justice	1 \ 40	1\ 228	1\ 78	1\ 137	3\ 49	1 \ 71	1 \ 137	2 \ 139
Labor	10	10	13	13	1\ 25	2 \ 25	2 \ 30	6 \ 28
State	333	48	37	157	351	8	6	14
Transportation	14	16	14	8	8	14	1 \ 68	1 \ 30
Treasury	13	11	11	2	4\ 17	3 \ 32	2 \ 10	2 \ 86
AID	0	10	45	31	52	42	54	55
CIA	0	7	7	7	7	8	7	7
CPSC	7	7	7	7	7	6	6	6
EEOC	15.5	18	15	19	19	20	18	18
EPA	16	14	19	17\ 36	17\ 113	16 \ 120	15 \ 27	13 \ 32
GSA	NR	20	0	14	0	0	0	0
NARA	29	53	33	140	7	31	35	13.5
NASA	17	15	24	19	19	6 \ 135	18	19
NLRB	10	16	13.5	10	11.5	9	9	9
NRC	15	17	19	17	14	13	11	12
NSF	10	12	13.5	13.17	10.39	14	20	14
SEC	7	10	11	9	16	152	30	26
SBA	12	8	3	2	1	2	5	7

Missed Response Deadline NR=Not Reported

Agencies are required by the FOIA to respond to all requests within 20 working days. Those that reported a median response time beyond the 20 days are highlighted. If an agency reported performance of component units but did not report agency totals, we show the lowest and highest wait times reported. Deadline performance is based on the latter.

In 1998, five agencies reported that they, or their component agencies, had exceeded the statutory deadline in responding to simple FOIA requests at least half of the time. In 2005, 13 of the 26 agencies said they failed to meet the standard set by law.

Median Days Response Wait Time, Complex Requests, 1998 to 2005

Department/ Agency	1998	1999	2000	2001	2002	2003	2004	2005
Agriculture	268	20	45	49	9\ 905	4 \ 467	54 \ 800	12 \ 1,277
Commerce	30	30	30	54	45	30	41	40
Defense	39	66	69	84	57.5	64	59	85
Education	30	27	51.15	44.67	7\ 180	9 \ 165	2 \ 134	66
Energy	184.1	55	531	1788	238	13 \ 2143	18 \ 916	10 \ 170
Homeland Sec.	Not an agency until 2003					6 \ 240	5 \ 111	3 \ 242
HUD	0	0	0	67	34\ 83	95	30 \ 161	35 \ 160
Interior	0	0	NR	0	0	0	56 \ 90	28 \ 89
Justice	1 \ 292	8\ 1148	12\ 2097	16\ 1311	13\ 621	8 \ 471	15 \ 636	12 \ 863
Labor	25	25	43	39	7\ 49	15 \ 40	18 \ 60	14 \ 60
State	0	308	694	742	431	671	209	142
Transportation	40	45	39	23	39	52	23 \ 135	20 \ 134
Treasury	97	237	19	232	5.5\ 383	6 \ 176	4 \ 172	3 \ 251
AID	36	70	NR	0	0	0	0	0
CIA	440	187	176	86	83	60	63	68
CPSC	30	30	30	27	27	20	25	35
EEOC	0	0	0	0	0	0	0	0
EPA	20 \ 27	25\ 55	31	24\ 333	31\ 123	9 \ 182	19 \ 353	4 \ 166
GSA	NR	0	14	0	14	14	14	14
NARA	0	267	28.5	541	20	312	354	252.4
NASA	27	29	38	45	29	8 \ 50	33	49
NLRB	0	0	0	0	0	0	0	0
NRC	15	75	25.5	20	25	35	47	75
NSF	0	0	0	0	0	0	0	0
SEC	151	141	127	82	137	24	202	410
SBA	0	0	0	0	0	0	0	0

Missed Response Deadline

NR=Not Reported

Agencies are required by the FOIA to respond to all requests within 20 working days. Those that reported a median response time beyond the 20 days are highlighted. If an agency reported performance of component units but did not report agency totals, we show the lowest and highest wait times reported. Deadline performance is based on the latter.

Some agencies do not use multi-track processing and record all requests as "Simple."

Only one agency, GSA, has been able to consistently meet the statutory deadline for FOIA responses to complex requests.

Full and Partial Grants

The percent of requests fully or partially granted dropped from 69% of those processed in 1998 to 63% in 2005. The agencies granted 92,280 fewer full grants but more partial grants, with the result that overall, 52,398 fewer requesters got any of the information sought.

- The State Department, the CIA and the Department of Justice granted a less than average percentage of requests in all eight years reported.
- The EPA got increasingly stingy with its records. In 1998, it provided information to 93% of those who filed a FOIA request. By 2005, that had dropped to 53% and in 2006 to 38%.
- The Securities and Exchange Commission granted 95% of the requests received in 2000 but only 43% the following year. In 2005, only 30% of the requesters got all or some of the information sought. The 2006 percentage fell further, to 27%.

Appeals

Over the 1998-2005 period, only one person in five who filed an appeal had any success, and in most of those cases it was only a partial victory.

- The Justice Department was consistently the least likely to grant an appeal, either in part or in full, averaging only 6% combined in the last three years. It granted only four percent in 2006.

FOIA Grants, Initial Requests and Appeals, 1998 to 2005

Intial Requests	1998	1999	2000	2001	2002	2003	2004	2005	% Ch. 98-05
Requests Processed	520,789	534,924	604,801	484,545	515,860	531,688	524,909	480,306	-8%
Full Grants	290,915	295,246	331,814	278,513	272,765	253,109	234,438	198,635	-32%
Partial Grants	66,302	70,430	72,418	76,267	86,353	108,375	116,544	106,184	60%
Total Full/Partial	357,217	365,676	404,232	354,780	359,118	361,484	350,982	304,819	-15%
% Granted	69%	68%	67%	73%	70%	68%	67%	63%	

Appeals	1998	1999	2000	2001	2002	2003	2004	2005	% Ch. 98-05
Appeals Processed	7,106	8,445	8,344	7,538	7,619	8,229	7,325	6,669	-6%
Full Grants	438	359	274	398	373	335	283	299	-32%
Partial Grants	1,138	1,476	1,158	897	1,096	826	947	938	-18%
Total Full/Partial	1,576	1,835	1,432	1,295	1,469	1,161	1,230	1,237	-22%
% Granted	22%	22%	17%	17%	19%	14%	17%	19%	

The number of requests processed annually declined by 40,483 over the eight years. There was an even greater decline in the number of requests granted. The percent of requests fully or partially granted dropped to 63 percent; in raw

Initial Requests Granted, All or in-Part, 1998 to 2005

	1998	1999	2000	2001	2002	2003	2004	2005
Agriculture	98%	97%	81%	96%	94%	93%	94%	94%
Commerce	69%	63%	69%	69%	60%	61%	60%	52%
Defense	71%	71%	71%	70%	67%	65%	64%	66%
Education	87%	84%	81%	83%	83%	79%	80%	69%
Energy	66%	75%	71%	84%	75%	73%	76%	89%
Homeland Sec	*Department did not exist until 2003.*					72%	73%	61%
HUD	88%	68%	65%	71%	50%	75%	61%	56%
Interior	77%	76%	72%	68%	68%	67%	63%	78%
Justice	49%	51%	53%	65%	66%	47%	49%	50%
Labor	44%	66%	63%	71%	66%	71%	68%	68%
State	53%	53%	54%	39%	31%	46%	44%	35%
Transportation	63%	74%	67%	67%	63%	59%	61%	63%
Treasury	69%	58%	58%	38%	54%	51%	52%	53%
AID	73%	72%	67%	64%	55%	63%	53%	65%
CIA	68%	57%	53%	49%	46%	49%	50%	45%
CPSC	97%	94%	94%	97%	94%	97%	96%	91%
EEOC	85%	82%	79%	79%	79%	82%	77%	75%
EPA	93%	103%	73%	69%	50%	59%	61%	53%
GSA	NR	67%	608%	85%	79%	80%	81%	77%
NARA	94%	96%	10%	89%	93%	24%	11%	6%
NASA	80%	77%	295%	69%	75%	68%	62%	62%
NLRB	90%	91%	13%	90%	86%	86%	85%	84%
NRC	73%	65%	41%	65%	67%	70%	66%	60%
NSF	76%	72%	518%	79%	82%	84%	85%	85%
SEC	41%	43%	95%	42%	30%	31%	34%	30%
SBA	94%	86%	82%	80%	80%	79%	13%	90%
Average	69%	68%	67%	73%	70%	68%	67%	63%

Below Average

NR= Not reported

The State Department, the CIA and the Department of Justice granted a less than average percentage of requests in all of the years reported. The Securities and Exchange Commission had a better grant rate than average only once in the eight years.

