

Witness List

Hearing before the Senate Committee on the Judiciary

on

“Open Government: Reinvigorating the Freedom of Information Act”

Wednesday, March 14, 2007

Dirksen Senate Office Building Room 226

10:00 a.m.

Panel I

Tom Curley

President and CEO of the Associated Press

Representing the Sunshine in Government Initiative

New York, NY

Meredith Fuchs

General Counsel

The National Security Archive

Washington, DC

Sabina Haskell

Editor

Brattleboro Reformer

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Testimony of Tom Curley

President and CEO of
The Associated Press

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Government Initiative

On

"Open Government: Reinvigorating
the Freedom of Information Act"

Senate Judiciary Committee

March 14, 2007

Chairman Leahy, Ranking Member Specter and Members of the Committee on the Judiciary, thank you on behalf of the Sunshine in Government Initiative. (Members of SGI include: American Society of Newspaper Editors, The 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.) Your efforts to strengthen the Freedom of Information Act show a courageous and timely commitment to the essence of our democratic values.

The enactment of the Freedom of Information Act more than 40 years ago affirmed that even though this government had become the mightiest power on earth, it was still the people's government.

It also was a bold admission that failure to allow public oversight leads quickly to less public service and more self-service.

FOIA was a promise to the people that whatever they might want to know about what their government was doing, the law would back them in all but a few kinds of highly sensitive or confidential matters.

The law does back them. But in too many cases the government doesn't back the law. As a result, increasingly we are seeing in the front-page headlines trends toward self-service government instead of public service.

First, let's look at the facts. The Coalition of Journalists for Open Government reported recently that the backlog of third party requests to executive departments rose in 2005 to 31 percent.

An Associated Press analysis last year of Freedom of Information summaries showed that the backlog problem, and the response delays have steadily worsened since agency performance reporting started in 1998.

What statistics like these can't show us is what the poor performance is costing us. News organizations like the one I manage understand that cost very well. We use FOIA and its state law counterparts every day.

When agencies respond as the law says they should, we know that the information they reveal can provoke public response that improves government operations, curbs waste and fraud, and even saves lives. When agencies don't respond, those opportunities are delayed, or lost altogether.

What kinds of opportunities lie hidden in the more than 200,000 FOIA requests that went unanswered in 2005?

I can tell you about one of them. It's not a dramatic story. It's as ordinary as the lunchbox a child carries to school every day.

In 2005, government scientists tested 60 of those little lunchboxes and found that one in five contained levels of lead that some medical experts consider unsafe. Several of them had more than 10 times the maximum acceptable level.

Yet the consumer Product Safety Commission issued a statement that said the tests uncovered "no instances of hazardous levels." AP national writer Martha Mendoza asked to see the tests and learned that the statement wasn't true.

You might have expected to read Martha's report more than a year ago when she filed her expedited FOIA request for the study results. But her story was just published last month.

That's because it took an entire year to get the 1,500 pages of lab reports and other documents...a year in which many parents continued to buy those popular soft vinyl lunch carriers and hand them to their children without any reason to wonder if they might not be safe.

Apparently the commission still thinks the boxes are safe. They told Martha that children don't use their lunchboxes in a way that exposes them to the lead found in the tests.

Maybe they're right. But maybe they're not.

Martha talked to researchers who study the effects of exposure to lead. Some of them told her the lead levels were cause for serious concern.

And they weren't the only ones who thought the commission had underplayed the threat. Another federal agency thought so, too.

When the Food and Drug Administration heard about the test results last summer – many months after the consumer commission said there was no problem – FDA officials warned lunchbox manufacturers that they might face penalties if they didn't get the lead out. One major store chain pulled the boxes off its shelves nationwide.

Evidently, reasonable people can disagree over whether it's okay to manufacture a tiny bit of toxic metal into your child's lunchbox.

And that's the point...reasonable people can disagree...but only if they know. And parents can make informed choices about what to put in their kids' hands only if they hear those differing views.

Why did it take a year for the commission to respond to a relatively simple request that FOIA says it was supposed to answer in 20 working days?

The commission offered a reason. Its position was that the test report could not be released until each lunchbox manufacturer had been notified that information about its product was being disclosed.

We'll leave for another day the question of whether a government safety agency should be more sensitive to product manufacturers than to the concerns of parents for their children's health.

What I believe should concern this committee is the choice that agencies like the consumer product commission face when they confront a FOIA request like Martha's:

On one hand, ignoring a duty to inform the manufacturers – whether the duty is real or not – could bring political or legal repercussions from powerful business interests and their allies.

On the other hand, ignoring a duty to meet the disclosure deadlines in the Freedom of Information Act could bring ... no consequences at all.

