

U.S. Senator John Cornyn

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

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

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

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

On March 15, 2005, during the first-ever National Sunshine Week, I chaired a Senate Judiciary subcommittee hearing entitled “Openness in Government and Freedom of Information: Examining the OPEN Government Act of 2005.” The hearing was the third in a series of bipartisan events in which Senator Patrick Leahy and I have joined forces to promote the cause of open government. On February 16, shortly before the President’s Day recess in February, Senator Leahy and I went to the Senate floor together to introduce the OPEN Government Act (S. 394) – legislation that promotes accountability, accessibility, and openness in the federal government, principally by strengthening and enhancing FOIA. And on March 10, Senator Leahy and I joined forces again to introduce the Faster FOIA Act of 2005 (S. 589). Moreover, two days after the hearing, on March 17, the Senate Judiciary Committee approved the Faster FOIA Act and sent the legislation to the full Senate.

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

I'm also grateful that a number of members of Congress, on both sides of the aisle, have agreed to co-sponsor either or both bills – including Senators Lamar Alexander, Chuck Grassley, Johnny Isakson, Dick Durbin, Russ Feingold, and Ben Nelson, as well as Representatives Michael McCaul, Jerry Moran, Ron Paul, Brian Baird, Howard Berman, Rick Boucher, Henry Cuellar, Major Owens, Mark Udall, and Lynn Woolsey.

The Faster FOIA Act would simply establish an advisory commission of experts and government officials to study what changes in federal law and federal policy are needed to ensure more effective and timely compliance with the FOIA law.

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

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

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

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

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

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

The OPEN Government Act is the product of months of extensive discussions between my office, Senator Leahy’s office, and numerous advocacy and watchdog groups. I am pleased that the bill is supported by Texas Attorney General Greg Abbott as well as a broad coalition of open government advocates and organizations across the ideological spectrum, including the following organizations:

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

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

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

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

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

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

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

to attorneys' fees even if the lawsuit was the primary or even sole "catalyst" of the change.

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

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

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

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

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

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

The National Security Archive has a similar tale to tell. And as the Archive's General Counsel, Meredith Fuchs, concludes: "In my view, this sort of manipulation of the timing of records releases is a purposeful litigation strategy designed to put off release of information that someone does not want to release until the government knows that it can no longer resist because a court will not agree with the withholding. It is an attempt to evade FOIA's attorney's fees provision by denying the FOIA requester a judicial decision ordering the release. It diverts FOIA requesters' resources unnecessarily into litigation that could be avoided by proper initial handling of FOIA requests."

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

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

This quotation warrants several comments.

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

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

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

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

Buckhannon's bar on catalyst attorneys' fees threatens FOIA actions to an even greater extent than it does traditional civil rights litigation. Many civil rights claims for damages are immune from *Buckhannon*'s greatest impact because defendants cannot easily moot damages claims by capitulating. Plaintiffs may reject settlement offers, increase their demands, or require attorneys' fees as part of a settlement. In the case of equitable relief, when defendants voluntarily remedy civil rights plaintiffs' injunctive claims, courts will not dismiss a plaintiff's action as moot if the defendant might repeat the challenged conduct. Although those conditions will aid some civil rights plaintiffs in avoiding *Buckhannon*, they will rarely assist a FOIA fee claimant. Plaintiffs never claim damages under FOIA because the law does not provide for them, and they rarely seek ongoing injunctive relief or declaratory judgments. Nearly all FOIA actions simply demand a one-time release of documents. Therefore, . . . government defendants could moot virtually all FOIA claims on the eve of judgment and deny compensation to successful plaintiffs' attorneys. Under such an arrangement, only parties capable of risking litigating without compensation would be able to enforce FOIA against intransigent government agencies. Furthermore, even in those cases, agencies would be able to prolong the litigation without fear of paying costs for their opponents. These bars to access, expediency, and enforceability directly contravene the purposes of amendments to FOIA and, as noted above, would greatly diminish FOIA's value for public interest actions--the very claims that FOIA fees promote.

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

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

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

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