Full Grants by Department and Agency, 1998 to 2005

	1998	1999	2000	2001	2002	2003	2004	2005
Agriculture	84,144	75,348	111,263	75,811	70,965	61,092	55,465	46,352
Commerce	1,332	1,022	1,189	1,181	855	875	950	652
Defense	65,164	57,221	56,836	44,531	40,458	37,802	37,914	36,587
Education	1,144	1,145	1,034	949	1,079	1,137	1,007	806
Energy	1,183	1,365	1,546	1,790	2,227	1,400	1,590	3,126
Homeland Sec	*Department did not exist until 2003.*					63,403	49,835	28,631
HUD	2,631	1,839	1,412	1,855	1,686	1,613	1,824	1,165
Interior	3,225	3,626	2,837	2,578	2,212	2,117	1,809	2,145
Justice	65,135	82,582	92,134	94,058	81,426	17,712	19,186	18,539
Labor	5,556	8,519	8,533	6,969	5,514	7,282	7,378	8,938
State	650	1,203	850	572	634	1,086	837	437
Transportation	8,918	12,670	10,670	10,536	8,803	4,276	4,435	3,695
Treasury	1,052	640	696	147	21,144	27,094	30,114	25,451
AID	117	109	87	78	77	95	51	70
CIA	3,188	2,503	1,084	502	391	422	427	334
CPSC	12,586	12,261	11,682	10,483	8,561	7,725	5,755	4,447
EEOC	3,623	3,011	1,936	1,808	1,335	1,001	1,109	1,191
EPA	16,718	16,271	10,178	9,319	9,080	7,925	7,540	5,385
GSA	NR	775	945	1,125	945	905	823	1,014
NARA	5,423	4,778	8,386	6,638	8,141	1,075	476	434
NASA	1,156	753	676	643	693	793	579	469
NLRB	5,342	4,833	4,418	4,206	4,304	4,016	3,980	3,560
NRC	232	162	171	149	175	179	155	108
NSF	69	46	64	67	51	43	36	29
SEC	889	823	893	658	522	765	1,090	1,898
SBA	1,438	1,741	2,294	1,860	1,487	1,276	73	3,172
Total	290,915	295,246	331,814	278,513	272,765	253,109	234,438	198,635

NR= Not reported

Partial Grants, 1998 to 2005

	1998	1999	2000	2001	2002	2003	2004	2005
Agriculture	1,908	1,909	2,043	3,750	2,339	2,447	1,953	2,277
Commerce	240	180	200	367	380	327	277	296
Defense	9,998	11,742	11,551	11,371	11,133	10,276	11,779	15,307
Education	319	298	331	342	344	325	659	732
Energy	355	428	328	445	277	342	258	269
Homeland Sec	*Department did not exist until 2003.*					52,726	60,612	48,564
HUD	313	549	473	447	384	486	587	485
Interior	647	629	761	798	764	995	854	2,873
Justice	31,036	31,231	32,010	32,325	40,571	8,144	8,495	7,066
Labor	2,179	4,784	5,591	7,104	6,442	7,661	7,551	6,959
State	572	817	822	728	818	1,581	1,370	905
Transportation	2,047	2,340	2,302	2,493	2,171	1,965	2,170	2,180
Treasury	181	215	234	375	4,622	3,502	3,413	3,366
AID	76	75	65	54	45	55	62	58
CIA	1,652	1,029	1,287	1,306	999	1,178	1,242	1,051
CPSC	470	477	704	386	531	396	385	454
EEOC	11,372	9,945	10,830	10,958	11,853	13,347	12,384	11,018
EPA	746	847	628	588	603	564	635	518
GSA	NR	251	169	173	169	180	131	184
NARA	157	503	285	268	48	92	110	101
NASA	534	533	457	560	592	485	390	367
NLRB	180	616	551	560	455	478	523	386
NRC	93	86	90	100	110	125	101	99
NSF	92	76	61	123	157	151	226	197
SEC	416	466	407	395	333	324	209	294
SBA	719	404	238	251	213	223	168	178
Total	66,302	70,430	72,418	76,267	86,353	108,375	116,544	106,184

NR= Not reported

Partial Grants of Appeals, 1998 to 2005

	1998	1999	2000	2001	2002	2003	2004	2005
Agriculture	51	47	42	77	48	49	47	54
Commerce	16	10	22	32	12	13	10	5
Defense	118	177	193	176	141	104	162	149
Education	1	3	1	2	2	0	9	7
Energy	36	36	24	34	17	1	4	5
Homeland Sec	*Department did not exist until 2003*					33	30	67
HUD	3	5	6	12	7	7	4	3
Interior	42	45	40	20	17	12	6	11
Justice	425	709	432	96	190	183	157	126
Labor	98	115	98	165	130	100	92	48
State	93	90	61	47	115	70	165	137
Transportation	32	37	32	34	22	23	12	24
Treasury	4	3	4	5	165	37	30	39
AID	4	1	0	0	2	3	1	0
CIA	37	39	33	36	29	38	45	59
CPSC	6	8	5	1	0	0	0	0
EEOC	129	88	106	115	151	87	91	135
EPA	8	1	18	15	13	31	9	24
GSA	4	15	8	1	8	6	1	4
NARA	1	20	13	2	2	2	1	5
NASA	5	3	5	5	6	4	8	2
NLRB	3	5	6	6	7	7	11	7
NRC	3	4	2	4	0	1	4	3
NSF	2	2	0	0	1	0	1	1
SEC	2	0	3	3	3	10	34	15
SBA	15	13	4	9	8	5	13	8
Total	1,138	1,476	1,158	897	1,096	826	947	938

Overall, the agencies granted an average 24 percent fewer partial appeals in each of the Bush Administration years than in the last three years of the Clinton Administration. The most pronounced decline was that of the Justice Department, which granted, on average, 47% fewer appeals each year. (Note: The transition fiscal year of 2001 is excluded from the comparison)

Appeals Granted in Full, 1998 to 2005

	1998	1999	2000	2001	2002	2003	2004	2005
Agriculture	38	41	28	51	49	44	36	29
Commerce	7	4	7	3	7	7	7	0
Defense	38	50	39	34	57	41	30	25
Education	2	3	4	3	0	0	1	3
Energy	4	6	1	1	0	1	0	0
Homeland Sec	*DHS did not exist until 2003*					7	6	38
HUD	3	2	2	0	1	0	3	2
Interior	87	12	6	125	66	62	32	52
Justice	115	131	104	58	81	89	33	13
Labor	48	30	9	26	10	11	16	10
State	20	12	11	6	11	6	9	11
Transportation	34	16	3	16	12	17	9	14
Treasury	1	0	1	1	30	12	9	14
AID	2	5	0	1	0	0	1	0
CIA	2	2	2	6	0	0	0	3
CPSC	0	0	0	0	0	2	0	0
EEOC	22	24	19	25	15	7	39	34
EPA	1	1	22	20	4	8	9	6
GSA	3	4	0	0	0	2	0	4
NARA	1	0	1	0	5	2	0	1
NASA	2	1	2	2	2	2	0	4
NLRB	3	1	3	4	5	3	2	3
NRC	3	1	3	4	3	2	0	4
NSF	0	0	0	0	0	0	2	0
SEC	1	9	4	10	14	6	39	28
SBA	1	4	3	2	1	4	0	1
Total	438	359	274	398	373	335	283	299

The Justice Department is the agency least likely to fully grant a requester's FOIA appeal. The odds of a Justice grant were 53 percent worse in the past four years than in the last three years of the Clinton Administration. An average of 54 appeals were granted in full in each of the past four years compared with an average of 116 from 1998 to 2000. Overall, agencies granted an aveverage of 10 percent fewer appeals-in-full. (Note: the transition fiscal year of 2001 is excluded in the comparison.)