Any agency compliance officer with a healthy survival instinct could figure this one out. Disclosure brings risk. Delay or denial brings no risk.

No risk, that is, unless you count whatever the risk may be to your child of lead in the lunchbox.

I urge you to make changes that give the benefits of full and timely disclosure of government information a fighting chance of overcoming the often self-serving forces arrayed against them.

S. 394, the Open Government Act introduced last Congress by Senators Cornyn (R. Texas) and Leahy (D. Vermont) included real FOIA enforcement provisions. The Sunshine in Government Initiative supported that bill and will help in any way it can toward enactment of similar legislation this year.

By no means is the news from the FOIA front all bad. I could tell you FOIA success stories, too.

Thanks to FOIA, AP last year was able to report for the first time the extent of deaths and injuries among private contract workers in Iraq.

Thanks to FOIA, AP learned that the FDA suspected but failed to follow up in time to stop a transplant organ provider who was using faked health records to ship body parts that were implanted in human recipients.

And FOIA requests were a crucial part of AP's reporting which showed that highly publicized federal fines against companies that break the law are increasingly being quietly written down afterwards – sometimes by more than 90 percent.

It's a tribute to the professionalism and respect for the rule of law of so many agency FOIA officers that they respond correctly to thousands of requests for information each year.

They know – as we do – that our government was designed to be open and works best when its principles are upheld.

But I am not here to reassure you that FOIA is working fine because we all know it's not. FOIA is a law that protects us against real harm and real loss. Such laws cannot be asked to enforce themselves.

If you leave FOIA defenseless, agencies will continue too often to take the risk-free path -- the easy path -- and just say no. And they're all the more likely to do it when something has gone wrong that the public really, really needs to know about.

One of our reporters had an experience a few years ago that shows just how little risk it can take to make “no” seem like the right answer to a FOIA request.

We asked the Defense Department for a copy of a training video they had developed.

They said “no.” Their reason was that a Freedom of Information Act exemption prevented them from releasing a copy of “Freedom of Information Act: The Public’s Right to Know.”

We had a good laugh over this. But it was the kind of laughing you do to keep from crying...because this is what life has been like so often in recent years for reporters and other regular FOIA requesters. The very same reflex that prompted the Department of Defense’s goofy denial of our request for their video is evident everywhere . . . sometimes with results nearly as absurd.

When we asked the Interior Department for documents showing which employees had asked for waivers from agency ethics rules in 2004, Interior said our request was too broad. They said we had to provide the names of the employees who sought the waivers . . . exactly the information we were requesting from them.

Federal officials who used to provide information for the asking now say you have to file a time-consuming FOIA request. Ground-level FOIA officers may be willing enough to comply with the law, but their bosses look for ways to delay or deny.

Administrative appeals from those denials are often no more than occasion for further broken deadlines and ritual denials. The requester ends up with a choice between giving up or commencing litigation that can easily cost well into six figures.

Even AP has to choose such fights carefully. Another problem is that we can litigate a FOIA denial for years and still not get our legal fees reimbursed if an agency turns over the goods before a court actually orders it to do so.

How many of your small business or private constituents can't afford to sue and just have to give up?

There could easily be a third way. A strong FOIA ombudsman within the federal government could help requesters around some of the most unreasonable obstacles without forcing them to go to court.

Unreasonable obstacles abound in part because many agency executives think obstructing information flow is our national policy. The Ashcroft memorandum advising agencies that the Justice Department stands ready to back any plausible argument for denying a FOIA requests continues to set the tone for the denial of access.

In similar fashion, the mania for classification of government documents and the creation of such categories as sensitive but unclassified continues to be a costly scourge. When in doubt, stamp it secret...even if it's been public for decades.

This reflex undermines our values, erodes public confidence in its government and in the end leaves the public in far greater danger than it would be if it knew more about the threats to its safety.

And the problem is no longer just with federal agencies. An AP survey last year found that state agencies and legislatures have caught the secrecy virus. We identified more than 600 new state laws that restrict access to what had once been public information.

The presumption that any plausible reason for locking the files is a good enough reason is doing immeasurable harm.

When government has trained itself to believe that the risks from openness are substantial, while the risks from keeping secrets are negligible, you begin to get the kind of government nobody wants – a government that believes its job is to do all the thinking for us.

You get, for example, a Consumer Product Safety Commission that decides on its own – for all of us – that a little bit of toxic lead in a lunchbox is okay...and that the matter needs no further discussion.

“Further discussion” is the essence of a free society. We need a strong and effective Freedom of Information Act to make sure that discussion flourishes.

