

**Testimony Before the
Subcommittee on Terrorism, Technology and
Homeland Security of the Senate Judiciary Committee**

of

Mr. Walter Mears

**Openness in Government and Freedom of Information:
Examining the OPEN Government Act of 2005**

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Testimony of Mr. Walter Mears

I appreciate the opportunity to be here today, in familiar territory. I spent more than 40 years as an Associated Press Washington reporter, editor and bureau chief, so I am no stranger to congressional hearing rooms. But this is my first experience on this side of the table.

I hope that what I have to say will be useful. I also hope that if it is not, you will do what we do as reporters, and ask questions that will get information you need. Insofar as I can provide it, I will.

To that disclaimer I will add another: I am not an expert on the legal aspects and the fine print of freedom of information law. So I hope that you will allow me to interpret my franchise broadly, so that I can speak about what I know best – the crucial importance of a free flow of information about government to the people. Too many people in government have, or acquire, an instinct to limit that flow because they think things work better without people they regard as nosy outsiders prying into what they consider their business.

It's not their business. It is all of our business. That is what a free, democratic government is about – you can't have one unless people know what is going on behind government doors. I believed that as a reporter, and I believe it today as a retired American, watching government from a distance.

President Bush spoke to Russia's President Putin at the Kremlin about the need for a free press in a democracy. What was true at the Kremlin also is true in Washington. The free flow of information is vital to a free press, and to a free people.

There is a difficult balance to be kept in this, especially since September 11 brought home to all of us the menace of terror in our midst. No reporter I know would demand or publish anything that would serve the purposes of a terrorist. The problem in times like these is to judge what would or would not weaken America against terrorism.

Tom Curley, the president of the Associated Press, has made that point well. He said that the battle against terrorism has followed the pattern of all eras when concern for security has moved to the forefront. There are real issues of public safety. But, historically, government goes too far in limiting information in the name of security.

Curley said the United States was attacked in large part because of the freedoms it cherishes. The strongest statement we could make to an enemy is to uphold these values.

They would be upheld by the Open Government Act of 2005. I know that you will hear from people more expert than I on the legal aspects and detailed provisions of the bill. I would like to offer some observations about the findings that preface it. First, the informed consent of the voters and thus the governed is crucial to our system of self government. That was the mission that guided me through my career as a political reporter, from the state house in Vermont to the Capitol to the eleven presidential campaigns I covered for the AP.

Secondly, the bill also would have Congress find that “the American people firmly believe that our system of government must itself be governed by a presumption of openness.” I wish that an act of Congress could make that so. In my experience, many – too many – people do not believe that, and are willing to let the government determine what we – and therefore they – ought to know. We journalists work every day to change that because if people don’t know what is going on, going right, and sometimes going wrong in government, there is no informed consent of the governed.

This is not only an era of tension about terror and security; it also is one of cynicism, about news and those of us who produce it – and also about government and those who lead it. So that’s us, and it also is you. A Pew Research poll this winter showed that only 31 percent of the public consistently focuses on what we call hard news– about Washington, politics, international affairs, local and state government, and economics. More than half the people said that they often do not trust what news organizations tell them.

The freer the flow of information, and the better the job we do in delivering it, the more likely that we can meet the standard on which the bill’s preamble quotes Justice Hugo Black:

“The effective functioning of a free government like ours depends largely on the force of informed public opinion. This calls for the widest possible understanding of the quality of government service rendered by all elective or appointed public officials or employees.”

The Freedom of Information Act (FOIA) gets straight to that point: We use it to get data on the quality of government service. In a more perfect world, that would be an aim shared by those of us who cover government and those who run it. Sometimes it is, and information flows because the people who control it realize that it belongs to the people whose taxes pay their salaries. Too often it is not, sometimes for valid reasons of security

and privacy, on which you will hear no argument from us. But more often it is because when people get into government they tend to get proprietary and protective.

I have seen that happen with colleagues who left the news business to go into government positions, often as spokesmen, public information officers. The latter title belies the instinct to withhold information, treat what is rightfully public as though it was somehow private.

There are far more PIOs in the government, and here in Congress, now than when I was reporting. When I covered the Senate 30 years ago, press secretaries were rare – most senators had staffers who handled that part of the work along with other duties. Senator Mike Mansfield never had a press secretary when he was majority leader. Those were simpler times, of course. The 24-hour news cycle hadn't arrived, and if you wanted to know what was happening on the Senate floor, you went there – you didn't turn on the television.

In the executive branch, according to *Newsday*, the number of public relations employees increased by 9 percent during the four years that ended last September. PR spending went up by \$50 million over three years. But adding public information officers doesn't add public information. That has been increasingly restricted during the same period.