Percent of Appeals Granted, All and in-Part, 1998 to 2005

	1998	1999	2000	2001	2002	2003	2004	2005
Agriculture	48%	43%	42%	45%	59%	53%	52%	51%
Commerce	41%	35%	29%	35%	24%	27%	25%	13%
Defense	14%	21%	22%	23%	21%	19%	21%	22%
Education	20%	25%	26%	33%	15%	0%	17%	26%
Energy	35%	51%	30%	40%	24%	4%	14%	11%
Homeland Sec	*Department did not exist until 2003.*					10%	5%	12%
HUD	18%	17%	15%	32%	14%	15%	16%	15%
Interior	62%	20%	17%	61%	50%	49%	57%	40%
Justice	15%	17%	11%	4%	8%	6%	6%	6%
Labor	32%	40%	31%	44%	44%	49%	35%	31%
State	63%	68%	58%	58%	68%	48%	59%	61%
Transportation	20%	24%	18%	24%	18%	31%	21%	28%
Treasury	38%	43%	56%	46%	19%	7%	8%	13%
AID	67%	46%	0%	20%	33%	100%	25%	0%
CIA	20%	16%	13%	22%	13%	16%	16%	27%
CPSC	14%	31%	22%	4%	0%	13%	0%	0%
EEOC	46%	30%	32%	33%	40%	27%	35%	49%
EPA	24%	6%	31%	47%	16%	26%	17%	27%
GSA	41%	59%	73%	13%	73%	57%	25%	62%
NARA	14%	80%	24%	5%	37%	36%	12%	21%
NASA	29%	40%	39%	39%	38%	30%	36%	27%
NLRB	15%	14%	25%	23%	28%	40%	28%	26%
NRC	35%	38%	42%	42%	20%	23%	33%	58%
NSF	67%	50%	0%	0%	14%	0%	50%	17%
SEC	11%	35%	23%	32%	31%	22%	36%	18%
SBA	53%	43%	22%	50%	45%	39%	46%	56%
Total Average	22%	22%	17%	17%	19%	14%	17%	19%
Below the Average								

Eight of the agencies have granted more appeals than the overall average in each of the years on record.

The Justice Department has ranked below the average in the percent of appeals granted in every year on record.

The Department of Homeland Security has been below average in each of the three years it has been operating.

The Cost of FOIA

The cost of processing FOIA requests rose $84 million, or 55 between 1998 and 2005, even though the number of requests actually processed decreased and the backlog increased.

- Costs at the Environmental Protection Agency more than doubled from $4.5 million to $9.4 million in 2005 even though the number of requests processed fell 41%, from 18,848 in 1998 to 11,108 in 2005. The cost for each request handled jumped from $239 to $851.
- The Defense Department spent $39 million in 1998 to process 106,191 requests. That's $368 for each request. In 2005, it spent almost $48 million but processed only 78,775 requests, or $608 for each one. In 2006, the cost per request reached $888 as processing costs hit $64 million.
- Interior spent $4 million in 1998 to process 5,002 requests, or $808 per request. In 2005, it handled 6,420 requests at $1,194 per request, a total cost of $ 7.7 million.
- Only two agencies showed a lower per request cost in 2005 than eight years earlier. However, the 2005 cost at the State Department, $2,565 per request, was still the third highest of all agencies. The SEC dropped its cost per request by $16 but at the expense of its backlog, which rose from 4% in 1998 to 225% in 2004, 131% in 2005, and 126% in 2006.

Costs and Fees, a Wide Gap

Requester fees are an insignificant means of recovering the costs of FOIA, a little over 1% of what the agencies spend. The gulf between costs and fees collected has grown deeper since 1998. Fees were 1.4% of the total processing costs in 1998; 1.2% in 2005. Costs rose 55% in the eight years; fees 29%.

The Escalating Cost Per FOIA Request

	Cost Per Request							
	1998	1999	2000	2001	2002	2003	2004	2005
Agriculture	$ 71	$ 83	$ 56	$ 255	$ 212	$ 130	$ 185	$ 190
Commerce	$ 405	$ 614	$ 612	$ 567	$ 669	$ 633	$ 675	$ 669
Defense	$ 368	$ 332	$ 365	$ 492	$ 514	$ 576	$ 606	$ 608
Education	$ 343	$ 317	$ 268	$ 251	$ 187	$ 271	$ 389	$ 479
Energy	$ 1,888	$ 1,526	$ 922	$ 927	$ 866	$ 1,302	$ 1,351	$ 1,049
HUD	$ 160	$ 167	$ 572	$ 820	$ 557	$ 134	$ 135	$ 225
Homeland Sec						$ 833	$ 502	$ 684
Interior	$ 806	$ 826	$ 1,016	$ 1,104	$ 1,424	$ 1,583	$ 1,719	$ 1,194
Justice	$ 253	$ 103	$ 279	$ 363	$ 419	$ 1,173	$ 959	$ 1,101
Labor	$ 248	$ 220	$ 231	$ 249	$ 652	$ 719	$ 670	$ 688
State	$ 5,438	$ 2,600	$ 3,784	$ 3,709	$ 2,999	$ 2,097	$ 2,550	$ 2,565
Transportation	$ 614	$ 346	$ 403	$ 459	$ 532	$ 609	$ 700	$ 782
Treasury	$ 208	$ 248	$ 203	$ 389	$ 215	$ 210	$ 210	$ 239
AID	$ 1,495	$ 1,654	$ 1,348	$ 1,582	$ 2,039	$ 1,901	$ 2,061	$ 2,335
CIA	$ 990	$ 1,269	$ 1,804	$ 2,063	$ 2,331	$ 2,337	$ 2,443	$ 2,685
CPSC	$ 121	$ 106	$ 107	$ 140	$ 167	$ 180	$ 254	$ 212
EEOC	$ 91	$ 99	$ 104	$ 112	$ 129	$ 109	$ 124	$ 122
EPA*	$ 239	$ 371	$ 511	$ 840	$ 501	$ 607	$ 840	$ 851
GSA	NR	NR	$ 572	$ 527	$ 572	$ 605	$ 740	$ 840
NARA	$ 164	$ 300	$ 143	$ 249	$ 175	$ 281	$ 273	$ 196
NASA	$ 273	$ 328	$ 406	$ 399	$ 409	$ 529	$ 984	$ 835
NLRB	$ 18	$ 20	$ 24	$ 36	$ 137	$ 157	$ 133	$ 166
NRC	$ 2,490	$ 3,536	$ 3,666	$ 3,217	$ 2,988	$ 2,940	$ 2,897	$ 2,947
NSF	$ 646	$ 825	$ 797	$ 710	$ 68	$ 745	$ 581	$ 805
SEC*	$ 533	$ 622	$ 1,069	$ 967	$ 1,016	$ 3,515	$ 670	$ 517
SBA	$ 113	$ 113	$ 110	$ 129	$ 168	$ 262	$ 391	$ 217
Average	$ 294	$ 220	$ 283	$ 416	$ 429	$ 444	$ 437	$ 494

The cost per request has risen 68 percent in the past eight years. Only two agencies show a lower cost in 2005 than in 1998, and one of those, State, still has the third highest overall cost. The other, the SEC, has shown significantly higher costs in most of the eight years.