Mr. Chairman, Senator Specter, members of the committee, on behalf of the Sunshine in Government Initiative, we are grateful for this opportunity to appear before you today.

We urge you to pass Open Government Act legislation this year.

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**Hearing on
Open Government: Reinvigorating the Freedom of Information Act**

**United States Senate
Committee on the Judiciary**

Statement of Meredith Fuchs, General Counsel, National Security Archive

March 14, 2007

Chairman Leahy, Ranking Member Specter and Members of the Senate Committee on the Judiciary, I am pleased to appear before you to support efforts to improve the Freedom Information Act (FOIA).

I am General Counsel to 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 one released this week that examined agency noncompliance with the E-FOIA Amendments of 1996 (which I am attaching to my testimony), 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, my colleagues' FOIA requests, litigation, and training federal agency FOIA officers, I am very familiar with how the Act functions.

There are many ways to measure the role the Freedom of Information Act plays in our nation. One way is to look at the work of the news organization headed by Mr. Curley, who sits on this witness panel. All the remarkable news stories based on records released under FOIA and reported by the AP to the public would not have been possible if the AP were not willing to litigate in court to enforce its right to information. This illustrates a significant problem – while the FOIA has been a powerful tool to advance honesty, integrity and accountability in government, there is still a culture of resistance to the law in many federal agencies. Instead of viewing the public as the customer or as part of the team, the handling of FOIA programs at some agencies suggests that the public is considered the enemy and any effort to obstruct or interfere with the meddlesome public will be tolerated. For requesters with the resources, litigation is sometimes a solution. The rest of the public is simply shut out of the process.

I recently spoke at the Western Regional Training Conference for the American Society of Access Professionals (ASAP), a private professional association comprised mainly of federal government FOIA personnel. A FOIA specialist came up to me after one of my talks and told me that at her agency, whenever a FOIA request touches on anything controversial, the staff begins listing ways to slow it down or derail it. She said

they start with fee disputes, then they add on questions about how clearly the request is described, and then they let it languish, apparently hoping all of those tactics will lead to the requester abandoning the request.

My response to her was one of dismay. This is a country where we are strong enough to acknowledge our mistakes, air our dirty laundry, and then fix the problems. If anything is a testament to the strength of our democracy, it is the fact that American citizens are not afraid to ask the government hard questions, but this is something we take for granted in the United States.

I would like to address why reforms are necessary now to revitalize the FOIA. The FOIA is a unique law. There is no federal, state or local agency that enforces it. Rather, it depends on the public to make it work with the tools provided by Congress and an independent judiciary that is willing to remind agencies of their obligations. Based on their own reporting, we know agencies will not make FOIA a tool for timely education about government activities. Each agency is required to submit an annual report that provides FOIA processing statistics as well as information on agencies' progress in achieving goals they set in FOIA improvement plans mandated by Executive Order 13392. Reports for FY 2006 were due by February 1, 2007. As of this past Monday (five weeks after the due date), the reports from only 8 out of 15 federal departments and only 51 out of 75 federal agencies were available.¹

The Department of Justice has taken the lead on guiding agencies through the Executive Order process. The Department of Justice's annual report, however, acknowledges that DOJ components have failed to meet 30 different goals set out in its FOIA improvement plan.² Most striking to me is the report from the Federal Bureau of Investigation (FBI), which indicates that 8 of the FBI's FOIA improvement goals were not met. For some goals the FBI simply pushed back its deadlines by one year. For example, in the FBI FOIA improvement plan, the FBI reported 60 vacancies in its FOIA staff and set a goal to fill those vacancies by September 30, 2006. They did not do the hiring and instead the goal has now been moved to September 30, **2007**. They set a goal to review and update their Web site by December 31, 2006. They failed to do it and instead moved the deadline to December 31, **2007**.

As you know, the FOIA requires agencies to respond to FOIA requests within 20 business days. Attached to my testimony is a compilation of the date ranges of pending FOIA requests at federal agencies. The list was compiled from the agency annual reports referenced above. As you can see from the chart, at least **7 departments have FOIA requests still pending that are more than 10 years old**. Another **7 have requests more than 5 years old**. Twenty-eight (28) more have requests that are between 1 and 5 years old. The second chart shows what happens when requests are sent to another agency for consultation – additional delays result. And, those are just the agencies whose reports are available. The Criminal Division of the Department of Justice reports the oldest FOIA request so far – it is eighteen years old and dates from 1989.

¹ Available at <http://www.usdoj.gov/oip/fy06.html>.

² Available at http://www.usdoj.gov/oip/annual_report/2006/06foiapg12.htm.