As an AP veteran I take pride on objectivity. We are concerned with what is happening now, and we should be. But I do not mean to limit my observations to the Bush years. This is not new business. I remember writing a story that angered Lyndon Johnson when he was president – he wasn't satisfied with the way the PR people in his executive branch agencies were getting out his chosen messages. So he called in their supervisors and told them that if they didn't do better, he'd replace the whole bunch of them with Johnson City high school seniors. The White House wouldn't comment on my story, but as soon as it hit the wire Johnson's people denied it all. Then they set about trying to find out who leaked it to me.

While restrictions on information have tightened in this administration, I believe that whoever had been in office, regardless of party, when those terrorists destroyed the World Trade towers, the administration would have erred on the side of security.

That makes this legislation especially vital in a difficult time. There is a need to reinforce the public's right to know.

It was encouraging to see that Attorney General Gonzales has told you he will examine Justice Department policies and practices under FOIA. It will be more encouraging

should he amend the restrictive lines set by his predecessor, who essentially flipped the policy from one favoring disclosure to one in which agencies were assured that the Justice Department would defend decisions to withhold information.

I would submit that overdone secrecy raises rather than reduces the risk that really vital secrets will be breached. The greater the mass of secret information, the greater the possibility that it will leak – and that without sensible priorities for withholding information, things that shouldn't get out will get out. During the Civil War, a censor tried to prevent an early AP Washington correspondent from filing a story reporting that Confederate forces were marching up the Shenandoah Valley, but finally passed it when the reporter pointed out that the Confederates already knew where they were. That is not a bad guideline about information that obviously is known to the other side. It should be available to Americans, too.

There is a valid need for secrecy in some government operations. But the presumption should be in favor of openness, not clamping down on information.

Too often, security becomes an excuse for shielding embarrassing information, and secrecy can conceal mismanagement or wrongdoing. I remember our coverage of Richard Nixon when he tried to use national security as part of the Watergate cover-up. Forgetting history risks repeating it.

And much of the information pried loose only by the pressure of FOIA action has nothing to do with security at all. Some examples:

- The AP found that researchers at the National Institutes of Health were collecting royalties on drugs and devices they were testing on patients who did not know of their financial interests in the products. That breached an NIH promise to Congress in 2000, and the practice ended under a new policy announced when the story hit the wire.

- Bureau of Land Management records obtained under FOIA showed that oil and gas companies were covering only a fraction of the cost of plugging old wells and reclaiming land, leaving behind millions of dollars in potential cleanup costs.

- The New York Daily News found that the federal courthouse in lower Manhattan had maintenance and cleaning costs double those at state court buildings a block away. In 1997, it cost \$84,812 to polish the brass in entrances to the building.

But along with those FOIA success stories there are too many stories of information blocked by delays, by attempts to raise the cost of asking for data, and by agencies bent

on secrecy. One remarkable example: when Terry Anderson, the former AP man held hostage for seven years in Lebanon, filed a FOIA request for information about his captivity, he says he was told he couldn't have all he sought because of the privacy rights of the kidnappers.

The OPEN government act you are considering will plug some holes and repair some problems in the FOIA, which has been updated only twice since it was enacted in 1966. For that it should be approved. But beyond the specific steps it would take, I think the message behind this measure is even more important.

Its enactment would once again declare that the public has a right to obtain information from federal agencies, and that the presumption must be in favor of disclosure, not secrecy. This hearing, and I hope a full discussion of freedom of information in the full Senate and in the House, will serve that mission well.

As you begin this legislative work, we in the news media are undertaking a project entitled the Sunshine in Government Initiative, with a similar mission – to promote policies that make government more accessible, accountable and open, and to educate the public on the importance of those policies.

One of the guiding principles of that initiative is that a democratic government must function with a presumption of openness, balanced with legitimate national security needs and individual privacy. What you are trying to do by law, we are trying to do by example and with our reporting.

A new Associated Press study shows that federal agencies have been curtailing information flows since 1998, while requests for information have increased. The real clampdown followed the 9/11 attacks, but the trend began before President Bush came to office.

There is a growth in classified documents – by 60 percent between 2001 and 2003. And it is not all federal. Since 9/11, at least 20 states have proposed or adopted new laws to control public records, according to the National Conference of State Legislatures. Those changes are intended to prevent would-be terrorists from seeing evacuation, emergency and security information. But in the process, there are new limits on all sorts of records ranging from birth and death data to architectural drawings of public buildings.

We newspeople are the highest profile advocates, and users of FOIA. But it is not only a tool for reporters and investigators. Most FOIA requests do not come from us at all, but from veterans or retirees, trying to get information about their government benefits. That

fact is worth emphasizing because it makes the case that access to information is best for everyone.

A final thought on one provision of your bill, the creation of a new freedom of information ombudsman to keep watch on compliance and try to find solutions to FOIA disputes short of going to court. I hope that the position would be a platform to keep this whole information issue on the public agenda. It is too vital to let it slide out of view.

We need to find ways to keep the flow of information – not just for the press but for all Americans – a topic of national concern. With that, I thank you for what you are doing in that cause, and for inviting me to join your effort.