Total Processing Costs by Department and Agency, 1998 to 2005

	1998	1999	2000	2001	2002	2003	2004	2005
Agriculture	$ 6,292,615	$ 6,626,448	$ 7,823,328	$ 21,192,010	$ 16,515,516	$ 8,833,920	$ 11,324,192	$ 9,862,348
Commerce	$ 923,904	$ 1,166,872	$ 1,240,553	$ 1,266,595	$ 1,380,586	$ 1,253,641	$ 1,373,355	$ 1,227,066
Defense	$ 39,086,265	$ 32,277,433	$ 35,243,410	$ 39,497,106	$ 39,528,693	$ 42,536,165	$ 46,783,592	$ 47,876,973
Education	$ 576,613	$ 541,989	$ 454,379	$ 389,658	$ 321,159	$ 498,339	$ 809,158	$ 1,063,860
Energy	$ 4,369,353	$ 3,641,888	$ 2,442,974	$ 2,478,599	$ 2,874,379	$ 3,086,455	$ 3,297,469	$ 4,020,094
Homeland Sec	*Department did not exist until 2003.*					$ 21,514,060	$ 20,585,515	$ 28,343,072
HUD	$ 451,688	$ 586,627	$ 1,645,000	$ 2,664,635	$ 2,322,395	$ 2,322,395	$ 1,998,632	$ 1,998,632
Interior	$ 4,030,094	$ 4,630,260	$ 5,044,570	$ 5,475,634	$ 6,233,400	$ 7,406,231	$ 7,252,721	$ 7,666,403
Justice	$ 49,314,198	$ 23,018,806	$ 65,661,649	$ 70,599,889	$ 77,448,577	$ 64,039,375	$ 54,531,828	$ 56,610,612
Labor	$ 4,350,000	$ 4,450,000	$ 5,200,000	$ 4,950,000	$ 11,865,900	$ 15,242,160	$ 14,645,397	$ 16,027,360
State	$ 12,600,000	$ 9,943,435	$ 11,616,361	$ 12,347,045	$ 13,904,439	$ 12,107,000	$ 12,656,689	$ 9,926,300
Transportation	$ 10,682,433	$ 7,003,081	$ 7,778,682	$ 8,968,024	$ 9,331,748	$ 6,413,295	$ 7,629,310	$ 7,334,051
Treasury	$ 369,381	$ 362,605	$ 324,465	$ 538,362	$ 10,296,453	$ 12,586,700	$ 13,577,037	$ 12,920,599
AID	$ 393,200	$ 423,400	$ 307,400	$ 327,400	$ 452,600	$ 456,200	$ 437,000	$ 460,000
CIA	$ 7,100,000	$ 7,900,000	$ 8,100,000	$ 7,600,000	$ 7,100,000	$ 7,600,000	$ 8,150,000	$ 8,350,000
CPSC	$ 1,626,500	$ 1,443,892	$ 1,407,044	$ 1,580,413	$ 1,611,755	$ 1,513,924	$ 1,627,309	$ 1,142,756
EEOC	$ 1,602,254	$ 1,555,180	$ 1,674,183	$ 1,802,423	$ 2,158,160	$ 1,910,866	$ 2,162,500	$ 1,976,105
EPA	$ 4,500,000	$ 6,203,195	$ 7,582,116	$ 12,005,482	$ 9,657,646	$ 8,773,710	$ 11,215,170	$ 9,449,572
GSA	NR	NR	$ 805,000	$ 800,000	$ 805,000	$ 825,000	$ 875,000	$ 1,311,000
NARA	$ 970,540	$ 1,642,970	$ 1,336,087	$ 1,924,522	$ 1,544,160	$ 1,354,911	$ 1,425,774	$ 1,741,987
NASA	$ 578,088	$ 547,545	$ 671,027	$ 696,088	$ 703,986	$ 993,669	$ 1,541,496	$ 1,128,410
NLRB	$ 112,072	$ 120,540	$ 128,859	$ 191,110	$ 759,923	$ 824,963	$ 706,148	$ 779,187
NRC	$ 1,115,402	$ 1,350,659	$ 1,381,965	$ 1,235,303	$ 1,273,026	$ 1,275,998	$ 1,127,003	$ 1,016,677
NSF	$ 137,620	$ 139,465	$ 146,710	$ 171,753	$ 17,396	$ 172,137	$ 179,567	$ 214,166
SEC	$ 1,700,621	$ 1,859,700	$ 3,052,213	$ 2,443,098	$ 2,933,058	$ 12,237,000	$ 2,564,726	$ 3,835,658
SBA	$ 259,922	$ 281,428	$ 338,812	$ 341,902	$ 356,578	$ 499,774	$ 753,750	$ 812,729
Total	$ 153,142,763	$ 117,717,418	$ 171,406,786	$ 201,487,051	$ 221,396,534	$ 236,277,888	$ 229,230,338	$ 237,095,617

NR= Not Reported

Costs and Fees, a Wide Gap, 1998 to 2005

	Total Cost	Total Fees	% of Total Cost
1998	$ 153,142,763	$ 2,186,000	1.4%
1999	$ 117,717,418	$ 2,503,230	2.1%
2000	$ 171,406,786	$ 2,363,152	1.4%
2001	$ 201,487,051	$ 2,774,094	1.4%
2002	$ 221,396,534	$ 2,788,451	1.3%
2003	$ 236,277,888	$ 3,147,123	1.3%
2004	$ 229,230,338	$ 3,065,809	1.3%
2005	$ 237,095,617	$ 2,795,643	1.2%

Costs have risen 55 percent since 1998. Fees have increased 29 percent.