At a hearing held in the House of Representatives on February 14, 2007, Melanie Pustay from the Department of Justice testified that agencies have made great progress handling their backlogs.³ While it is true that some agencies are gradually reducing their backlogs, I would like to give you an example of how they are doing so.

The story begins in 2001 when the Treasury apparently was trying to close out old requests. It sent the Archive letters concerning 31 requests that had been submitted in the mid-1990s and asked whether we remained interested in the requests. We said we were still interested in the records. Then, in December 2005, President Bush issued Executive Order 13392, which directed agencies to set goals designed to reduce or eliminate the agencies' FOIA request backlog. Here is what happened next:

- June 14, 2006: The Department of the Treasury set a goal in its FOIA improvement plan of reducing its FOIA backlog by 10% by January 1, 2007.⁴
- August 24, 2006-Present: The Archive receives letters from the Department of Treasury asking whether we are still interested in pursuing access to records under our pending individual FOIA requests, many of which were submitted 10 or more years ago. The letters – which usually took more than seven days to reach our office – warned “if we do not receive a reply from you within 14 business days from the date of this letter, we will conclude that you no longer are interested in the requests and will close our files regarding this matter.” **We received these letters for the same 31 requests that the Department of the Treasury checked on in 2001.**
- January 9, 2007: I sent a letter to Treasury in which I wrote: “In many instances, we have received two or three letters [threatening to close] a particular FOIA request despite the fact that we already advised the Department of our continued interest in that request. In some cases, we have received these letters for requests that are pending on administrative appeal (including appeals filed as recently as August 2006) where the very fact that we appealed should signal our continued interest.” I concluded, “I request that you do not close any Archive FOIA request or appeal without processing it.”
- February 23, 2007: Treasury sent a letter asking whether we continue to be interested in several other old FOIA requests, filed in 1997, in which it states: “We received a letter from Meredith Fuchs of the National Security Archive ... [but] we are in the process of reducing [Treasury’s] significant backlog by communicating with requesters as to which of those requests have gone stale.”

The punch line is that several of the letters received in the past year also indicate that the original requests (which had been submitted from 1994-1997) have been

³ <http://www.usdoj.gov/oip/foiapost/2007foiapost1.htm>.

⁴ Available at <http://www.ustreas.gov/foia/reading-room/foia-improvement-plan.pdf>.

destroyed and ask if we can send new copies of the original FOIA requests. What has the Department of the Treasury FOIA program done for the last six years after it asked whether we would abandon our requests? I wonder if I come back here in another six years whether I will be able to tell you that they asked us yet again whether we are willing to give up.

There are many things wrong with Treasury's practices. They have requests as old as 10-13 years that they clearly have made no effort to process in all those years. In some cases they destroyed the requests without making any substantive response to the FOIA requester. In addition, despite taking years to respond, and failing to meet their 20 business day response time, they only give the FOIA requester 14 business days before closing the request. What if the requester has moved in the intervening 13 years? What if they do not get the letter until more than a week has passed and simply are not able to respond in time? While this may be one way to eliminate backlogs, it is certainly not what Congress intended from FOIA programs.

There are several provisions of the OPEN Government Act of 2007, introduced just yesterday by Senators Leahy and Cornyn, that I think are critical for improving the functioning of FOIA. The attorneys' fees provision will improve the situation because it will make it possible for the public to enforce a law that now has no one ensuring compliance. It will end agency litigation gamesmanship, such as the common practice of agencies taking no action until after a lawsuit has been filed and summary judgment has been briefed. I, and colleagues at other organizations, all can offer examples of these wasteful litigation tactics. Restoration of the catalyst theory for attorneys' fees awards will push agencies to take a responsible legal position from the outset and will end practices that waste the resources of FOIA requesters, the Department of Justice lawyers who have to defend agencies, and the judicial system. The attorneys' fees reform, along with the imposition of real consequences for delay and enhanced authority of the Office of Special Counsel, will provide incentives for agencies to process requests correctly and expeditiously.

Better reporting is an essential part of the package. FOIA annual reports do not permit Congress to conduct quality oversight, agency managers to identify problems and improve processing, and the public to press for responses. I urge you to mandate better, more reliable reporting, including requiring data on: average processing times, range of processing times, oldest pending requests and appeals, 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 Committee should require more standardized reporting, including measuring response time from receipt of the FOIA request and disaggregating data for first person Privacy Act requests and FOIA requests. I assure, judging by the results of our audits and the success of FOIA, such transparency will have an impact on agency processing of FOIA requests.

The tracking requirements also will help. Although it seems obvious that agencies should have some reliable record of public information requests, many do not.

