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ON S. 394, THE "OPEN GOVERNMENT ACT"

BEFORE THE

TERRORISM, TECHNOLOGY AND HOMELAND SECURITY SUBCOMMITTEE

OF THE UNITED STATES SENATE COMMITTEE ON THE JUDICIARY

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

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

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

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

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

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

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

### **What the Bill Would Do:**

#### Make Agency Compliance with FOIA a Real Priority, Rather than an Afterthought.

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

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

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

called “ghost” detainees, individuals kept from inspection by the Red Cross, as well as information about torture and abuse of detainees.

The underlying disclosures raise very troubling issues, but the fact of disclosure—even as a result of court order—demonstrates the continuing vitality of the democratic principle of an open society. As the famously conservative historian Raoul Berger argued, the notion that the Executive Branch should not have to conduct its affairs in a goldfish bowl should be met with the response that “the alternative is not to conduct its operations in a dark room”—the “plain fact is that the executive branch was meant to operate in a goldfish bowl . . . that is one of the presuppositions of a democratic government.”<sup>6</sup>

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

#### Help Bring FOIA into the 21<sup>st</sup> Century.

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

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

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

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

allowing individual web loggers, or “bloggers,” who meet certain criteria to access information held by the government at the same reduced expense as media corporations. Protect Incentives for the Enforcement of FOIA.

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

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

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

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

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

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

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

### **Challenges to the Free Flow of Information**

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

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

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

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

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

### **Conclusion**

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

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

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Endnotes

- 1 5 U.S.C. § 552 (1966), *as amended* in 1974, 1976, 1986, 1996, and 2002.  
2 *Department of the Air Force v. Rose*, 425 U.S. 352 (1976).  
3 5 U.S.C. § 552(b).  
4 5 U.S.C. § 552(e).  
5 *See ACLU v. Department of Defense*, Docket No. 4 Civ. 4151 (S.D.N.Y. Aug. 17, 2004) (available at [http://www.aclu.org/torturefoia/SignedOrder\\_081804.pdf](http://www.aclu.org/torturefoia/SignedOrder_081804.pdf)).  
6 *See* Raoul Berger, *Executive Privilege: A Constitutional Myth* (1974).  
7 The fee provision of FOIA can be founding Section 552(a)(4)(E) of the Act.  
8 *Buckhannon Board and Care Home, Inc. v. West Virginia Dep’t of Health & Human Resources*, 532 U.S. 598 (2001),  
9 We hope the definition in S. 379 would not narrow the law on attorney fees in FOIA case or reduce the standard to a mathematical counting of the number of requests or claims won versus lost. In FOIA fees litigation, the court’s inquiry has focused on eligibility and entitlement to fees. *See, e.g., Church of Scientology v. Harris*, 653 F.2d 584 (D.C. Cir. 1981).  
10 *Department of State v. Ray*, 502 U.S. 164 (1991).  
11 *Compare* Attorney General Memorandum of October 12, 2001 (available at <http://www.usdoj.gov/04foia/011012.htm>) *with* Attorney General Memorandum, October 4, 1993 ([http://www.usdoj.gov/oip/foia\\_updates/Vol\\_XIV\\_3/page3.htm](http://www.usdoj.gov/oip/foia_updates/Vol_XIV_3/page3.htm)).  
12 *See* E.O. 12958 (Apr. 17, 1995).  
13 *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978).