FOIA Fees Collected by Department, Agency, 1998 to 2005

Depts/Agencies	1998	1999	2000	2001	2002	2003	2004	2005
Agriculture	$ 140,913	$ 132,718	$ 117,530	$ 109,332	$ 124,190	$ 140,461	$ 134,229	$ 104,408
Commerce	$ 33,939	$ 38,119	$ 15,163	$ 55,560	$ 48,867	$ 42,758	$ 36,271	$ 26,540
Defense	$ 689,155	$ 834,816	$ 666,363	$ 652,516	$ 522,301	$ 518,815	$ 537,741	$ 470,829
Education	$ 31,518	$ 30,955	$ 22,409	$ 13,057	$ 9,691	$ 15,538	$ 13,732	$ 32,825
Energy	$ 6,414	$ 20,956	$ 57,079	$ 82,365	$ 13,786	$ 18,906	$ 57,027	$ 25,588
Homeland Sec	*Department did not exist until 2003.*					$ 270,384	$ 320,154	$ 280,663
HUD	$ 27,203	$ 7,715	$ 2,067	$ 32,649	$ 26,588	$ 26,588	$ 54,614	$ 40,696
Interior	$ 95,672	$ 105,666	$ 123,985	$ 102,726	$ 70,474	$ 109,749	$ 177,734	$ 134,114
Justice	$ 82,057	$ 89,432	$ 126,339	$ 179,086	$ 239,040	$ 125,915	$ 108,013	$ 95,855
Labor	$ 187,537	$ 199,766	$ 227,731	$ 218,802	$ 207,365	$ 225,232	$ 198,246	$ 180,690
State	$ 11,567	$ 5,822	$ 5,822	$ 6,352	$ 18,889	$ 16,443	$ 30,767	$ 15,218
Transportation	$ 113,942	$ 266,540	$ 328,356	$ 366,592	$ 284,214	$ 215,818	$ 214,496	$ 216,269
Treasury	$ 5,095	$ 3,099	$ 2,789	$ 3,479	$ 513,309	$ 422,773	$ 472,323	$ 520,021
AID	$ 443	$ 7,000	$ 2,470	$ 780	$ 2,466	$ 4,400	$ 2,340	$ 5,500
CIA	$ 1,269	$ 1,395	$ 1,759	$ 1,012	$ 1,228	$ 1,250	$ 1,870	$ 1,258
CPSC	$ 17,080	$ 23,418	$ 17,002	$ 10,642	$ 4,187	$ 2,511	$ 2,494	$ 5,119
EEOC	$ 49,801	$ 50,342	$ 35,962	$ 262,201	$ 116,154	$ 181,225	$ 69,609	$ 27,379
EPA	$ 524,841	$ 457,534	$ 394,970	$ 440,064	$ 341,325	$ 324,203	$ 350,871	$ 325,812
GSA	NR	$ 30,655	$ 29,247	$ 32,552	$ 29,247	$ 23,521	$ 20,147	$ 58,876
NARA	$ 327	0	0	$ 2,030	0	$ 2,482	$ 3,588	0
NASA	$ 24,240	$ 33,003	$ 34,578	$ 44,428	$ 41,459	$ 24,713	$ 27,658	$ 21,362
NLRB	$ 81,856	$ 81,311	$ 91,270	$ 83,588	$ 94,423	$ 86,381	$ 95,903	$ 82,383
NRC	$ 25,170	$ 34,513	$ 23,059	$ 21,036	$ 40,559	$ 28,140	$ 38,225	$ 43,081
NSF	$ 3,680	$ 6,462	$ 1,491	$ 1,227	$ 746	$ 974	$ 194	$ 1,475
SEC	$ 23,885	$ 30,534	$ 24,795	$ 31,156	$ 21,304	$ 306,098	$ 83,059	$ 63,431
SBA	$ 8,397	$ 11,458	$ 10,917	$ 20,862	$ 16,640	$ 11,847	$ 14,503	$ 16,250
Total	$ 2,186,000	$ 2,503,230	$ 2,363,152	$ 2,774,094	$ 2,788,451	$ 3,147,123	$ 3,065,809	$ 2,795,643

NR= Not reported

Only one of the component agencies of the Treasury Department reported FOIA data prior to 2002.

The SEC provided no explanation for the reported 2003 spike. If accurate, it means the agency charged 12 times as much per request in 2003 as it did in 2002 and 4.5 times as much as it charged per request in 2004.

The Justice Department decrease in 2003 reflects the transfer of INS to Homeland Security.

Expedited Requests, 2002 to 2005

Federal reporting began in 1998 but agencies didn't begin to list total expedited requests until 2002. Some still do not. GSA, NLRB and SBA did not report any expedited requests from 2002 to 2005. The numbers reported indicate agencies on average grant less than 50% of expedited requests received. In calculating the average of expedited requests granted, shown below, we exculded instances where the agency did not report both the total expedited requests recevied and the total processed.

2002	2003	2004	2005
25%	56%	51%	41%

Even when the answer was "yes", the reported numbers show, "expedited" didn't necessarily mean "fast."

- Some agencies showed median response times as high as 136, 185 and 195 working days.
- Defense showed a steady increase in expedited grants, from 50% in 2002 to 78% in 2005.
- Treasury went from an 87% grant rate in 2003 to 17% in 2005.
- The State Department approved only 9% in 2002 and just 4% in 2005.

Department/	2002			2003			2004			2005		
Agency	T	P	%	T	P	%	T	P	%	T	P	%
Agriculture	NR	797		1526	840	55%	1840	526	29%	940	325	35%
Commerce	0	0		0	0		6	6	100%	2	2	100%
Defense	1238	677	55%	1358	817	60%	1057	841	80%	528	411	78%
Education	25	25	100%	76	76	100%	74	74	100%	NR	16	
Energy	66	46	70%	8	4	50%	40	40	100%	54	19	35%
Homeland Sec	*	*		194	187	96%	NR	692		NR	1,016	
HUD	71	50	70%	NR	150		180	60	33%	NR	85	
Interior	53	46	87%	79	24	30%	133	63	47%	54	25	46%
Justice	2677	120	4%	290	123	42%	257	134	52%	536	177	33%
Labor	NR	529		594	406	68%	NR	130		NR	174	
State	117	10	9%	177	13	7%	95	8	8%	170	7	4%
Transportation	NR	162		400	103	26%	180	59	33%	208	74	36%
Treasury	108	91	84%	77	67	87%	12	3	25%	6	1	17%
AID	0	0		2	2	100%	3	3	100%	12	NR	
CIA	0	0		0	0		18	1	6%	53	0	0%
CPSC	0	0		0	0		0	0		0	0	
EEOC	NR	343		NR	292		324	321	99%	485	215	44%
EPA	50	14	28%	40	4	10%	39	21	54%	NR	5	
NARA	0	0		0	0		0	0		2	0	0%
NASA	NR	4		51	51	100%	NR	44		5	3	60%
NRC	18	9	50%	23	10	43%	29	5	17%	34	14	41%
NSF	0	0		1	0	0%	2	0	0%	0	0	
SEC	5	4	80%	11	11	100%	10	10	100%	1	1	100%

T= Total Requests P= Number Processed %= Percent Processed NR= Not Reported

***The Department of Homeland Security did not exist until 2003.**

The Use of Exemptions

As agencies moved to withhold increasing amounts of information after 9/11, they turned most often to those exemptions based on administrative rules, law enforcement and personal privacy for support.

- The use of Exemption 6, allowing agencies to withhold information because release would violate someone's personal privacy, surged in the early Bush Administration years before falling back in 2005 to a level almost double that in 1998.
- The use of the combined law enforcement exemptions rose 31 percent overall in the eight years since record keeping began. The most dramatic surge was in the use of 7e, which protects information on investigations and procedures. It was cited 327% more frequently in 2005 than in 1998.
- Agency attention was focused on Exemptions 2, 4,and 5 by former Attorney General John Ashcroft and then White House Chief of Staff Andrew Card in fiscal 2002. They urged agencies to use those exemptions to safeguard sensitive security information. Exemptions 2 and 5, providing exclusions for agency rules and internal memorandums, were cited 279% and 83% more frequently in 2005 than back in 2001. Exemption 4, covering proprietary and trade secret information, was cited 27 percent more often.