As a result, many requests get lost in the system. It is very hard for a FOIA requester to advocate for processing when neither the requester nor the agency knows who is handling the request.

Finally, the OPEN Government Act of 2007 includes many additional provisions that will help improve FOIA programs. The personnel review could lead to improvements in the professionalism of FOIA programs. The requirement that withholding statutes include specific reference to FOIA would curb the slow erosion of the presumption of open government by making sure careful consideration is given to any new withholding statute. The annual reporting requirement on the use of the Department of Homeland Security disclosure exemption for critical infrastructure information would provide greater accountability concerning the use of the exemption. The provision clarifying that all legitimate journalists are entitled to preferred status would eliminate a common delay tactic employed by agencies against FOIA requesters.

I am hopeful that my testimony today has offered a glimpse into the public's experience with FOIA. I am grateful for your interest in these issues and am happy to respond to any questions.

Meredith Fuchs serves as the General Counsel to the non-governmental National Security Archive at George Washington University. At the Archive, she oversees Freedom of Information Act and anti-secrecy litigation, advocates for open government, and frequently lectures on access to government information. She has supervised five government-wide audits of federal agency FOIA performance including one released this week entitled: "File Not Found: Ten Years After E-FOIA, Most Agencies are Delinquent." She is the Secretary of the Board of Directors of the American Society of Access Professionals (ASAP), a private professional association of FOIA personnel who serve throughout the federal government. She is the author of "Judging Secrets: The Role Courts Should Play in Preventing Unnecessary Secrecy," 58 Admin. L. Rev. 131 (2006); and "Greasing the Wheels of Justice: Independent Experts in National Security Cases," 28 Nat'l Sec. L. Rep. 1 (2006).

Previously she was a Partner at the Washington, D.C. law firm Wiley Rein & Fielding LLP, where she was a member of the Litigation, Insurance, Privacy and E-Commerce practice groups. Ms. Fuchs served as a law clerk to the Honorable Patricia M. Wald, U.S. Court of Appeals for the District of Columbia Circuit, and to the Honorable Paul L. Friedman, U. S. District Court for the District of Columbia. She received her J.D. from the New York University School of Law.

Range of Pending FOIA Requests

Data from FY 2006 FOIA Annual Reports

Agency	Oldest Pending Request	Most Recent Pending Request
CNS	N/A	N/A
FTC	N/A	N/A
NIGC	N/A	N/A
USTR	N/A ⁵	N/A
DOJ-Criminal	7/10/89	1/8/07
DOD	3/10/91	9/30/06
CIA	2/1/92	1/23/07
NARA	9/21/92	1/31/07
DOJ-FBI	12/18/92	1/9/07
DOE	3/10/93	1/30/07
EPA	5/23/95	1/30/07
DOS	11/28/97	1/24/07
NTSB	1/7/99	1/23/07
DOJ-Antitrust	6/3/99	1/8/07
DOJ-EOUSA	12/30/99	1/9/07
DOT	8/29/00	1/29/07
DOJ-CRT	1/10/02	1/9/06
DOJ-OIP	2/5/02	1/8/07
DOC-NOAA	8/2/02	1/31/07
SEC	10/4/02	1/31/07
EDU	12/11/03	1/31/07
NEH	2/27/04	1/31/07
DOJ-EOIR	6/20/04	1/17/07
CPSC	7/26/04	1/22/07
Peace Corps	8/2/04	1/22/07
NASA	11/5/04	1/29/07
RRB	2/2/05	9/27/05
DOJ-JMD	3/7/05	12/16/06
DOL	4/5/05	1/24/07
DOJ-USMS	4/20/05	1/9/07
DOC-NIST	4/28/05	1/31/07
DOJ-BOP	4/29/05	1/9/07
DOJ-OLC	5/20/05	12/21/05
SSA	8/10/05	12/31/07
DOJ-ENRD	8/11/05	12/19/06
Committee	9/30/05	1/22/07
EEOC	10/13/05	1/23/07
DOJ-DEA	11/5/05	12/31/06
DOJ-OIG	12/28/05	12/21/06
NSF	1/13/06	11/9/06