Use of Exemptions in Denying Requests, 1998 to 2005

	Exemption Cited										
	1	3	6	7a	7b	7c	7d	7e	7f	8	9
1998	4,638	6,891	24,645	11,988	340	27,350	14,672	4,484	2,084	78	7
1999	4,343	6,341	25,302	10,635	216	27,565	11,223	4,580	1,686	77	19
2000	4,599	7,197	60,841	16,384	136	49,638	12,979	7,487	2,157	5	8
2001	3,598	6,386	94,882	12,269	115	88,513	10,276	11,762	1,608	52	6
2002	2,954	8,598	187,820	16,918	135	196,536	11,775	16,446	1,686	91	5
2003	3,607	11,088	55,517	12,284	123	48,008	8,476	11,902	1,658	80	5
2004	3,419	8,154	60,349	10,124	883	55,378	8,351	12,835	2,016	108	188
2005	2,940	9,366	48,722	8,037	427	44,887	6,677	19,161	1,039	102	11
Total	30,098	64,021	558,078	98,639	2,375	537,875	84,429	88,657	13,934	593	249
Change 1998-2005	-37%	36%	98%	-33%	26%	64%	-54%	327%	-50%	31%	57%

	Exemption Cited		
	2	4	5
1998	10,166	6,059	33,654
1999	6,813	5,880	27,735
2000	9,203	6,368	32,945
2001	10,849	7,096	32,344
2002	13,485	8,417	43,253
2003	10,386	9,293	37,147
2004	30,177	9,372	52,779
2005	41,211	9,185	55,205
Total	132,290	61,670	315,062
Change 1998-2005	305%	52%	64%

The Nine Exemptions

1 National Security
2 Internal Agency Rules
3 Statutory
4 Proprietary Information, Trade Secrets
5 Internal Agency Memorandum
6 Personal Privacy
7 Law Enforcement Records
8 Bank Reports
9 Oil and Gas Well Data

In their memorandums to agencies on Oct. 12, 2001 and March 19, 2002 former Attorney General John Ashcroft and then White House Chief of Staff Andrew Card suggested agencies make greater use of Exemptions 2, 4 and 5 in making non-disclosure decisions on sensitive information. Those derectives would reflected beginning in 2002.

Other Reasons for Nondisclosure, 1998 to 2005

In reporting on the disposition of requests, agencies often cite "Other" to explain a non-disclosure decision not based on one of the exemptions. Here's a look at how often those reasons were cited by the 26 agencies. All categories cited increased in usage except "records not reasonably described." The total number of requests rejected for "other reasons" was 107% greater in 2005 than 1998.

- The greatest increase, 754%, was in the citation of "not a proper request."
- "Duplicate requests" was cited 554% more often in 2005 than in 1998.

	1998	1999	2000	2001	2002	2003	2004	2005
No Records	35,217	45,115	52,881	50,915	52,090	63,819	70,001	70,809
Referrals	15,527	18,189	20,334	18,168	16,835	19,973	27,107	22,671
Request Withdrawn	6,526	8,744	8,095	7,947	14,248	10,373	9,040	8,827
Fee Related Reason	2,084	4,687	2,927	3,827	4,941	4,411	5,087	7,367
Not Reasonably Described	5,226	8,850	5,407	3,097	3,295	12,735	4,506	4,057
Not a Proper Request	2,476	10,919	10,283	13,291	23,101	16,188	21,760	20,958
Not an Agency Record	2,585	7,121	4,169	4,010	4,397	3,468	4,503	3,219
Duplicate Request	2,706	7,861	9,098	10,327	13,279	12,804	5,705	17,691
Other	6,508	53,977	53,782	7,031	12,227	13,278	10,864	7,801
TOTAL	78,855	165,463	166,986	118,613	144,413	157,049	158,573	163,400

Year to Year Change in Other Reasons for Nondisclosure, 1998 to 2005

	1998 to 1999	1999 to 2000	2000 to 2001	2001 to 2002	2002 to 2003	2003 to 2004	2004 to 2005	*1998 to 2005*	*2001 to 2005*
No Records	28%	17%	-4%	2%	23%	10%	1%	*101%*	*39%*
Referrals	17%	12%	-11%	-7%	19%	36%	-16%	*46%*	*25%*
Request Withdrawn	34%	-7%	-2%	79%	-27%	-13%	-2%	*35%*	*11%*
Fee Related Reason	125%	-38%	31%	29%	-11%	15%	45%	*254%*	*93%*
Not Reasonably Described	69%	-39%	-43%	6%	286%	-65%	-10%	*-22%*	*31%*
Not a Proper Request	341%	-6%	29%	74%	-30%	34%	-4%	*746%*	*58%*
Not an Agency Record	175%	-41%	-4%	10%	-21%	30%	-29%	*25%*	*-20%*
Duplicate Request	191%	16%	14%	29%	-4%	-55%	210%	*554%*	*71%*
Other	729%	0%	-87%	74%	9%	-18%	-28%	*20%*	*11%*
TOTAL	110%	1%	-29%	22%	9%	1%	3%	*107%*	*38%*

Mr. HOYT. It is my understanding that the coalition has worked with this subcommittee before and would be glad to——

Mr. TURNER. I would love to see that.

Mr. HOYT. Yes.

Mr. TURNER. Ms. Fredrickson, to go back to my other comments, partisan bickering is a tone in Washington, DC, that absolutely drives me crazy, and your statements concerning the administration I think really diminish the overall substance of the academic contribution that you can make to the issue of FOIA, so I have a pretty straightforward question for you. Was there anything that was done during the Clinton administration or the Carter administration with respect to withholding information that you thought was inappropriate or improper?

Ms. FREDRICKSON. You know, I appreciate your question. We are a nonpartisan organization, and we——

Mr. TURNER. Well, your comments didn't sound nonpartisan. That is why I ask you that question.

Ms. FREDRICKSON. Well, I think one of the roles of the Freedom of Information Act and the role of Congress as an oversight body is to ensure that our Government is kept to that straight and narrow, and, unfortunately, we have seen a lot of deviation from that in the past many years.

Mr. TURNER. So your answer is that there is nothing you found in those, the Clinton administration or the Carter administration?

Ms. FREDRICKSON. My answer is I have been with the ACLU only in the past year and a half, and I was not there during the Clinton and Carter administrations.

Mr. TURNER. Are you unaware of any things that occurred in the Clinton and Carter——

Ms. FREDRICKSON. However, I am sure that we had many concerns about things that happened in the Clinton and Carter administration.

Mr. TURNER. Excellent.

Ms. FREDRICKSON. I would be happy to provide to the committee any information about prior FOIA requests that we had.

Mr. TURNER. Thank you.

Ms. FREDRICKSON. But I can assure you that we did.

Mr. TURNER. You would serve your purposes in advocating on this bill and on this subject matter to include those and not focus on criticism of the administration.

Ms. Fuchs, obviously one of the issues that we have with FOIA in both the policy substance of wanting to have this accountability, because it serves us all—no one person can look up and down an organization and ensure its quality or its performance by having the broad Freedom of Information empower everyone to be able to help the Government do that, but there are those that don't acknowledge sometimes that what they are doing is a business, and that the costs that the business is incurring as a result of their interests also result in profits to their operations. Can you speak a minute about the issue of those that might be looking for fee abatement or attorney fee waivers where, in fact, their processes are those that result in profits to their organization, and not, as Ms. Fredrickson contended, her being a nonprofit?

Ms. FUCHS. Well, my understanding is that the largest users of the Freedom of Information Act are commercial interests, and they do pay fees for search review and for duplication of their FOIA requests, so they repay the Government for the cost of that.

The other categories of FOIA requestors, you have a large category of private individuals, the people who make the requests to the VA for their veterans records or to the Social Security Administration for their Social Security records. Those requests are handled at a very low cost. They are entitled to 2 hours of free search time, 100 pages free. They know the name of the person they are giving it to. They are giving it to that person. There is no privacy issues. They don't incur very high costs.

The other two categories are basically news media and the education and scientific institutions. Now, Congress, when it enacted the fee provisions, made the determination that news media are not commercial requestors, and the reason Congress made that determination is because the news media serve the main core purpose of FOIA, because what they do is they disseminate the information to the public and give the public the information they need to know. So there are costs that are incurred, and those costs are not generally charged to the news media, with the exception of duplication fees.

Mr. TURNER. Mr. Chairman, I want to thank you again for holding this hearing, because, as I stated, this is a very important act, and it is very important because it ensures performance of Government on all levels on behalf of all of us. I know that in a hearing like this that one of the things that we have to look at are the problems with it, but I do think that before we just move on from looking at the problems we do have to acknowledge that I am sure that there are information requests that show where there is no conspiracy, where there are people that are doing a really good job, and that there are people every day who show up in the Government and execute their duties in a way that makes us all proud, even though we look at the problems today.

Mr. CLAY. Thank you, Mr. Turner. We know that the law has been in existence since 1966, and I am sure they have had to iron out some difficulties with the law over the years, and before either one of us got here.

Mr. TURNER. Absolutely.

Mr. CLAY. I will turn now to Mr. Hodes.

You are recognized for 5 minutes.

Mr. HODES. Thank you, Mr. Chairman.

Ms. Fredrickson, thank you for your testimony, which I found very enlightening. I would say that I don't believe that open government is a partisan issue. It is an American issue. Democracy requires open government. It doesn't matter whether or not there is a Republican administration or a Democratic administration, so I appreciate the perspective of your organization on this.

In her testimony, which I know you were present for, Ms. Pustay from DOJ told us that the Ashcroft memo "changed the tone" but didn't narrow the application of any of the standards of FOIA. Do you agree? And, if not, why not?

Ms. FREDRICKSON. Well, I think there is actually evidence to the contrary. I believe GAO, itself, did a study that reviewed with

FOIA officers throughout the Government whether, in fact, the Ashcroft memo had affected their interpretation of how to comply with FOIA. I believe that there was a large percentage of those FOIA officers—and I think Meredith probably has the number in her head, but I think it was a third of the FOIA officers said yes, it would actually make them much less inclined to provide the information to the person requesting. So there has definitely been an impact.

Mr. HODES. Do you believe that Congress should take steps to reverse the impact of the Ashcroft memo on the way DOJ is dealing with FOIA?

Ms. FREDRICKSON. Yes, we certainly do. The Reno Doctrine that preceded the Ashcroft memo, with a presumption toward disclosure, we think is much more consonant with what congressional intent was behind the Freedom of Information Act. There are exemptions already stated in FOIA that gives the Government the opportunity to protect important information, and there shouldn't be yet another step beyond that to which the Government can go to keep critical information out of the hands of the public.

Mr. HODES. To the panel, in general, I ask the following. I note that both the suggestion for a FOIA ombudsman and suggestion for tracking as critical components of the suggested reforms. It strikes me that if UPS can track packages, we should be able to track FOIA requests. Tell me, educate me, did anything in the 1996 e-FOIA provisions provide for a central repository and central tracking of FOIA requests by date, so that there was one place that we could go to track time, compliance, things like that?

Ms. FUCHS. No, there is nothing that requires a central tracking in the FOIA right now. Most agencies maintain FOIA logs. The agencies that have sophisticated logs have data bases and they are able to see where the FOIA request is. Some agencies have paper logs and you can request FOIA logs from agencies and see them filled out, date, name, etc. Some agencies have no logs.

Mr. HODES. So there is no single standard that applies across the Government as to how logs should be kept, how they should be maintained, how the data bases should be maintained for FOIA requests?

Ms. FUCHS. No.

Mr. HODES. Would that be helpful?

Mr. HOYT. Yes.

Ms. FUCHS. Yes.

Mr. HODES. Why would it be helpful?

Mr. HOYT. It would help open up the process, make the process more transparent so that two things: people with FOIA requests would be able to tell where they are, where they are moving through the process, and it puts heat on the people processing to, if they can hide behind a veil of I don't know where it is, it is much harder for you to get results.

Mr. HODES. Do you think entitlement to legal fees is enough of a sanction?

Mr. HOYT. No.

Mr. HODES. What else ought to be done?

Mr. HOYT. Well, in the Open Government Act that was reported out of the committee last year, it is my understanding that con-

tained another type of sanction, which is removing some of the exemptions, not privacy or national security, but some of the exemptions that an agency or department could claim as a reason for keeping something secret if it failed to meet the deadline.

Ms. FUCHS. The other thing is that the attorneys fees is not really a sanction. I mean, it is a private attorney general provision. It is a way of making the public have the ability to enforce the law against the Federal Government, which will not otherwise enforce the law against itself. It is not a sanction. And for the average citizen who is not going to bring a lawsuit, it doesn't help them at all. It helps potentially groups like ours who can get lawyers to represent us, but I understand that most attorneys who are approached to do a FOIA case will tell your average member of the public that they have to put a pretty big retainer on the table to get it done.

Ms. FREDRICKSON. I think there is one other issue, which is more accountability inside the Government, the people who are responsible in the Government for responding to FOIA requests. There needs to be some kind of aspect of their personnel review or something about their jobs that makes them accountable for processing these requests.

Mr. HODES. Thank you very much.

Thank you, Mr. Chairman.

Mr. CLAY. I thank you. Thank you for your line of questioning.

Mr. Yarmuth of Kentucky, welcome to the subcommittee.

Mr. YARMUTH. Thank you, Mr. Chairman. It is a pleasure to be here.

Mr. Hoyt, I read in your testimony your background, and you and I come to this spot from fairly similar backgrounds, because I was a journalist, too, before getting in this field.

Mr. HOYT. I understand.

Mr. YARMUTH. One of the things that concerns me in listening is we obviously face two issues here, it seems to me. One is a logistical one, and some of the suggestions that you have made, Mr. Hoyt, in your testimony deal with logistical sides of it. We also have the issue of recalcitrance for whatever reason it may be, whether it is personal embarrassment, whether it is legitimate national security, whether it is political, or whatever. All I have heard so far is a discussion of how we get at this information through some kind of adversarial process, and adversarial processes—I mean, in this case, some of these cases it is definitely adversarial. But has there been any discussion among those of you who study this subject on a regular basis for some kind of way to get to resolve these disputes outside of litigation or some other thing that results in a great deal of expense and time-consuming activity?

Mr. HOYT. Well, Congressman, I think that is where the ombudsman provision particularly could come into play. If you had an ombudsman who had clout and some stature of independence within a department so that office, that individual is not subject to some of the political pressures that I think come into play sometimes with these decisions, you could keep it from becoming the formally adversarial process that you have to go into when you file a lawsuit.

Mr. YARMUTH. Has there been any discussion of something—and it probably is a nasty word to bring up, but FISA or some kind of analogous situation where there was a panel empowered to hear some of these cases, just throwing it out?

Ms. FUCHS. Well, there is, in the classification realm, there is a panel that deals with classification decisions that go through mandatory declassification review. There hasn't been much discussion of that in the FOIA situation, and there are a couple of reasons for that. Each agency's records can be very different, and different issues can be raised by those records and they have different exemptions that they tend to rely on, so one panel—it would be hard for a small panel to have the expertise to handle all of those issues.

One of the things that we would advocate for would be greater independence in the administrative appeal process, which we find works very well at some agencies, like the State Department, where they have different people look at the administrative appeal and look at the initial FOIA request, whereas at other agencies it is the exact same people, and so, you know, it is not surprising they don't change their mind in administrative appeal.

Ms. FREDRICKSON. And I do think that part of the accountability that we are talking about that could be built into FOIA would actually help this if there was more of a presumption toward disclosure. I think you would have a whole lot less litigation.

Mr. YARMUTH. Where in this whole equation does this committee and this Congress enter in? It seems to me that obviously when you have one party in control of the executive branch, one party in control of the Congress, whichever party it may be, the availability or the usefulness of an oversight committee like this is minimized. It is going to be much more effective when there are differing parties. But how can the Congress better exercise its role?

Ms. FUCHS. Well, I think that oversight is a key part of it. Agencies should be asked to explain why they are not satisfying what the law requires of them. If the Congress were to require better reporting, it would make it possible for you to do that.

I will say that in 1974 when FOIA was strengthened significantly it was over President Ford's veto, so Congress has power, despite the fact that the administration may be headed by another party.