⁵ N/A—Agency did not provide information in FY 2006 Annual Report

Agency	Oldest Pending Request	Most Recent Pending Request
ODNI	1/23/06	1/3/07
DOJ-OJP	1/26/06	1/11/07
DOJ-USPC	2/7/06	2/7/06
DOJ-OIPR	2/21/06	1/3/07
Amtrak	3/1/06	1/26/07
DOC-OIG	3/10/06	1/31/07
EXIM	4/10/06	1/30/07
USPS	4/25/06	1/25/07
USTDA	4/28/06	1/25/07
FCC	5/2/06	1/30/07
DOJ-EOUST	5/8/06	12/14/06
CFTC	5/24/06	1/31/07
DOJ-ATF	6/12/06	1/8/07
DOC-PTO	6/16/06	1/31/07
TVA	6/29/06	10/24/06
DOC-BTS	7/13/06	12/19/06
DOC-ITA	7/21/06	1/31/06
FEC	8/8/06	1/29/07
PBGC	8/21/06	1/31/07
FERC	8/30/06	1/9/07
FCA	9/8/06	9/22/06
DOC-Census	9/11/06	10/26/06
DOC-OS	9/12/06	1/31/07
DOC-EDA	9/14/06	11/15/06
DOC-NTIA	9/20/06	1/29/07
FRB	9/28/06	1/29/07
DOJ-OSG	10/6/06	1/9/07
FMC	10/11/06	1/31/07
GSA	10/11/06	1/31/07
NLRB	10/11/06	1/24/07
DOJ-Civil Division	10/24/06	12/15/06
MSPB	11/9/06	1/30/07
FDIC	11/14/06	12/7/06
OMB	11/15/06	2/1/07
DOJ-OVW	11/16/06	12/18/06
DOJ-OPR	12/7/06	12/20/06
DOJ-NDIC	12/15/06	1/11/07
NCUA	12/26/06	1/30/07
OFHEO	12/27/06	1/19/07
OGE	1/17/07	1/17/07

Range of Consultations Pending with Other Agencies

By date of initial interagency communication

Data from FY 2006 FOIA Annual Reports

Agency	Oldest Pending Request	Most Recent Pending Request
CNS	N/A	N/A
FTC	N/A	N/A
NIGC	N/A	N/A
USTR	N/A ⁶	N/A
DOS	4/13/89	1/24/07
DOD	5/3/93	9/30/06
NARA	9/4/93	1/31/07
DOE	5/17/95	11/21/06
CIA	6/2001	1/29/07
DOJ-Criminal	8/2/01	1/9/07
DOJ-FBI	1/8/02	1/9/07
DOJ-DEA	1/3/03	12/29/06
DOJ-OIP	1/3/03	12/29/06
DOJ-USMS	8/4/03	9/11/06
DOC-NIST	8/4/05	1/31/07
DOJ-OIPR	3/24/06	1/5/07
DOJ-OIG	6/15/06	9/11/06
DOJ-Civil Division	8/7/06	8/7/06
DOJ-OSG	11/27/06	12/18/06
DOC-OS	12/5/06	1/31/07
EPA	12/13/06	1/23/07
DOJ-OJP	12/15/06	12/15/06
DOC-NTIA	12/19/06	1/29/07
DOC-OIG	1/2/07	1/31/07

⁶ N/A—Agency did not provide information in FY 2006 Annual Report

Good morning and thank you for inviting me to talk to you about the Freedom of Information Act and the needed reforms to protect our First Amendment rights. I am Sabina Haskell and I am the editor of the Brattleboro Reformer, a newspaper 10,000 circulation located in southeastern Vermont.

Even at that small size, we're the third largest newspaper in Vermont. And we're in good company: about 85 percent of the daily newspapers in the United States have circulations of 50,000 or less. Smaller newspapers generally pursue public records from state and local officials, rather than from federal sources, but our daily efforts to do so are a quagmire and it's getting worse.

In Vermont, where I am also president of the Vermont Press Association, we're frustrated by the de facto sentiment of secrecy that seems to be seeping down to every level of government – and it begins at the top, where it appears the Bush administration is unilaterally stripping Americans of their Constitutional rights.

The most recent example of the need for the Freedom of Information Act came only last week, when the inspector general released a report revealing that the FBI had improperly used the USA Patriot Act to obtain information about people and businesses. It was through the efforts of Sen. Leahy and others that the Freedom of Information Act was amended last year, making it possible to obtain the records needed to expose the wrongdoing at the bureau.

The fear-mongering espoused at the federal level – where questions and requests for information are viewed as suspect – is replayed time and time again at state and local levels. I truly believe the effort to seal off the federal government is the primary reason that there is increased efforts to close the doors on transparent government at the local and state levels.

The anecdotes I will share come from the dozen dailies and more than four dozen non-dailies that are members of the Vermont Press Association. Multiply us in Vermont by all 50 states and almost 1,500 newspapers and you can understand the magnitude of the problem.

The Freedom of Information Act is supposed to allow any person — individual, corporate, and regardless of citizenship — to request without explanation or justification, access to existing, identifiable executive branch agency records of any topic. Requesters are supposed to get timely answers at little or no cost.