But I think the other thing just to remember is, even though President Bush issued an Executive order which has been helpful in many ways, we have started to look at the compliance reports from the Executive order, from the agencies, and many of them have not met their goals. In fact, some of them, what they have done is simply postpone their goals for another year. There is nothing, there is no recourse in that they haven't met their goals. So when you come to that point when they are not able to do it themselves, that is when Congress can step in.

Mr. YARMUTH. So I take it that some kind of regular reporting requirement to Congress of performance by all the agencies on this matter, rather than just waiting for a piece of legislation and hearings, would be something you might support?

Ms. FUCHS. Yes.

Mr. HOYT. But we would support legislation. If I am not misquoting the chairman from at the outset of this hearing, you talked

about the Open Government Act as a starting point. I hope that you would take up the Open Government Act again. I think there are some things about it that need improvement, particularly in the ombudsman feature. But I hope that you would use that piece of legislation.

By the way, I couldn't agree more with Congressman Hodes that this is not a partisan issue. It is not an ideological issue. Some of the most eloquent statements I have heard about freedom of information have come from people like Senator Cornyn, who is a real champion of this. It is also not a partisan issue on the other side, because the truth is the original FOIA passed during the Johnson administration. President Johnson didn't want to sign it, and only did so at the very last minute and very reluctantly.

Mr. YARMUTH. Thank you for your testimony here today. I yield back.

[The prepared statement of Hon. John A. Yarmuth follows:]

Statement of Congressman John Yarmuth
Committee on Oversight and Government Reform
Subcommittee on Information Policy, Census, and National Archives

Statement on Subcommittee Hearings on "The State of FOIA: Assessing Agency Efforts to Meet FOIA Requirements"
February 14, 2007

Thanks to Chairman Waxman and to the witnesses who join us today for a hearing that is very close to me personally.

As a former journalist, I know just how important the Freedom of Information act is, not just to the media, but to the public who depends on us for honest information. We pride ourselves on having a government of the people, by the people, and for the people, but how can we be such a government if the people don't know what the government is doing?

While the law states that an agency has 20 days to respond to a FOIA request, agencies rarely respond in this time frame. There are instances of requestors waiting up to four years for information, of agencies being swayed by large private companies. To embody the democracy that we hope and strive to be, it is imperative that we honor all requests indiscriminately – small interest groups, independent journalists, private citizens. Otherwise we run the risk of becoming a government of the lobbyists, by the lobbyists, and for the lobbyists.

Our hearings have focused on the lack of oversight in federal agencies, and this is no different. We have a responsibility to our constituents to reinstate accountability and ensure that all government agencies fulfill their obligations to the people.

In the 109th Congress, several bills were introduced to address these issues. I am hopeful that in the 110th, we will be able to work in a bipartisan fashion to create a more open government that honors the rights this country guarantees to its citizens.

Mr. HOYT. Thank you.

Mr. CLAY. I thank the gentleman from Kentucky.

Mr. Hoyt, you are exactly right. We do plan on bringing up the Open Records Act, as well as this subcommittee does have jurisdiction over the implementation of.

Mr. Hoyt, let me ask you, outside of national security have members of your organization identified specific areas where there are increasing conflicts with agencies in gaining access to Government records and proceedings?

Mr. HOYT. The answer is, I think, Mr. Chairman, if you refer to the report that you have so graciously put into the record, I think when you read that report you will see that across the Government the backlog is increasing, and it is increasingly difficult to get information.

Mr. CLAY. How about the proliferation of pseudo classifications such as sensitive but unclassified.

Mr. HOYT. Yes.

Mr. CLAY. Is that limiting the amount of information available to you?

Mr. HOYT. Yes, it is. The discussion before about the Card memo and about the Ashcroft memo, those have—I think the word that was used was tone, but to me that is kind of an understatement about the impact. The fact of the matter is they have had a very chilling effect, and agencies, I believe, have taken that as a signal and they have acted on that signal.

Mr. CLAY. Thank you for that response.

Ms. Fredrickson, in general, about how many FOIA requests does your organization file on an annual basis? And of these, about how many receive an adequate response within the prescribed 20-day statutory window?

Ms. FREDRICKSON. Well, we file a great number of FOIA requests, and I would have to get back to you with a typical number.

Mr. CLAY. Sure.

Ms. FREDRICKSON. I would have to say that of late it has been very difficult. We have had to engage in quite a bit of litigation to actually get responses to our FOIA requests. So I will get back to the committee and provide you with further information on it.

Mr. CLAY. Could you give us an approximate percentage now on which ones you think may or may not get a response?

Ms. FREDRICKSON. Well, our FOIA typically involve fairly controversial issues, so I think probably most of them meet resistance.

Mr. CLAY. So quite a few of them——

Ms. FREDRICKSON. Quite a few.

Mr. CLAY [continuing]. Get full denial.

Ms. FREDRICKSON. If not all of them. When we do get documents, it takes quite a long time and, as you can see, they are very, very heavily redacted, and even that is after the product of litigation. So I think it has been very, very difficult.

Mr. CLAY. Thank you for that response.

Ms. Fuchs, last fall your organization expressed misgivings with the recent attorney general report and agency FOIA activities. Please elaborate for us on your areas of concern.

Ms. FUCHS. Well, we looked at all of the 1991 FOIA improvement plans, and it was clear from reading those FOIA improvement

plans that, without high-level agency support for the changes, and also resources in some cases, it would be impossible for agencies to meet those goals. And what concerned us is that the attorney general then reported on those reports to the President and didn't acknowledge those concerns. And also one of the problems in the FOIA area is there is no central overseer who can tell agencies you have to do it. You have to fix the problem. The Justice Department does an outstanding job issuing guidance, and it is just guidance, and no one has to follow it, and in some cases they don't pay any attention to it. So it would be great to have a situation where improvements could be mandated.

Mr. CLAY. Sounds like you have some very interesting suggestions for streamlining this process and making it better for U.S. citizens. Thank you.

Ms. FUCHS. Thank you.

Mr. CLAY. Are there any further questions? Mr. Hodes.

Mr. HODES. I just have one last one, Mr. Chairman. Thank you.

In talking about the office of an ombudsman, and following up on Mr. Yarmuth's question about alternatives to litigation, in my background as an attorney in New Hampshire we have instituted mandatory alternative dispute resolution for cases headed to litigation, which has reduced by 50 percent the burden on the courts and does a great service, I think, to citizens. Do you think that having mediation available through the office of the ombudsman would help solve these cases before they get to costly litigation?

Mr. HOYT. If it didn't rule out litigation, if litigation became necessary. I wouldn't like to give up that right.

Mr. HODES. Mediation is generally a non-binding process. There are various forms of alternative dispute resolution which are non-binding which provide the opportunity for people to resolve their disputes before going to court but don't foreclose them.

Mr. HOYT. Another way that the ombudsman could help in this process, a number of States have ombudsmen and have a process under which ombudsmen issue advisory opinions, and they don't have the power to force an agency to do something, but they carry great weight, because in the event of litigation these are admissible as evidence and they carry a lot of weight. So something like that could be a feature you might want to consider.

Mr. HODES. Thank you very much.

Thank you, Mr. Chairman.

Mr. CLAY. Thank you, too.

The gentleman from Kentucky, any further questions?

[No response.]

Mr. CLAY. If not, I would just like to conclude our first hearing on this important subject by saying that it is evident that the public needs to have access to certain Government information, and it will certainly be a goal of this committee to help streamline that process.

I want to thank the witnesses of this panel and the previous panel for your participation in this.

Without objection, the committee stands adjourned. Thank you.

[Whereupon, at 4:27 p.m., the subcommittee was adjourned.]