But when we wanted a copy of the Brattleboro police chief's contract and a record of the days he's away from his job, we were rebuffed. We were asked: Why did we want that information? What were we going to do with it? We were told the information would be provided when we answered their questions. We still don't have the documents.

In northeastern Vermont, a weekly newspaper wanted to do a story on the town hall's new handicapped-accessible ramp, paid for, in part, by federal grant money. It was

supposed to be a nice, feel-good story about disabled people having better access to their local town hall.

But when the paper requested an architect's drawing of the *exterior* wooden ramp to illustrate the story, the newspaper was denied because of Homeland Security concerns. It's hard to understand how a wooden ramp and railings, built of pressure-treated lumber, could be viewed as a security risk. You could wait six months, drive by and then snap the picture.

In Winooski, the school board went behind closed doors to make a sweetheart deal to buy out the embattled superintendent's contract. The Burlington Free Press sued to get the details of the settlement and when the newspaper finally won 18 months later and was given the documents, the school district's attorney's response was, "You don't think we lost, do you?" By stalling, the school district and its lawyer kept running up the legal bill on the taxpayers, knowing full well it was all public information, but hoping some of the storm would subside by the time they agreed to follow the law and release the information.

In Jamaica, Vermont, a town official, requested the public documents about the sheriff's department:

- copies of timesheets for the sheriff, a deputy and a detective.
- records showing reimbursed or partially reimbursed expenses incurred by the three

- timesheets and other records that would identify the "whereabouts and activities" of the three for three days in January 2004.

Two of the three requests were denied under subsections of Vermont public records law. The third request was denied because the sheriff was "unable to recall any instance" in which the three incurred a business expense that was reimbursed by the department. The attorney for the sheriff's department then intimidated this local official, reminding him that there would a 45 cent charge for every minute in excess of a half-hour the bookkeeper spends searching for responsive documents.

The sheriff was later found to be misappropriating money; she resigned in disgrace and was subsequently convicted.

The town official's assessment: "So -- I'm kept from a public record. I take the matter to court on my own dime, and I get falsified information back. Who picks up the tab? Me."

Keeping bad news – mistakes out of the public eye may work in the short-term – but the long-term outcome is the ever-increasing mistrust of government and politicians.

A survey conducted by the American Society of Newspaper Editors confirms this: More than two-thirds of Americans polled said the federal government is "somewhat secretive" or "very secretive." People overwhelmingly believe their federal leaders have become

sneaky, listening to telephone conversations or opening private mail without getting court permission, the study found.

In fact, the Coalition of Journalists for Open Government has found that the backlog of requests continues to grow. Its latest research found that an all-time record of 31 percent of requests went unprocessed in 2005 – up 138 percent in seven years. More important was the finding that half of the 26 federal agencies in the study said they failed to comply with even simple requests within the federally mandated 20 days.

The Freedom of Information Act is clear in its charge: We are a country where we do the people's business. And the people have a right to know what local, state and federal officials doing.

FOIA allows but nine exemptions in considering whether a record is open or not. Federal agencies are mandated to reply within 20 days to a request for documents.

But stall tactics and legal costs to challenge officials' decisions effectively closes the doors to government. Requesters are treated as guilty until proven innocent.

In Vermont, a legislative study last summer found that our open government laws have been rewritten and amended to allow 207 exemptions and counting. Like the federal law, Vermont has provisions to reimburse requesters for their costs to obtain the public documents. Like the federal law, those penalties are rarely enforced.

State law, like the federal act, speaks to mandates but enforcement is lax. The Vermont attorney general believes his job is to defend the state officials breaking the law, not protect the citizens who own the public records.

The amendments proposed by Sens. Leahy and Cornyn in S. 394 and in those proposed in the House, under H.R. 1309, are needed and should be passed.

Starting with the premise that records should be considered public, the amendments would strengthen the Freedom of Information Act requiring these safeguards:

- Enforcing the 20-day statutory clock on FOIA requests
- Imposing consequences on agencies that do not respond in a timely manner
- Tracking requests with individualized case numbers and providing telephone and internet access to the status of such requests
- Strengthening reporting requirements, which would identify excessive delays
- Creating a FOIA ombudsman to mediate problems with requests without resorting to litigation
- Making it easier for requesters to recoup costs for successful FOIA challenges
- Holding agencies accountable for their decisions by giving the Office of Special Counsel the ability to take disciplinary action against officials who deny disclosure

These amendments will go a long way to enhancing the Freedom of Information Act and will set higher standard of conduct for state and local officials to follow.

Testimony
United States Senate Committee on the Judiciary
Open Government: Reinvigorating the Freedom of Information Act
March 14, 2007

Ms. Katherine M. Cary
General Counsel,
Texas Attorney General's Office

Thank you, Chairman Leahy and Members of the Committee:

My name is Katherine Minter Cary. I am the General Counsel of the Texas Attorney General's Office. Thank you for the high honor of appearing before you today.

First, let me convey for the record Texas Attorney General Greg Abbott's strong support for the bipartisan OPEN Government Act of 2007. Attorney General Abbott has a strong record on open government and believes that, as stewards of the public trust, government officials have a duty of transparency when governing. He often quotes Supreme Court Justice Louis D. Brandeis who said that "sunshine is the best disinfectant."

As the leading open government expert in the Office of the Attorney General, I work daily to apply, educate and enforce one of the most proficient public information laws in the United States. As I have said before, unfettered access to government is a principled – and an achievable – reality.

Texas is a big state. We have more than 2,500 governmental bodies that span 268,801 square miles. From El Paso to the Panhandle and from Texarkana to Brownsville, the Texas Public Information Act ensures that information is placed into the public's hands every day without dispute.

Under the Texas Public Information Act, as under the Freedom of Information Act, requested information is to be "promptly released." Texas law defines this to mean as soon as possible, within a reasonable time, without delay. Any governmental body that wants to withhold records from the public must, within 10 business days, seek a ruling from the Attorney General's Office.

In Texas, a governmental body that fails to take the simple, but required procedural steps to keep information closed has waived any exceptions to disclosure unless another provision of law explicitly makes the information confidential. It is this waiver provision that is critical to providing meaningful consequences that prevent government from benefitting from its own inaction. Under the Public Information Act, if a governmental entity disregards the law and fails to invoke the provisions that specifically protect certain categories of information from disclosure, it has forfeited its right to use those disclosure exceptions. The OPEN Government Act would institute a similar waiver provision. The Texas experience shows that striking this

balance is fair and practical. Simply stated— it works.

In 1999, with Senator Cornyn as Attorney General, governmental bodies in Texas sought roughly 4,000 rulings from the Attorney General. Last year, our office issued approximately 15,000 rulings. This is staggering when you consider that these rulings represent a mere fraction of the requests for information that are promptly fulfilled every day.

What I have found is that education is vital. A noncompliance with open government laws most often results from a misunderstanding of what the law requires rather than malicious intent. For this reason, our office asked the Texas Legislature to require mandatory open government training for public officials in Texas. They agreed, requiring a course of training that must either be done or approved by the Attorney General's Office. We offer the training by free video that is available on the Attorney General's website. To date, our office has issued completed training certificates to almost 40,000 people.

In addition to open government training, our office provides handbooks about the law and an extensive open government website. The Attorney General's Office also has an open government toll-free hotline staffed by attorneys who help clarify the law and make open government information readily available to anyone. This service includes updating callers on where a request for ruling is in the process. The Texas open government hotline answers over 10,000 calls per year. The inclusion of a similar interactive process in the proposed OPEN Government Act would provide citizens with the customer service, attention and access that they deserve from their public servants.

Our office also handles citizen complaints. The Open Records Divisions attorneys attempt, with a 99 percent success rate, to mediate compliance with open records requirements. The OPEN Government Act would create a similar system that Texas has all ready demonstrated successfully. Resolving matters efficiently certainly underscores the usefulness of a dispute resolution function.

We have learned that it only requires a few legal actions by the Attorney General for word to get out that we are serious about enforcing compliance. It appears that the proposed Special Counsel will be in a comparable position to achieve positive results on the federal level.

Finally, Texas has a legal presumption that all information collected, assembled or maintained by or for a governmental body by a third party is open to the public. Records kept by third parties on behalf of Texas governmental bodies remain accessible by request to the governmental body as long as the governmental body enjoys a "right of access" to the information.

Moreover, Texas law does not allow the government to contract away access to public records held by its agents. The OPEN Government Act would appropriately extend the availability of federal governmental records to those records held by non-governmental third parties.

The policy statement that introduces the Texas Public Information Act is on-point:

The people, in delegating authority, do not give their public servants the right to decide what is good for the people to know and what is not good for them to know. The people insist on remaining informed so that they may retain control over the instruments they have created.

The United States Supreme Court has held that the Freedom of Information Act's ideals are analogous:

The basic purpose of FOIA is to ensure an informed citizenry, vital to the functioning of a democratic society, needed to check against corruption and to hold the governors accountable to the governed.

NLRB v. Robbins Tire and Rubber Co., 437 U.S. 214, 242 (1978)

Thank you again for the privilege of appearing before you today.

I would be happy to answer any questions.

